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COM (79)621

Vol. 1979/0210

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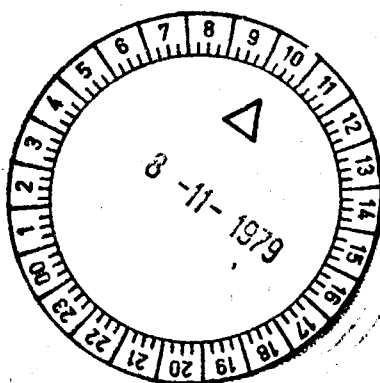
COMMISSION OF THE EUROPEAN COMMUNITIES

COM(79) 621 final

Brussels, 31st October 1979

PROPOSAL FOR A COUNCIL DIRECTIVE
AMENDING DIRECTIVE 77/62/EEC COORDINATING PROCEDURES
FOR THE AWARD OF PUBLIC SUPPLY CONTRACTS

(Proposal by the Commission to the Council)



COM(79) 621 final

EXPLANATORY MEMORANDUM

I. GENERAL CONSIDERATIONS

1. The objective of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts is to ensure a greater degree of transparency, by introducing equal conditions of competition for public contracts of the Member States, in order to improve the functioning of the common market. The Directive applies to public supply contracts of a certain value awarded by States, public bodies and local authorities and makes them subject to Community procedures designed, inter alia, to ensure more extensive advertising and to fix objective criteria as to entitlement to compete for, and the award of, public contracts.
2. The Community has stated within the context of the GATT Multilateral Trade Negotiations that it is prepared to negotiate increased access to public contracts at international level on the basis of effective reciprocity. It is clear from the results of the negotiations that the aim of eliminating all reservations of contracts to national suppliers and all preferential prices in their favour has been achieved only in part by reason of the fact that, contrary to Directive 77/62/EEC, only contracting authorities at central or federal level enter into such a commitment vis-à-vis countries that are signatories to the Agreement. In matters of procedure and transparency, the arrangements under the MTN Agreement do not differ greatly from those adopted by the Council in the Community Directive.

3. Since implementation of the MTN Agreement on Government Procurement would not, as such, amend Community legislation, which solely governs access to public contracts within the Community, a solution must be found to deal with the situation in which the contracting authorities to which both the Directive and the Agreement apply would be required, without more to apply both sets of arrangements which it would be difficult, if not impossible, to render compatible.
4. In seeking a suitable solution to the problem the Commission's first concern has been not to relinquish, even in part, what has been achieved in this field under Community legislation and, secondly, to retain the directive as the sole instrument for extending access to contracts within the Community. The Commission has decided, therefore, in accordance with the orientation set out in its report of 8 October 1979 on the Geneva GATT MTN, COM(79) 514 final, in favour of aligning the provisions of Directive 77/62/EEC on those of the MTN Agreement in so far as the latter are more favourable to suppliers in the area covered by the two instruments.

II. ANALYSIS OF THE ARTICLES

Article 1

1. Paragraph 1 amends the definition contained in Article 1(a) of Directive 77/62/EEC to cover the slightly wider range of contracting authorities referred to in the MTN Agreement (Article I, paragraph 1(c)). The contracting authorities have had to be subdivided into two categories in order to enable some of the proposed amendments to be applied to the contracting authorities referred to in the first indent only.

2. Paragraph 2 aligns the threshold of contracts awarded by these contracting authorities referred to in the first indent of paragraph 1 on that of the MTN Agreement (Article 1, paragraph 1(b)), which is approximately 160 000 EUA. The threshold for the other contracting authorities referred to in the second indent remains unchanged at 200 000 EUA.
3. Paragraph 3 provides for the abolition of an exception to the Community procedures for the award of contracts in respect of goods quoted and purchased on a commodity market, since such goods are subject to the tendering procedures provided for in the MTN Agreement (Article V, paragraph 15).
4. Paragraph 4 reproduces the requirements contained in paragraph 16 of Article V of the MTN Agreement and ensures a greater degree of transparency in the case of contracts awarded pursuant to Article 6(1) of Directive 77/62/EEC by all contracting authorities.
5. Paragraphs 5, 6 and 8 align the time limits of the procedures for the award of contracts contained in Directive 77/62/EEC on the slightly longer ones contained in the MTN Agreement (Article V, paragraph 10).
6. Paragraphs 7 and 9 reflect certain special features of the selective procedure laid down in Article V, paragraph 8 of the MTN Agreement. Although the incorporation of these provisions impose additional obligations on the contracting authorities referred to in the first indent of the first paragraph only, it has proved necessary in order to ensure no less favourable treatment for suppliers from the Member States than that accorded to suppliers from third countries which are signatories to the MTN Agreement.
7. Paragraph 10 reproduces in Article 25a of a new chapter in Title IV of Directive 77/62/EEC appropriate provisions drawn from paragraphs 2 to 5 of Article VI of the MTN Agreement enabling suppliers from Member States who have not been invited or admitted to tender to obtain the same information concerning the award

of the contract as can be obtained by suppliers who are nationals of a third country which is a signatory to the Agreement. Out of the same concern to ensure a greater degree of transparency, Article 25b which is based on paragraphs 6 to 8 of Part VI of the Agreement, introduces new arrangements for the exchange between governments of more sensitive information.

Article 2

The Commission expressly reserves the right to submit appropriate proposals to the Council to amend the Directive in the light of the results of the negotiations referred to in paragraph 6 of Article IX of the MTN Agreement which are designed to broaden and improve it.

Article 3

The final date for implementing the Directive must be that of the entry into force of the MTN Agreement. It would be contrary to the EEC Treaty to allow, as from the date of entry into force of the MTN Agreement, more favourable treatment to be accorded to suppliers from third countries than that accorded to suppliers from Member States.

COUNCIL DIRECTIVE

amending Council Directive 77/62/EEC coordinating procedures for the award of public supply contracts

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas by Decision of ... on the conclusion of the Multilateral Agreements resulting from the 1973-79 Trade Negotiations the Council approved on behalf of the European Economic Community in particular the Agreement on Government Procurement the purpose of which is to establish an international framework of rights and obligations concerning the award of public contracts in order to secure the liberalization and expansion of world trade;

Whereas Council Directive 77/62/EEC of 21 December 1976 coordinated national procedures relating to public supply contracts in order to introduce equal conditions of competition for such contracts in all the Member States;

Whereas as regards the international rights and commitments accruing to the Community as a result of the acceptance of the Agreement referred to above, the arrangements to be applied to tenderers and products of third countries is that defined by that Agreement;

Whereas certain provisions of the Agreement introduce more favourable conditions for tenderers than those laid down in Directive 77/62/EEC of 21 December 1976;

Whereas the opportunities for access to public contracts within the Community available under the EEC Treaty to undertakings of the Member States must be at least as favourable as the conditions of access to public contracts within the Community accorded under the arrangements contained in the "Agreement on Government Procurement" to undertakings of third countries which are signatories to the Agreement;

Whereas it is necessary therefore to align the provisions of Directive 77/62/EEC of 21 December 1976 on those of the Agreement on Government Procurement;

Whereas the provisions of this Directive should be reconsidered in the light of the results of the new negotiations provided for in paragraph 6 of Article IX of the Agreement on Government Procurement;

HAS ADOPTED THIS DIRECTIVE:

ARTICLE 1

Council Directive 77/62/EEC is amended as follows:

1. Article 1(b) shall be replaced by the following:

"(b) "contracting authorities" shall be:

- the entities referred to in Article I, paragraph 1(c) of the "Agreement on Government Procurement" concluded within the context of the multilateral trade negotiations;
- regional or local authorities and the legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto as specified in Annex I to this Directive;"

2. Article 5(1)(a) shall be replaced by the following:

"The provisions of Titles II, III and IV and of Article 6 shall apply, under the conditions laid down in Article 4, to public supply contracts:

- whose value is not less than the threshold applied under Article I, paragraph 1(b) of the "Agreement on Government Procurement" concluded within the context of the multilateral trade negotiations, with regard to the contracting authorities referred to in the first indent of Article 1(b);
- whose estimated value net of VAT is not less than 200 000 European units of account, with regard to the contracting authorities referred to in the second indent of Article 1(b)."

3. Article 6(1)(f) shall be deleted

4. Article 6 shall be supplemented by the following new paragraph 3:

"Contracting authorities shall draw up a report on each contract awarded on the basis of provisions (a) to (e) of paragraph 1. The report shall contain the name of the contracting authority, the value and nature of the contract, the name of the successful tenderer, and shall indicate the circumstances referred to in paragraph 1(a) to (e) in which the contract was awarded. The report shall remain with the contracting authority in question and shall be available to the Commission and, through it, to the Advisory Committee for Public Contracts."

5. Article 10(1) shall be replaced by the following:

"In open procedures, the time limit for the receipt of tenders fixed by the contracting authorities shall be not less than 30 days from the date of publication of the notice."

6. Article 11(1) shall be replaced by the following:

"In restricted procedures, the time limit for the receipt of requests to participate fixed by the contracting authorities shall be not less than 30 days from the date of publication of the notice."

7. Article 11 shall be supplemented by the following paragraph (1)a:

"The contract documents and supporting documents shall be sent to candidates who request them by the contracting authorities referred to in the first indent of Article 1(b) or by the competent departments within four working days of receiving such request."

8. Article 11(3) shall be replaced by the following:

"The time limit for the receipt of tenders fixed by the contracting authorities shall be not less than 30 days from the date of dispatch of the written invitation."

9. Article 19(1) shall be supplemented by the following new subparagraph:

"The contracting authorities referred to in the first indent of Article 1(b) shall authorize any other candidate who so requests to submit a tender on condition that the procedure referred to in Article 17 for checking suitability can be completed within the prescribed time.

The number of such suppliers shall be limited only by the need to ensure the effective operation of the procedure for awarding contracts."

10. A new Chapter 3 entitled "Provision of information and examination of complaints" shall be introduced into Title IV consisting of the following two articles:

"Article 25a

The contracting authorities referred to in the first indent of Article 1(b) shall:

- without delay, notify to any candidate who so requests the reasons why he has not been invited or authorized to submit a tender;
- inform unsuccessful tenderers of the award of the contract. Such information shall be notified without delay in writing or by notice and, in any event, within not more than seven working days from the date of the award;
- without delay, notify to any unsuccessful tenderer who so requests relevant information concerning the reasons for the rejection of his tender including information concerning the comparative characteristics and advantages of the successful tender, and the name of the successful tenderer;
- designate a department which shall be responsible for furnishing additional information to unsuccessful tenderers who consider that the reasons given for the rejection of their tender are unsatisfactory or who wish to put other questions concerning the award of the contract;

- establish, without prejudice to Articles 169 and 170 of the Treaty and to the Council Decision of 26 July 1971 setting up an Advisory Committee for Public Contracts, as amended by Council Decision 77/63/EEC of 21 December 1976, procedures for the receipt and examination of complaints relating to any stage of the procedure for the award of contracts."

"Article 25b

With regard to the contracting authorities referred to in the first indent of Article 1(b):

- the Member State of an unsuccessful tenderer may, without prejudice to the Council Decision of 26 July 1971 setting up an Advisory Committee for Public Contracts, as amended by Council Decision 77/63/EEC of 21 December 1976, request any further information concerning the award of the contract which may be necessary to enable it to ascertain whether the contract has been awarded justly and fairly. The Member State of the contracting authority in question shall, to this end, furnish information on both the comparative characteristics and advantages of the successful tender and the contract price. This latter information may be disclosed by the Member State of the unsuccessful tenderer provided such right is exercised with discretion. Where such disclosure would prejudice competition on the occasion of subsequent invitations to tender, such information shall be disclosed only following consultation and with the consent of the Member State by which it was notified;
- available information concerning the award of a contract shall be notified to any other Member State who so requests;
- confidential information furnished pursuant to this Article which would impede the application of statutory provisions or which would be contrary in any other way to the public interest or would prejudice the legitimate commercial interests of specific public or private undertakings, or which could prejudice fair competition between suppliers shall be disclosed only with the formal authorization of the Member State which furnished it."

ARTICLE 2

The Commission shall determine whether this Directive should be reviewed, having regard to the results of the further negotiations provided for in paragraph 6 of Article IX of the Agreement on Government Procurement concluded within the context of the multilateral trade negotiations, and shall, if necessary, submit appropriate proposals to the Council.

ARTICLE 3

Member States shall adopt the measures necessary to comply with this Directive not later than 1 January 1981 and shall forthwith inform the Commission thereof.

ARTICLE 4

Member States shall ensure that the texts of the basic provisions of domestic law, whether laws, regulations or administrative provisions, which they adopt in the field covered by this Directive, are communicated to the Commission.

ARTICLE 5

This Directive is addressed to Member States.

Done at Brussels,

For the Council
The President