

EUROPEAN FILE

Opening up public procurement in the European Community

Public authorities frequently place their orders with national suppliers or arrange to have work carried out by one or other of their main national contractors, even when competitors – more qualified but established in other Member States – might be interested in the contracts. This is an attitude which should not be allowed to persist in Europe while preparations are being made for the large internal market of 1992. Of course the European Community has regulations for opening up public procurement to Community-wide competition, but not only are they incomplete, they are too often badly applied and even misused or ignored. Protectionist reflexes and deeply rooted chauvinistic national habits are responsible for this state of affairs.¹

Open public procurement has assumed major importance, as much from the general economic point of view as from the more particular one of European integration and the establishment between now and 1992 of a single large economic area.

- The financial stakes are considerable. Contracts placed by central and local governments of Member States (not including Spain and Portugal) account for approximately 9 % of the Community's gross domestic product, or some ECU 180 billion, according to 1984 estimates.² They amount to 15 % (ECU 300 billion) if contracts placed by nationalized industries (transport, post and telegraph and telephones, etc.) are included. At the moment, scarcely 20 % of the overall European public procurement market could be considered to conform to the Community directives which harmonize public procurement procedures and provide for the publication throughout the Community of tenders for public works and supplies. In addition, as we shall see later in this file, certain important industrial sectors are still outside the scope of these European rules and there are numerous contracts which are smaller than the minimum threshold level and do not have to comply. Just as in other fields, the lack of economic integration – or 'non-Europe', as it is called – costs the exchequer and the taxpayer dearly. The European Commission estimates that the cost of the waste and lack of competition resulting from the fragmentation of public procurement in the Community is some ECU 20 billion per year – equivalent to approximately half of the entire Community budget.
- The industrial stakes are of crucial importance. Opening up public procurement will increase the opportunities for industrialists, contractors and tradesmen to operate on the scale of the large market. With information becoming transparent and tendering and award procedures harmonized by European regulations, suppliers and contractors will find new outlets available to them. They will be able to expand their activities and, because of the economies of scale associated with mass production, reduce production costs – more especially as, for their

¹ Text based on 'Public procurement and construction – towards an integrated market', from the 'Target 92' collection published in the *European Documentation* series, edited by the Commission of the European Communities. For detailed information on Community public procurement procedures and the means of redress for companies in the event of these rules not being respected, see 'Guide to the Community rules on open government procurement', *Official Journal of the European Communities*, C 358, 31. 12. 1987.

² ECU 1 (European currency unit) = approximately £ 0.65, Ir£ 0.77 or US \$ 1.18 (at exchange rates current on 3 January 1989).

technical specifications, the contracting authorities will have to refer to European standards, so that technical barriers to trade, caused by the proliferation of differing national standards, can be abolished. Opening up public procurement will thus provide leverage for the elimination of technical barriers to industrial trade. In addition, competing with rivals from other countries should encourage efficiency in firms and improve their competitiveness. Companies from different member countries will be tempted towards increased cooperation in order to tender for contracts, thereby contributing to greater interpenetration of the economies of Community countries.

Numerous sectors are affected. There are differences between one country and another, but the great majority of public contracts are awarded in the following fields: construction and public works, fuels, electrical and telecommunications equipment, water and energy distribution, transport equipment, industrial machinery and office equipment, textiles. Something else to note is the importance in public procurement of small and medium-sized businesses – often through subcontracting.

The opening-up of public procurement will have particularly favourable effects in the area of technology and advanced products, where the small size of national markets is increasingly affecting the competitiveness of European firms. The research and development costs required for launching innovative products or services are high and can be covered only when markets are large. The European dimension has become essential for high technology firms and for research workers: the more public procurement is opened up to all enterprises in all the member countries, the more chance they will have of achieving concrete results with commercial applications.

The opening-up of public procurement was given a fresh impetus in the drive to complete the large market without frontiers by 1992. In its White Paper of June 1985 on the completion of the internal market, the European Commission laid down an action programme which was approved by the Heads of State or Government of the 12 member countries. This envisages the adoption of nearly 300 legislative measures grouped under three headings: the abolition of physical, technical and fiscal frontiers.¹ The definitive opening-up of public procurement is one of the priorities listed in this programme.

The achievement of this programme should be helped by the coming into force in 1987 of the Single Act amending the European Treaties. Decisions on various matters including public procurement no longer require unanimity but can be taken by a qualified majority of ministers. In addition, the Single Act underlines the link between the opening-up of public procurement and the development of the scientific and technological base of European industry. It also indicates that the Member

¹ See *European File* No 17/87: 'Europe without frontiers: towards a large internal market'.

States are disposed to increasing coordination of their positions on the political and economic aspects of security: this could make for progress in opening up military contracts, which amount each year to between ECU 40 to 50 billion.

It will be up to the business community to exploit all the new possibilities for growth presented by the single market. The complete success of the European Commission's efforts to open up public procurement also depends on Europe's business managers. For these efforts to bring quick results, contractors must understand that the Community is endeavouring to frame regulations which are as transparent and practical as possible, with no unnecessary red tape, aimed only at providing the guarantees essential for the free play of market forces. They must not hesitate to call on public authorities to apply Community rules – complaining to the European authorities, if necessary. The representatives of European industry are well aware of the importance of this issue. The Union of Industries of the European Community (Unice) has publicly come out in favour of the opening-up of public procurement, believing that 'the continued fragmentation of national markets denies to numerous European firms the economies of scale which they need to compete with their American and Japanese rivals and is responsible for a loss of efficiency in the European economy'.

This file will now examine, first the Community legislation adopted during the 1970s, then the new European Commission initiatives to open up public procurement fully.

The legislation of the 1970s

In order to apply more successfully the principles of non-discrimination and freedom of movement embodied in the Treaty of Rome, the Community Council of Ministers issued several directives which have already obliged Member States to amend their public procurement legislation according to common principles. Two basic directives were adopted in 1971 and 1977 and were subsequently adapted and amended. These directives are intended to harmonize national procedures which apply to:

- Public works contracts – written contracts awarded by public authorities for construction and civil engineering activities and worth, excluding VAT, at least ECU 1 million.
- Public supply contracts – written contracts awarded by public authorities for the supply of products, including their possible siting or installation, and worth, excluding VAT, at least ECU 200 000. Since 1980 an international agreement, concluded in the GATT framework, requires all signatories to open up supply contracts awarded by authorities directly dependent on national governments; the threshold for these authorities is lowered to a value which varies according to exchange rates. Under the renegotiation of this agreement, concluded in November 1986, the 1989 value is fixed at ECU 130 000.

The directives have in common a number of provisions intended to establish in all the member countries equal conditions for participation in the public procurement market and transparency to ensure greater respect for the free movement of goods, freedom of establishment and freedom to offer services. These measures:

- Determine the types of procedures to be followed normally by the contracting authorities: open, restricted or, in exceptional cases, private contract.
- Forbid any kind of discrimination, particularly in technical specifications.
- Make obligatory the publication of tender notices in the *Official Journal of the European Communities*, detailing the precise time limits, so that tenders may be drawn up in optimum conditions.
- Set out common rules for tendering and awarding contracts.

However, the adoption of these directives did not result in the complete opening-up of contracts.

- Certain sectors are not covered. These include, apart from arms and war material, contracts awarded by bodies administering: transport services, the production, transport or distribution of drinking water and energy and (with regard to supplies only) organizations in the telecommunications sector. The European Commission believes that such exceptions must be interpreted narrowly; they could not, for example, apply to orders for military uniforms or to airport authorities or irrigation services.
- In this field as in others, the difficult economic conditions of the 1970s slowed down the process of European unification and led to an increased number of infringements of Community law. In addition, the two directives in force did not ensure complete transparency in tendering for contracts and frequently did not enable discrimination in the awarding of contracts to be effectively revealed and prevented.

To secure more open public procurement, it was judged useful to highlight the most common or most serious infringements of the law. The European Commission is also taking a number of specific steps to ensure that, in regard to breaches of the more sensitive provisions, the Member States respect the Community legislation in force. Some of the most frequent infringements include:

- Non-publication in the *Official Journal of the European Communities*.
- The misuse of exceptional tendering procedures.
- The inclusion in tender notices of administrative, financial, economic or technical stipulations, such as an obligation to use standards not compatible with Community law.

- The illegal exclusion of bidders or applicants from Member States other than that of the contracting authority, for example by fixing discriminatory selection criteria.
- Discrimination in the awarding of contracts.

Where they exist – which is not the case in all countries – opportunities of redress for a contractor who believes himself to have been unfairly rejected are organized in different ways from one Member State to another. As for the procedures intended to allow the Commission to take action against infringements, these are lengthy and do not generally allow for the rapid reaction necessary to avoid or redress the wrongs caused. The injured parties are rarely aware of the means to be employed to defend their rights. The Commission will work to provide them with more information, while at the same time strengthening the possibilities of redress and the restraints provided by Community legislation.

The new initiatives of the European Commission

The European Commission is fully aware both of the economic and industrial importance of a real opening-up of public procurement and of the need to improve the legislation in force. In March 1987 it submitted a programme to relaunch Community action, to ensure effective application in the public procurement area of the fundamental principles of the common market.

- The first of these principles is the prohibition of any measure which, by whatever means, leads to preventing the movement of goods between member countries. Equally targeted here are prohibitions and barriers to imports and legislation which indirectly could have a similar effect. An example would be a requirement that certain products conform to standards which only national manufacturers could respect.
- The second major principle is the right of establishment. Each individual or company must be able to set up in any one of the Community countries in order to carry out professional activities. Restrictions which affect non-nationals either solely or more seriously than nationals are therefore forbidden. At issue here are the granting of residence rights, differences in tax burdens, etc.
- The third principle is the free movement of services. It provides similar freedom for the occasional supply of services in another Member State.

The European Commission intends to conduct its action programme on four fronts:

- Improving the transparency of procedures by amending the previous 'Works' and 'Supplies' directives.

- Opening-up public procurement in the following sectors: transport, water, energy, telecommunications equipment, services.
- Strengthening surveillance of the provisions in force.
- Keeping the interested parties informed and taking advice from them.

In addition, special emphasis must be put on small and medium-sized enterprises. The Commission intends to offer them real access to public procurement contracts, which have too often been limited to bigger firms.

Improving and adapting existing directives.

- The first achievement of the relaunch programme was the adoption by the Council of Ministers in March 1988 of a new directive on public supply contracts. This strengthens and defines the relevant provisions. The principal amendments, which entered into force on 1 January 1989 (with exemptions until 1 March 1992 for Greece, Spain and Portugal), are mainly intended to make procedures for the tendering and award of contracts more transparent:
 - (i) The contracting authorities must publish in advance their programmes and purchasing timetables and disseminate all relevant information concerning contracts awarded.
 - (ii) Those bodies outside the scope of the directive are more strictly defined, as are the circumstances in which restricted or private tendering procedures may be employed.
 - (iii) A procedure for the negotiation of contracts has been set up: in exceptional circumstances, defined by the directive, the contracting authority may preselect one or more suppliers and negotiate for the contract, which will be awarded freely.
 - (iv) Time-limits for the submission of bids are lengthened.
 - (v) There is an obligation to refer to European technical standards.
- In October 1988, the Council of Ministers adopted a joint position in support of a proposal for a similar directive to improve and adapt the initial directive on public works contracts. The main innovations envisaged are:
 - (i) The scope of the directive is better defined. It confirms that certain types of contracts are now covered (for example, contracts relating to financial promotion or management). In addition, those sectors which are not covered (water, energy, transport) are defined in more detail and the definition of the contracting authorities is broadened.
 - (ii) Other provisions are included which are similar to those in the new 'Supplies' directive: a system of advance information, lengthening of time-limits and limitation of exceptional procedures.

- *Opening up public procurement in the major sectors currently excluded.* In October 1988 the European Commission proposed to the Council that four important sectors, until now outside the scope of Community legislation, should be included: contracts awarded by bodies operating in the telecommunications, transport, drinking water and energy sectors. The question of contracts for other services not covered by the regulations will be the subject of a further proposal for a directive to be submitted shortly. This widening of scope will have important economic consequences since it affects key areas where public demand is capable of providing Community firms with a sufficiently large market to enable them to strengthen their competitiveness in the world market.

Telecommunications is a sector of major importance for Europe's industrial future. Community policy aims to establish on a Community-wide scale a homogeneous market for equipment and services. Appreciable results are already evident. A directive adopted in 1986 introduced the mutual recognition of the results of conformity tests for telecommunications terminals. A decision by the Community's Council of Ministers requires public authorities to refer, in their tender notices, to European standards and to those international standards accepted by the Member State concerned. In addition, a recommendation adopted by Ministers in 1984 provided for a first experimental phase of opening up public procurement contracts for equipment. National administrations are called on to give businesses in other member countries the opportunity to submit bids for all new telematic terminals as well as for conventional terminals for which there are common type-approval specifications. For all other types of equipment, the liberalization process already affects 10 % of the value of annual orders. The new directive is a follow-up to these measures, but its aim is much more ambitious – a complete opening up as part of the large market of 1992.

- *Ensuring the application of Community rules.* In July 1987, the European Commission proposed a new directive intended to combat infringements in public procurement more effectively. This requires Member States, when necessary, to amend their legislation so as to guarantee to those submitting tenders an efficient and rapid redress against contract awarding procedures clearly incompatible with Community legislation. This will enable business operators, with the help of national tribunals, to ensure that their interests are better respected by national administrations. Every national procedure for redress will have to guarantee the possibility of cancelling irregular decisions. The possibility of compensating wronged contractors and suppliers is also envisaged.

In addition, it is essential for the Commission to have at its disposal a simple administrative instrument with which to intervene before it is too late. This is why it has proposed a specific procedure enabling it to react rapidly in a preventive manner before the awarding of a contract becomes irreversible. Using this procedure, in cases of urgency and of clear and manifest irregularity, the Commission could temporarily suspend the awarding of contracts.

□ *Informing and taking the advice of interested parties.*

- Anxious to develop European rules on public procurement and to apply them flexibly while taking all economic factors into account, the European Commission is committed to taking advice from interested parties. It therefore set up in 1987 an Advisory Committee on the Opening-up of Public Procurement, composed of independent experts from all the member countries. These experts, who are nominated in a personal capacity and whose professional experience and competence are widely recognized, represent the areas of supplies, works, and services as well as public procurement in general. The Committee's task is to help the Commission appraise the economic, technical, legal and social realities of public procurement and to enable business interests to be more aware of the scope of Community rules and the possible problems they might cause.
- Companies wishing to be informed about public procurement contracts can refer first of all to national and Community official journals. In addition, the TED (Tenders Electronic Daily) computerized system contains details of all tenders for public works, supplies and services published in the *Official Journal of the European Communities*. This system is accessible through various host organizations.¹ Since October 1987, interested companies can also contact their local Euro-Info-Centre. These are offices providing information about Community activities which have been set up more or less throughout the Community as part of a pilot programme. They stock the Official Journals and are linked up to the TED system.² Complaints concerning breaches of Community legislation may be lodged either through the Euro-Info-Centres or directly with the European Commission's Directorate-General for the Internal Market and Industrial Affairs.³ Simultaneous recourse to national courts is also recommended.

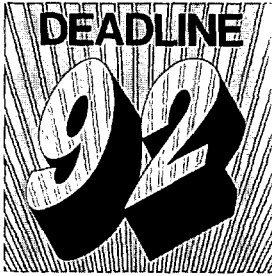
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Opening-up public procurement to real international competition will lead to decision-making that is economically more rational. It will generate savings for public authorities and give them a wider choice. It can encourage European companies to take on an international dimension, make for a better structuring of production and play a key role in stimulating the Community's technical and industrial performance. It is up to all the interested parties to ensure that the necessary decisions are taken without delay ■

¹ For information: Office for Official Publications of the European Communities, Sales Service, L-2985 Luxembourg.

² For information: the Commission of the European Communities' Task Force on Small and Medium-sized Enterprises, rue de la Loi 200, B-1049 Brussels.

³ Rue de la Loi 200, B-1049 Brussels.



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