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OPINION

of the Committee on Legal Affairs
and Citizens' Rights

for the Committee on Economic and Monetary Affairs and Industrial Policy

on the proposal from the Commission to the Council for a directive relating to the coordination of procedures on the award of public service contracts (COM(90) 0372 final - C3-0001/90 - SYN 293)

Draftsman : Mr. F. BLAK

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* = Consultation procedure requiring a single reading

**II = Cooperation procedure (second reading) which requires the votes of a majority of the current Members of Parliament for rejection or amendment

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*** = Parliamentary assent which requires the votes of a majority of the current Members of Parliament

OPINION

(Rule 120 of the Rules of Procedure)

of the Committee on Legal Affairs and Citizens' Rights

for the Committee on Economic and Monetary Affairs and Industrial Policy

Draftsman : Mr. F. BLAK

At its meeting of 8 February 1991, the Committee on Legal Affairs and Citizens' Rights appointed Mr. BLAK draftsman.

At its meeting of 22, 23, 24 April 1991 and 2 and 3 May 1991, it considered the draft opinion.

At the latter meeting it adopted the conclusions as a whole unanimously.

The following took part in the vote : Graf STAUFFENBERG (Chairman), BLAK (draftsman), ELLIOTT, FALCONER, FONTAINE, GARCIA AMIGO, ODDY, PERREAU DE PINNINCK DOMENECH, ROGALLA, SCHLECHTER, SIMPSON, VAN OTRIVE.

Introduction

In its White Paper on the completion of the internal market from June 1985¹ the Commission concluded that there were still obstacles to the freedom of movement for persons, services and capital. Open procurement makes a major contribution to eliminating technical barriers to trade in manufactured goods, since purchasing entities will no longer be able to insist that products meet national standards. Increasingly they will be obliged to refer to European standards in their contract specifications. More international competition in procurement will also lead to decisions that make better commercial and economic sense. There will be many other benefits : budget savings, opportunities for firms to scale up international competition, and pressure on Community industry to rationalize.

In March 1987 the Commission came forward with a package, which called for action on four fronts :

- (i) to make tendering and award procedures more transparent ;
- (ii) to propose rules for EC-wide competitive tendering in the sectors excluded from the original legislation;
- (iii) to open up procurement of services to a greater extent than provided for at that moment;
- (iv) to tighten up enforcement.

The legislation, based on the directive 71/305/EEC² for public works contracts and 77/62/EEC³ for public supply contracts has been completed and modified by a large number of Directives of which some of the most recent are 87/305/EEC⁴ setting up an Advisory Committee, 88/295/EEC⁵ amending Directive 77/62/EEC and repealing certain provisions of Directive 80/767/EEC, 89/440/EEC⁶ amending Directive 71/305/EEC concerning coordination of procedures for award of public works contracts, 89/665/EEC⁷ relating to the application of review procedures and 90/531/EEC⁸ on the procurement procedures in the water, energy, transport and telecommunications sectors.

The proposal relating to the coordination of procedures on the award of public service contracts is designed to establish a Community framework for the purchasing of services by central, regional and local public authorities. Since, according to information supplied by the Commission, services cover 20 % of total public purchasing, the economic impact will be of importance. Together with the two directives relating to the application of Community rules on the procurement procedures of entities operating in the water,

1 COM (85) 310
2 O.J. L 185 of 16.08.1971, p. 5
3 O.J. L 013, of 10.05.1977, p. 1
4 O.J. L 152 of 12.06.1987, p. 32
5 O.J. L 127 of 20.05.1989, p. 1
6 O.J. L 210 of 21.07.1989, p. 1
7 O.J. L 395 of 30.12.1989, p. 1
8 O.J. L 297 of 29.10.1990, p. 1

energy, transport and telecommunications sectors ⁹ (the so-called excluded sectors) and the announced proposal on utilities in those sectors, the aim is to cover the different economic activities : works, purchases and services.

The proposed directive

The Commission proposal sets up a two-tier system. Identified 'priority services' will be subject to a full procurement regime, the residual category will only be subjected to basic transparency requirements.

The procedure for the full procurement regime applies to services listed in ANNEX I A of the proposal, such as engineering, architecture, telecommunications, insurance, certain banking services, research and development, transport, publishing, printing, cleaning, maintenance and repair.

The other category of services, listed in ANNEX I B of the proposal, includes hotels, catering, rail and water transport, certain financial and banking services, legal, social, recreational, cultural and sporting services. Some other sectors are subject to derogations eg. defence subject to the limits set out in Article 223 of the Treaty, services related to secrecy, State security, certain real estate contracts, broadcasting, local telephone services, arbitration and conciliation services and some financial services related to Member States' monetary policies.

The aim is to apply the Directive fully to those services wherefore the market is genuinely open or will be by the time the Directive will come into force and where the provisions will enable the full potential for increased cross-frontier trade to be realised (Recital 21). However, there is considerable concern over the large number of services governed only by the transparency requirements and the exceptions.

In particular, in-house performance could limit the application of the directive in those areas where the authorities already employ the necessary experts, such as computer specialists, architects, engineers, economists scientists and so on. Nevertheless the Community procurement rules should not interfere with public authorities decisions as to buying in the market place or satisfying their needs with their own means. The public procurement rules should not lead to massive privatization of a part of the public sector. The rapporteur is of the opinion that also at the review after three years (Article 42) the status quo must remain.

Many items are treated in the same way as in the existing Directives for public works contracts and public supply contracts.

It is to be regretted that the reference of abnormally low tenders in Article 34 is only applied to public entities. Experience shows that such tenders are frequent and cause many problems for the workers in the contracting company (bad working conditions, low pay) and that contractors very often underestimate the resources and efforts needed to provide a public service which can meet the necessary quality standards.

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The Council Directive 90/531/EEC of 17 September 1990 deals with the procurement-procedures whereas COM (90) 287-SYN 292-OJ C 216, 31.08.1990, (not yet adopted), of which the first reading in Parliament has taken place during March 91 part-session, deals with the coordination of laws, regulations and administrative provisions (enforcement).

Furthermore there are strong indications that a number of services are not fit to be left to the market forces. This is particularly the case for the care of the elderly, the handicapped or psychiatrically ill.

It is an established social right that governments in their capacity as public sector employers need to address the issue of quality, efficiency and contracting, with trade unions. This must not be changed under the forthcoming Directive.

There is further a concern relating to the potential social dumping contained in the Directive. Article 26 (2) provides for the payment of social security contributions but it is felt that also obligations in respect of employment conditions, labour laws and wage agreements and equal opportunities (between sexes) must be respected. The rapporteur would urge all Member States to ratify and to comply with ILO Convention N° 94.

Legal basis

The Commission proposes Articles 57 (2), 66, 100 A and 113 of the EEC Treaty as legal basis. The Directive 71/305/EEC which was the first directive on public procurement, was based on Articles 57 (2), 66 and Article 100 of the Treaties. After the Single Act has entered into force, Article 100 A constitutes the appropriate legal basis instead of article 100. As an example for the present situation it is to be mentioned that the proposal for a Council Directive amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (COM (86) 679) was also based on Articles 57 (2), 66 and 100. The Amendment proposed by the Committee on Legal Affairs and Citizens' Rights to replace Article 100 by Article 100 A had been taken over by the Parliament, Commission and the Council (Directive 89/440/EEC).

The opening up of the public procurement-market will also improve the market access of firms of third countries, because of the transparency, procedural regularity, clear technical specifications and objective, non-discriminatory criteria. Access of Community firms to public contracts in the services field in third countries is not guaranteed to the same extent. International rules, in the GATT particularly, are aimed at forbidding discriminations, but at present the 1980 GATT Government Procurement Code ¹⁰ does not yet cover services. The US 'Buy America' legislation prohibits federal agencies from procuring services from firms from third countries identified by decisions taken on an annual basis as pursuing protectionist policies or practices. It is therefore welcomed that the proposal (Article 40) gives the Commission the possibility to close the market for firms from third countries or to open negotiations with third countries, if this is deemed necessary.

The question arises on which legal basis this possibility must be founded. The Commission, by proposing amongst others Article 113 of the Treaty as legal basis, is apparently of the opinion that this article is appropriate. During the discussions on the proposal for a Directive on procurement-procedures of entities operating in the water, energy and transport (initial proposal COM (88) 377 final, based on Article 100 A and 113) the Committee on Legal Affairs and Citizens' Rights had discussed this. It is important, since the cooperation procedure does not apply for proposals based on Article 113.

The rapporteur, while considering that the Articles 57 (2), 66 and 100 A, in the light of the Court cases AETR ¹¹ and KRAMER ¹², provide a sufficient legal basis for negotiations with third countries, will nevertheless not introduce an Amendment because the same Articles (including Article 113) were used as legal bases for the Directive 90/531/EEC. The conclusion of agreements should, on the basis of Articles 57 (2), 66 and 100 A, be in cooperation with the Parliament.

Final provisions

From 1 March 1992 the proposed directive should come into effect. The Dutch and Danish version contain an error and state 1 March 1990 as date from which the dispositions must be applicable. This must be remedied. The Member States will ensure that the provisions in national law contain or shall be accompanied by a reference to the Directive.

The report by the Commission, pursuant to Article 40(2), which for the first time should be transmitted to the Council before the 31 December 1991 (before the Directive should come into force), can provide much information on behaviour of third countries. This report must not only be transmitted to the Council but also to Parliament. The report foreseen in Article 42 should also be transmitted to the Parliament, at the latest when the proposals to modify the Directive will be made available.

The provision concerning the Advisory Committees (Article 39) for Public Contracts set up by Decision 71/306/EEC and by Directive 90/531/EEC is important (Article 91). In the Explanatory Memorandum there is a reference to Council Decision 87/373/EEC of 13 July 1987 ¹³ laying down the procedure for the exercise of implementing powers delegated to the Commission. Procedure I provided for in Decision 87/373/EEC is envisaged by Article 39. Under Article 40 of the proposed Directive, the Commission shall not defer application of the measures if the Advisory Committee is not agreeing, but the Council, acting by a qualified majority, may override a Commission Decision within three months of a Member State referring its disagreement to the Council.

As concerns the report to be drawn up pursuant to Article 42, it should be established that the Commission will also take account of the remarks of the providers of services, their associations and the professional organizations and unions of the workers which are concerned by the application of the Directive and any future proposals to adapt it.

Article 41 guarantees that the Member State shall take the measures necessary to ensure that also services are falling within the scope of Directive 89/665/EEC (enforcement), so that decisions taken by contracting authorities may be reviewed effectively and as rapidly as possible.

Conclusions

The Committee on Legal Affairs and Citizens' Rights adopted the following amendments to the Commission proposal :

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- 11 31.03.1976, Case 22/70, Decisions of the Court, Volume 1971, Page 263
- 12 14.07.1976, joint cases 3/76, 4/76, 6/76, Decisions of the Court, Volume 1976, page 1279
- 13 O.J. L 197 of 18.7.87 p. 33

(Amendment N° 1)

Sixth recital

Whereas suppliers may be natural persons; whereas without prejudice to national rules compatible with the Treaty suppliers may also be legal persons;

Whereas providers of services may, without prejudice to national rules compatible with the Treaties, be natural or legal persons. ¹

(Amendment N° 2)

Recital 15 a (new)

Whereas it is useful that all Member States ratify and comply with ILO Convention N° 94;

(Amendment N° 3)

Recital 23 a (new)

Whereas the contracting authorities shall ensure that the submitted tenders will take the social and environmental objectives and rules into account;

(Amendment N° 4)

Article 13 (3) e

for additional services not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the carrying out of the service described therein, on condition that the award is made to the supplier carrying out such service :

- when such services cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities;

- or when such services, although separable from the execution of the original contract, are strictly necessary to the later stages.

However, the aggregate estimated value of contracts awarded for additional services may not exceed 50 % of the amount of the main contract ;

for additional services not included in the project initially considered in the contract first concluded but which have, through unforeseen circumstances, become necessary for the carrying out of the service described therein, on condition that the award is made to the supplier carrying out such service;

-when such services cannot be technically separated from the main contract without great inconvenience to the contracting authorities;

-or when such services, although separable from the execution of the original contract, are strictly necessary to the later stages.

However, the aggregate estimated value of contracts awarded for additional services may not exceed 25% of the amount of the main contract;

(Amendment N° 5)
Article 25

1. The authority may state in the contract documents, or be obliged by a Member State to do so, the authority or authorities from which a candidate may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the services are to be performed and which shall be applicable to the services provided on site during the performance of the contract.

2. The authority which supplies the information referred to in paragraph 1 shall request the tenderers or those participating in the contract procedure 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 service is to be carried out. This shall be without prejudice to the application of the provisions of Article 34 concerning the examination of abnormally low tenders.

1. Without prejudice to the provisions of the Treaties and measures adopted in compliance with the Treaties, the contracting authority shall indicate, in the specifications, the obligations in respect of employment conditions, labour laws, wage agreements and health and safety obtaining in the Member States, regions or localities in which the work is to be carried out on the site during the performance of the contract.

The tenderer shall indicate in his offer that he has taken account of the obligations relating to labour, law, wage agreements, employment protection provisions, health and safety and other working conditions in force on the place where the work is carried out.

2. The Directive shall not prevent the application of existing or future national provisions on the award of public supply or works contracts which have as their objective the promotion and protection of equal rights and opportunities for women, the disabled, members of minority ethnic groups, migrant workers, religious groups, on condition that the provisions are compatible with the Treaty and with the international obligations of the Member States, in particular ILO Convention 94.

(Amendment N° 6)
Article 26 (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 authority ;

has not indicated in his tender that he has fulfilled obligations relating to equal opportunities (between sexes) provisions, to employment protection, the working condition and the payment of social security contributions in accordance with the legal provisions and collective agreements of the country in which he established or with those of the country of the authority ; the contracting authority shall inform each candidate from which authorities information concerning the obligations in force can be obtained ;

(Amendment N° 7)
Article 26 (f2) new

has proved to be incapable of fulfilling the obligations related to environment legislation ;

(Amendment N° 8)
Article 40(2)

The Commission shall report to the Council, before 31 December 1991 and then periodically, on the opening up of public service contracts and concessions in third countries and on the state of negotiations with these countries on this subject in the GATT framework or elsewhere.

The Commission shall report to the European Parliament and the Council, before 1 March 1992 and then periodically, on the opening up of public service contracts and concessions in third countries and on the state of negotiations with these countries on this subject in the GATT framework or elsewhere.

(Amendment N° 9)
Article 40 (4)

Under the conditions referred to in paragraph 3 (b) and (c), the Commission may decide, in addition to action taken pursuant to that paragraph, that the award of public contracts or concessions to (rest unchanged)

Under the conditions referred to in paragraph 3 (a), (b) and (c), the Commission may decide, in addition to action taken pursuant to that paragraph, that the award of public service contracts or concessions to (rest unchanged)

(Amendment N° 10)
Article 42

Not later than three years after the time limit for compliance with this Directive, the Commission, acting in close cooperation with the Committees referred to in Article 39, shall review the manner in which this Directive has operated including, in particular, the effects of the application of the Directive to procurement of services listed in Annex 1A (rest unchanged)

Not later than three years after the time limit for compliance with this Directive The Commission, acting in close cooperation with the Committees referred to in Article 39, taking into account the opinions of companies providing services, associations of those companies, professional organisations or unions, shall review the manner (rest unchanged)

(Amendment N° 11)
Article 43

Member States shall implement the laws, regulations and administrative provisions necessary to comply with this Directive by 1 March 1990. They shall forthwith inform the Commission thereof (rest unchanged) ²

Member States shall implement the laws, regulations and administrative provisions necessary to comply with this Directive by 1 March 1992. They shall forthwith inform the Commission thereof (rest unchanged)

1. Throughout the Directive replace the word "supplier" by "provider of services" and the word "services supplied" by "services provided"
2. This Amendment is applicable to the Dutch and Danish version of The Commission proposal.

