Public procurement in the fields of defence and security

2007/0280(COD) - 05/12/2007 - Legislative proposal

PURPOSE: to coordinate procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security.

LEGISLATIVE ACT: Directive of the European Parliament and of the Council.

CONTENT: in spite of ECJ case law to the contrary, most defence and security equipment is purchased on the basis of uncoordinated national contract award procedures and rules. These provisions can differ significantly in terms of publication, tendering procedures, selection and award criteria. Such a lack of legal uniformity constitutes a major obstacle to the establishment of a European defence equipment market and opens the door to the non-compliance of Treaty principles, in particular the principles of transparency, non-discrimination and equal treatment, in wide sections of Europe's defence markets. Public contracts awarded in the fields of defence and security currently fall within the scope of Directive 2004/18/EC– other than exceptions arising in situations provided for by Article 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 should be restricted to exceptional and clearly defined cases only. The current national practice of relying on derogations is largely due to the fact that Directive 2004/18/EC does not take sufficient account of specific requirements that have to be met by certain purchases of goods and services in the fields of defence and security.

The purpose of this proposal, therefore, is to establish a new legislative pubic procurement framework unique to the field of defence and security. In presenting this proposal the Commission's stated objective is to circumscribe the use of exemptions, from both the Treaty and Directive 2004/18/EC, to exceptional cases only, whilst at the same time respecting the security interests of the Member States. The 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 contract. Once approved, the Member States will have at their disposal a common public procurement framework that not only ensures the application of EU principles, but one that will simultaneously guarantee security of information, security of supply and flexible procedures.

This proposal forms part of a package of defence related proposals:

- On public procurement, (the subject of this summary).
- On transfers of defence-related products. See COD/2007/0279.

In addition the Commission has prepared a Communication for a stronger and more competitive defence industry. See COM/2007/0764.

The proposed Directive would apply to sensitive public supply contract, public service contracts and public works contracts in the fields of defence and security only. The proposed thresholds are the same as those currently applied by Directive 2004/18/EC. Indeed, for the most part, this proposal is based on the design and rationale of Directive 2004/18/EC, but has a certain number of specific features tailored to the characteristics of sensitive public defence and security contracts. These features provide, on the one hand, greater flexibility for the contracting authorities, whilst at the same time, safeguarding security of information and supply. The main provisions being proposed are as follows:

Procedures: The negotiated procedure with publication of a contract notice will be authorised without the need for specific justification in order to allow for enhanced flexibility. The restricted procedure and competitive dialogue may also be used. However, in view of the need for confidentiality and security of information, the Commission has decided not to propose the "open procedure".

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 is being proposed.

Security of information: Similarly, the 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.

On a final point, the Directive will have an impact on the Community's budget. Financing will be needed for:

- the daily publication of notices in the Official Journal of the European Union;
- annual monitoring of the Directive's implementation;
- medium-term assessment (not before five years) of the administrative impact of the Directive by the contracting authorities and in businesses;
- long-term assessment (not before 10 years) of the economic impact of the Directive.

The measures listed above (in the field of monitoring and assessment) may require the services of external service providers.