

Public procurement in the fields of defence and security

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The Committee on the Internal Market and Consumer Protection adopted a report drafted by Alexander Graf **LAMBSDORFF** (ADLE, DE), and amended the 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.

The main amendments – adopted in 1st reading of codecision procedure – are as follows :

Scope: Members state that the Directive shall apply to public contracts relating to the supply of goods and services which are used in order to guarantee the security and defence of the Union or its Member States and entailing, requiring or containing sensitive information, and public works and services contracts strictly related to such supply. These comprise public contracts for, inter alia: a) the supply of arms, munitions and/or war material, including, but not limited to, the list of military equipment referred to in the Council Decision of 15 April 1958; (d) works, supplies and/or services which are necessary for the security of the EU and/or in order to protect the security interests of the Member States.

Calculation of value of contract: Members introduced an amendment which is intended to prevent authorities from dividing contracts which extend over a relatively long period of time into separate contracts relating to different periods in such a way that they fall below the thresholds above which a public procurement procedure is required.

Limit to Member States' use of Article 296 of the Treaty: the committee clarified that the directive is without prejudice to Article 296(1)(a) of the Treaty and that the Member States remain free to use the exemption provided for in substantiated and justified exceptional cases. It stated that the provision for derogations pursuant to Article 296(1)(a) of the EC Treaty remains in force notwithstanding this proposal, but is incorporated in Article 9 in a form appropriate to public procurement law in order to improve legal certainty and prevent abusive or avoidable application of Article 296 of the Treaty. The Directive shall not apply if in the opinion of a Member State the disclosure of information which is necessary in order to award a contract is contrary to the essential security interests of that Member State. This amendment will improve legal certainty and is intended to make it possible for those who accept public contracts to invoke secondary law in relation to the conditions for a derogation.

Contract notices: the proposal provides that, when a public contract contains sensitive technical specifications that may only be communicated to the successful tenderer, these specifications may not be set out in the contract notice, contract documents or additional documents, provided that knowledge of the details of such specifications is not required in order to prepare tenders. Members added that, in this case, the contract notice shall inform the candidates of the situation, giving general information as to the nature or type of the missing sensitive technical specifications. This amendment aims to ensure that sufficient information is provided to allow a fair process in these particular, but not uncommon, circumstances.

Security of information: Members state that it is important to contracting authorities to obtain from tenderers commitments which are as reliable as possible. However, a tenderer cannot in every case provide proof or a definitive commitment, particularly regarding the conduct of a subcontractor or in relation to a transit entitlement. They propose amendments which will make it easier for tenderers to comply with the requirements in practice. Rather than proof, contractors must provide : a) a) sufficient information about proposed subcontractors to enable the contracting authority to determine whether each

subcontractor possesses the capabilities required to protect the confidentiality of, and to safeguard, the sensitive information to which they will have access; b) a commitment to provide the same information about any new subcontractors that may be involved during performance of the contract; c) a commitment to protect the confidentiality of, and to safeguard, all sensitive information in the possession of the tenderer for the entire duration of the contract and after termination or conclusion of the contract.

Within one year of publication of this Directive in the Official Journal of the European Union, the Commission shall submit to the European Parliament and to the Council a proposal for an EU security of information system that will allow the exchange of information between contracting authorities and European undertakings

Security of supply: the Commission's proposal had provided that the contracting authority may require of the tenderer that the tender submitted contain evidence that it will be able to honour its obligations regarding the security of supply, including by means of a commitment from the Member State(s) concerned. However, despite the interest in guaranteed security of supply for the contracting authority, it is often not possible for candidates/contractors to provide binding evidence regarding security of supply. Members suggest that the tender submitted contain, inter alia: (a) certification or documentation regarding the export, transfer and transit of goods which confirms that the products and services or any deliverable resulting from those products or services are not subject to restrictions regarding disclosure, transfer or use by the originating Member State resulting from export control or security arrangements; (b) a commitment to meet additional needs required by the contracting authority as a result of a crisis, under terms to be agreed between the contracting authority and the contractor; (c) a commitment that the contracting authority will obtain a license for the production of spare parts, components, specific fittings, specific tests for equipment, including the design and transfer of know-how, and instructions in the event that the contractor is no longer able to supply and transport them.

Mutual confidence: the contracting authorities shall work to increase the level of mutual confidence amongst them. For this purpose and within one year of publication of this Directive in the Official Journal of the EU, the Commission shall submit to the European Parliament and to the Council a proposal for a common regime of appropriate guarantees, backed up by verification possibilities, with a view to a stable security of supply.

Personal situation of the candidate: Members felt that the Commission's general derogation to requirements seriously undermines their credibility. They provided that Member States may decide to admit candidates or tenderers convicted for any reason listed in the text if they prove to the satisfaction of the contracting authority that they have taken all specific technical, organisational and personnel-related measures to eliminate the reasons for the action or actions for which they were convicted, and that such measures are fully operational and effective at the time the tender is submitted. Moreover, economic operators may be excluded from participation in the procurement procedure if information is available about them, including from protected data sources, indicating that the products which they manufacture or supply display dubious characteristics which give rise to doubts about the suitability of the economic operator.

Use of electronic auctions: a new article provides that Member States may allow contracting authorities to use electronic auctions. In negotiated procedures, the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the contract specifications can be established with precision. Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice.

Review procedures: a new Title IIA sets out the review procedures. The inclusion of a review procedure, along the lines of Directive 2007/66/EC, in this Directive is intended to achieve genuine market opening, provide effective legal protection for tenderers and ensure transparency and non-discrimination in the award of contracts without prejudice to Member States' need to protect secret information. The system of

legal remedies provided for in the proposal basically adopts the same approach as the standard legal remedy directives, but at the same time takes account of the special interests of the Member States in relation to the award of defence and security contracts.