

# Public procurement in the fields of defence and security

2007/0280(COD) - 14/01/2009 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 597 votes to 69 with 33 abstentions, a legislative resolution amending 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 report had been tabled for consideration in plenary by Alexander Graf **LAMBSDORFF** (ADLE, DE), on behalf of the Committee on the Environment, Public Health and Food Safety.

The amendments were the result of a compromise between Parliament and Council. The main amendments - adopted under 1st reading of the codecision procedure - were as follows:

**Scope:** the Directive shall apply to contracts awarded in the fields of defence and security for: (a) the supply of military equipment, including any parts, components and/or subassemblies thereof; (b) the supply of sensitive equipment, including any parts, components and/or subassemblies thereof; (c) works, supplies and services directly related to the equipment referred to in (a) and (b) for any and all elements of its life cycle; (d) works and services for specifically military purposes, or sensitive works and sensitive services.

**Definition of "military equipment":** this is defined as equipment specifically designed or adapted for military purposes, intended for use as an arm, munition or war material. However, a recital states that military equipment should be understood in particular as the product types included in the list of arms, munitions and war material adopted by the Council Decision of 15 April 1958, and Member States may limit themselves to this list only when transposing this Directive. This list includes only equipment which is designed, developed and produced for specifically military purposes. However, the list is generic and is to be interpreted in a broad way in the light of the evolving character of technology, procurement policies and military requirements leading to the development of new types of equipment, for instance on the basis of the Common Military List of the European Union. The term "military equipment" should also cover products which, although initially designed for civilian use, were later adapted to military purposes to be used as arms, munitions or war material.

**Article 296 of the Treaty:** the compromise text states that Article 296(1)(a) of the Treaty gives Member States the possibility to exempt contracts in the fields of both defence and security from the rules of this Directive if the application of the latter would oblige them to supply information the disclosure of which they consider contrary to the essential interests of their security. This can be the case in particular where contracts are so sensitive that their very existence must be kept secret.

**Operators from third countries:** in the specific context of defence and security markets, Member States retain the power to decide whether or not their contracting authority/entity may allow economic operators from third countries to participate in contract award procedures. They should take that decision on grounds of value for money, recognizing the need for a globally competitive European defence technological and industrial base, the importance of open and fair markets, and the obtaining of mutual benefits.

**Threshold amounts for contracts:** the Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds: EUR 412 000 for supply and service contracts; and EUR 5 150 000 for works contracts.

**Specific exclusions:** the compromise text establishes a list of specific exclusions which are outside the scope of the directive. The list includes contracts for which the application of the rules of the Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security; contracts for the purpose of intelligence activities; and contracts awarded in a third country, including for civil purchases; . It also includes contracts awarded in the framework of a cooperative programme based on R&D, conducted jointly by at least two Member States for the development of a new product and, where applicable, the later phases for all or parts of the life-cycle of this product. This provision ensures that the Commission might judge whether the provisions of the directive are being unfairly evaded.

**Protection of classified information:** contracting authorities/entities may impose on economic operators requirements aimed at protecting the classified information they communicate throughout the tendering and contracting procedure. They may also request these economic operators to ensure compliance with such requirements by their subcontractors.

**Central purchasing bodies:** Member States may stipulate that contracting authorities/entities may purchase works, supplies and/or services from or through a central purchasing body.

**Reserved contracts:** they may reserve the right to participate in contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons. **Subcontracting:** the text contains a clearer definition of subcontracting and states that the successful tenderer is free to select its subcontractors for all sub-contracts that are not covered by certain requirements mentioned in the directive, and shall in particular not be required to discriminate against potential sub-contractors on grounds of nationality. The directive does not include specific rules on offsets, also called "industrial compensations". The provisions on subcontracting do not prohibit offsets but will help in preventing illegal offsets. They will also facilitate market access for SMEs.

**Security of information:** the contracting authority/entity may require that the tender contain certain particulars to ensure the security of such information at the requisite level. A list of such particulars is stated in the text. It includes a commitment from the tenderer and the sub-contractors already identified to appropriately safeguard the confidentiality of all classified information in their possession or coming to their notice throughout the duration of the contract and after termination or conclusion of the contract, in accordance with the relevant laws, regulations and administrative provisions.

**Security of supply:** similarly the contracting authority/entity may require that the tender contain certain particulars in order to ensure its security of supply requirements. This list includes the indication of any restriction on the contracting authority/entity regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements;

**Official lists of approved economic operators and certification by bodies established under public or private law :** Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law. Economic operators registered on the official lists or having a certificate may, for each contract, submit to the contracting authority/entity a certificate of registration issued by the competent authority or the certificate issued by the competent certification body.

**Use of electronic auctions:** a new clause states that Member States may provide that contracting authorities/entities may use electronic auctions. In restricted and negotiated procedures with publication of

a contract notice, the contracting authorities/entities may decide that the award of a contract shall be preceded by an electronic auction when the contract specifications can be established with precision. The text gives a list of the matters on which the electronic auction shall be based.

**Transparency:** the new legislation strengthens transparency requirements to contractors, and does not allow combined research and production contracts for national procurements without a competitive stage.

**Review procedure:** the compromise text introduces a new review procedure, which provides the possibility of challenging the award procedure before the contract is signed. It also provides the guarantees necessary for the efficiency of this review such as the standstill period. It also provides that a contract will be considered ineffective under certain circumstances specified in the text. Under some conditions, however, the review body may not consider a contract ineffective, even though it has been awarded illegally, if it finds that overriding reasons relating to a general interest, first and foremost in connection with defence and/or security interests, require that the effects of the contract should be maintained.

**Review and reporting:** the Commission will review the functioning of the Directive and report after 5 years. It shall evaluate in particular whether, and to what extent, the purposes of this Directive have been achieved with regard to the functioning of the Internal Market and to the development of a European defence equipment market and a European defence technological and industrial base, including the situation of small and medium-sized enterprises.