Public procurement in the fields of defence and security

2007/0280(COD) - 13/07/2009 - Final act

PURPOSE: to further open and enhance the competitiveness of public procurement in the fields of defence and security with a view to gradual creation of a European market for defence equipment.

LEGISLATIVE ACT: Directive 2009/81/EC of the European Parliament and of the Council on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004 /17/EC and 2004/18/EC.

CONTENT: following an agreement with the Parliament under the second reading of the codecision procedure, the Council adopted a directive on public procurement in the fields of defence and security that seeks to further open and enhance the competitiveness of the EU's defence equipment market. It is closely linked with Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community, adopted by the Council on 23 April 2009.

This directive will reduce the current regulatory fragmentation in this field and increase competition and transparency, thus enabling European companies, including small and medium-sized enterprises, to tender for contracts throughout the EU. The text states that national security remains the sole responsibility of each Member State, in the fields of both defence and security.

Under the new harmonised rules applicable to the procurement of arms, munitions and war material, exceptional cases where the member states may apply restrictions to access to public tender will be limited to certain cases, such as those affecting the interests of its national security. The new rules take into account the specific features of the market, namely security of supply and security of information.

Arms concerned: "military equipment" means equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material and covered by the Council in its Decision of 15 April 1958. Member States may limit themselves to this list only when transposing this Directive. 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 which lead to the development of new types of equipment. For the purposes of this Directive, military equipment should also cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material.

Scope: the Directive recalls 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 this Directive 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.

Subject to Article 296 of the EC Treaty, the directive shall apply to contracts awarded in the fields of defence and security for:

- the supply of military and sensitive equipment, including any parts, components and/or subassemblies thereof;
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works, supplies and services directly related to the military, or sensitive equipment for any or all of its life cycles;
- works and services for specifically military purposes or sensitive works and sensitive services.

Thresholds: This directive applies to contracts which have a value estimated to be no less than EUR 412 000 for supply and services contracts and EUR 5 150 000 for works contracts.

Specific exclusions: the directive provides a list of the contracts that do not fall within its scope. This list includes:

- contracts where 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 purposes of intelligence activities;
- contracts awarded in the framework of a cooperative programme based on research and development, conducted jointly by at least two Member States for the development of a new product;
- contracts awarded in a third country, including for civil purchases, carried out when forces are deployed outside the territory of the Union where operational needs require them to be concluded with economic operators located in the area of operations;
- service contracts for the acquisition or rental, under whatever financial arrangements, of land, existing buildings or other immovable property, or concerning rights in respect thereof;
- contracts awarded by a government to another government relating to the supply of military or sensitive equipment.

Subcontracting: the rules in this regard have been clarified. The directive states that the successful tenderer shall be free to select its subcontractors for ll subcontracts that are not covered by certain requirements in the directive and shall, in particular, not be required to discriminate against potential subcontractors on grounds of nationality.

The contracting authority/entity may ask or may be required by a Member State to ask the tenderer: i) to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractor, as well as the subject-matter of the subcontracts for which they are proposed; and /or, ii) to indicate any change occurring at the level of subcontractors during the execution of the contract.

Use of electronic auctions: the directive allows for the possibility for contracting authorities to 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. Contracting authorities/entities which decide to hold an electronic auction shall state that fact in the contract notice.

Transparency: in order to ensure transparency, provision should be made for rules on publication by the contracting authorities/entities of appropriate information prior to, and at the end of, the award procedure. In addition, further specific information should be provided to candidates and tenderers regarding the results of that procedure. However, contracting authorities/entities should be allowed to withhold some of the information so required when and insofar as its release would impede law enforcement or otherwise be contrary to the public interest, harm the legitimate commercial interests of economic operators or might prejudice fair competition between them. The compromise also makes provision for the use the negotiated procedure without the prior publication of a contract notice in certain cases.

Review procedure: the directive provides for review procedures, the aim of which is to guarantee effective legal protection of tenderers involved, to encourage transparency and non-discrimination in the award of contracts without compromising Member States' need for confidentiality. The judicial review system provided for is, for the most part, based on the classic directives in the field, in particular Directive

2007/66/EC, although taking into account the specific interests of Member States with regard to procurement in the areas of defence and security.

Review and reporting: by 21 August 2012, the Commission shall report on the measures taken by Member States with a view to the transposition of this Directive. The Commission shall review the implementation of this Directive and report thereon to the European Parliament and the Council by 21 August 2016. It shall evaluate in particular whether, and to what extent, the objectives of this Directive have been achieved with regard to the functioning of the internal market and the development of a European defence equipment market and a European Defence Technological and Industrial Base, having regard, inter alia, to the situation of small and medium-sized enterprises. Where appropriate, the report shall be accompanied by a legislative proposal.

ENTRY INTO FORCE: 21/08/2009.

TRANSPOSITION: 21/08/2011.