

Procurement water, energy, transport and postal sectors: coordination of procedures for award, utilities directive

2000/0117(COD) - 20/03/2003 - Council position

The common position maintains the objective of the Commission's proposal, integrating a number of amendments which all contribute in a useful way to the further clarification of the objective. Some of those amendments have also been accepted by the Commission in its modified proposal. Like in the "classical" directive, certain new features have been introduced, such as electronic auctions and dynamic purchasing systems. The Council has sought to further underline the relationship between the two directives by including the postal services sector in the "utilities" directive and by adapting the provisions accordingly. The amendments introduced by the common position concern the following in particular: - greater account to be taken of the use of new information technologies in awarding contracts, in line with the objective of modernisation set out in the Commission's proposals. In this respect, it is worth drawing attention, in particular, to the introduction, for commonly used purchases, of dynamic purchasing systems intended both to provide the contracting entities with fully electronic systems which make it possible to simplify and automate the purchasing procedures and to ensure that any interested economic operator can take part, where appropriate by using an electronic catalogue. With the same objective in mind, provisions concerning the possibility of using electronic auctions under conditions that ensure transparency and equality of treatment have been added. Moreover, as regards the general framework for purchases using electronic means, the common position strengthens the obligations with regard to confidentiality in the text by referring to Annex XXIII; - with regard to taking account of environmental and social aspects, the Council accepted the Commission's amended proposals subsequent to Parliament's amendments and, in addition, clarified how environmental and social concerns can be taken into consideration when assessing the tenders at the contract award stage; - while preserving the flexibility needed in a Directive whose scope covers not only contracting authorities, but also public and private undertakings operating on the basis of special or exclusive rights, some of the provisions have been brought into line with those of the classic Directive, which helps to achieve the objective of simplifying and clarifying the rules. Unjustified differences between the rules on the same matter may cause difficulties in application and interpretation - not only for contracting authorities such as local authorities, where this Directive may apply to certain contracts while the classic Directive applies to others, but also for economic operators, who may have different rights even with regard to contracts for the same type of supplies with the same contracting authority. As a result, a number of Parliament amendments proposed or adopted for the classic Directive have been taken over in the same way in both Directives; - the discussions which took place after the amended proposal was adopted showed that certain contracting entities acted as or used central purchasing bodies and that there was a need for specific rules on the subject. Provisions have therefore been added to enable the contracting entities to use central purchasing bodies whether these operate in compliance with the provisions laid down in this Directive or with those of the classic Directive; - an additional implementation period for the provisions concerning the postal sector was added, as the current Utilities Directive does not apply to operators in that sector; - whatever their legal status. As a result, the contracting entities in this sector will need more time to adapt their contract award procedures to the rules of the Directive than those in other sectors, which are already familiar with the procedures provided for under the current Directive. Within this extension, which runs until 1 January 2009, it is up to the Member States to determine the exact date on which the Directive will be implemented for that sector. Note that postal operators, who are contracting authorities, will continue to be covered by the classic Directive until the switchover to the Utilities Directive. On the other hand, the common position has introduced changes concerning financial services, the scope of the "intra-group" exception¹, and the weighting of the award criteria: - with regard to financial services, the common position specifies that in compliance with the Agreement on public procurement signed within the WTO, the financial services referred to in the

Directive do not include contracts on the issue, purchase, sale and transfer of securities or other financial instruments "in particular, transactions by the contracting entities to raise money or capital; - the Council was able to achieve the unanimity required to extend to works and supply contracts the exception provided for in Article 23 for contracts awarded without a call for competition to affiliated undertakings, joint ventures or contracting entities forming part of a joint venture; - the obligation to indicate the weighting of the award criteria is confirmed. However, the Commission has agreed on the need to take account of cases in which the contracting entity can justify its having been unable to specify the weighting and, in such cases, to allow it simply to indicate the descending order of importance of such criteria. Several declarations were included in the minutes. They came from the Commission, the Council as well as from the German and Austrian delegations.