

## SCOPE OF APPLICATION AND MAIN PRINCIPLES OF THE CLASSICAL SECTOR DIRECTIVE

*Note: this document does not provide a binding and exhaustive description. The text of Directive 2004/18/EC, as interpreted by the EC Court of Justice, prevails*

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts repeals, at latest by the end of the implementation period (31 January 2006) Directive 92/50/EEC, except for Article 41 thereof and Directives 93/36/EEC and 93/37/EEC.

### **I) SCOPE OF APPLICATION**

#### **1. Who is a contracting authority?**

The concept of contracting authority is a concept of European law and its scope does not depend on the definition of public/administrative law body in the relevant Member State. The definition covers the **traditional forms of governmental authority**, such as central government departments, regional and local authorities. In view of the diverse organisational forms employed in Europe, however, it has been necessary to go beyond this, and to formulate a more sophisticated definition of the public sector, which also includes other types of bodies **subject to governmental influence or pressure**.

The different **types of contracting authorities** provided in the Directive are:

- **Traditional state authorities:** State, regional or local authorities,
- **Bodies governed by public law:** a body with legal personality “established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character” and which either:
  - is financed for the most part by the state, a regional or local authority or some other body governed by public law,
  - is subject to management supervision by the State, regional or local authorities or bodies governed by public law, or
  - has an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local bodies or bodies governed by public law.

These three criteria of finance, managerial supervision and appointment have been described by the ECJ as embodying a relationship of “close dependency” of the contracting authority (Mannesmann, Case C-44/95, The Queen v HM Treasury Ex p. the University of Cambridge, Case C-380/98). As an aid for determining which specific entities are bodies governed by public law, Annex III of the Directive includes a non-exhaustive list of relevant bodies in each Member State. This is for guidance only: those bodies not in the list but within the general definition are still covered. As a general principle, the ECJ has stated that the concept of bodies governed by public law must be interpreted broadly (Adolf Trully v Bestattung Wien, Case C-373/000).

- **Associations formed by one or more of the above bodies.**

Moreover, the Directive refers specifically to contracting authorities acting as a **central purchasing body**, i.e. which:

- **acquire** supplies and/or services intended for contracting authorities, or

- **award** public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.

In this case, contracting authorities which purchase goods, works and/or services **from or through** a central purchasing body shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it.

## 2. Which contracts are covered?

**Definition of public contracts:** contracts for **pecuniary interest** concluded **in writing** between **one or more economic operators and one or more contracting authorities** and having as their **object** the execution of works, the supply of products or the provision of services within the meaning of this Directive.

Requirement to have a contract between two different persons: the so-called in-house contracts, i.e. contracts executed by the **same legal entity** as the contracting authority are not subject to the Directive.

The different **types of public contracts** covered by the Directive are:

- **public works contracts:** public contracts having as their object either the execution or both the design and the execution of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.
  - A **work** means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.
- **public supply contracts:** public contracts other than public works contracts having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products:
- **public service contracts:** public contracts other than public works or public supply contracts having as their object the provision of services referred to in Annex II.

**Different rules** apply service contracts listed in Annex II A and those listed in Annex II B:

- **Annex II A** service contracts need to respect all relevant provisions of the Directive,
- **Annex II B** service contracts are only subject to the rules on technical specifications and the obligation to publish a contract award notice.

Classification of **mixed public contracts**:

- A public contract having as its object the **supply** of products which also covers, as an incidental manner, **siting and installation operations** can be considered to be a **public supply contract**.
- The boundary between **supply and services** contracts: **“greater value test”**: a public contract having as its object both **products and services** within the meaning of Annex II shall be considered to be a public service contract if the **value of the services** in question exceeds that of the products covered by the contract.
- The same **“greater value test”** applies for service contracts involving both **Annex II A and Annex II B services** (Felix Svoboda, Case C-411-00).
- The boundary between **works and services** contracts: **“main object test”**: A public contract having as its object **services** within the meaning of Annex II and including

**activities within the meaning of Annex I** that are only **incidental** to the principal object of the contract shall be considered to be a **public service contract**.

Treatment of **concessions**:

- The Directive defines **two types** of concessions:
  - **Public works concession**: a contract of the same type as a **public works contract** except for the fact that the consideration for the works to be carried out consists either solely in **the right to exploit** the work or in this right together with **payment**
  - **Public service concession**: a contract of the same type as a **public service contract** except for the fact that the consideration for the works to be carried out consists either solely in the **right to exploit** the service or in this right together with **payment**.

Key indicator of a concession: the fact that the consideration consists of **exploitation** of the work/service. Exploitation entails that the provider assumes the **economic risk** arising from the execution of a work/the provision and management of the services.

**Subsidised contracts**: in some cases, the Directive also applies to contracts subsidised directly by contracting authorities by more than 50%:

- For those contracts involving **civil engineering activities** within the meaning of Annex I, as well as for those contracts involving **building works for hospitals**, facilities intended for **sports, recreation and leisure**, **university buildings** and buildings used for **administrative** purposes if their estimated value net of VAT is equal to or greater than EUR 5 923 000,
- For service contracts the estimated value net of VAT is equal to or greater than EUR 154 000.

Definition of **framework agreement** as a specific type of contract: an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

### 3. Which contracts are excluded?

As a general rule, exclusions from the scope of the Directive are to be interpreted strictly. The exceptions listed are exhaustive:

- Contracts covered by the **utilities rules** and contracts in the **telecommunications** sector,
- **Secrecy and security** exemptions:
  - Contracts **classified as secret**,
  - Contracts **requiring special security measures** in accordance with the laws, regulations and administrative provisions in force in the Member State concerned,
  - When the protection of **essential security interests** of that Member State si requires.
- Contracts relating to **hard defence equipment** covered by Article 296 of the Treaty,
- Contracts awarded **pursuant to international rules**:

- Contracts pursuant to **international agreements** between a Member State and one or more third countries in conformity with the Treaty regarding the **joint implementation of a work/project**. These agreements shall be communicated to the Commission.
- Contracts pursuant to **international agreements on the stationing of troops**,
- Contracts pursuant to the particular procedure of an **international organisation**.
- Specific exclusions:
  - Contracts for the **acquisition or rental of land** and immovable property,
  - **Broadcasting contracts**: acquisition, development, production or co-production of programme material, contracts for broadcasting time,
  - **Arbitration and conciliation** services,
  - **Certain financial services**: issue, sale, purchase or transfer of securities, transactions to raise money or capital, central bank services,
  - **Employment contracts**,
  - **Research and development services** other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is fully remunerated by the contracting authority.
- Exclusion of **service concessions**: without prejudice to the obligation to provide for the requirement of non-discrimination when granting special or exclusive rights to carry out a public service activity,
- **Service provision by another contracting authority pursuant to exclusive rights**: i.e. when:
  - A public service contract is awarded to **another contracting authority** or to an association of contracting authorities
  - Based on an **exclusive right** on their side
  - The exclusive right is based on a **published measure** (law, regulation or administrative provision)
  - The exclusive right is **compatible** with the Treaty.

#### 4. Financial thresholds

The EC Treaty applies to all procurements, however small. The directives on the other hand, apply only to contracts above a certain threshold value. Subsequently to the adoption of the directives, the thresholds were amended by **Regulation 1824/2004** and a new revision is envisaged in the course of the forthcoming months (revisions are made every two years).

The **current thresholds** are, based on an estimated value of the contracts net of VAT, equal to or greater than:

- Thresholds for **works contracts**: EUR 5 923 000,
- Thresholds for **supply contracts**:
  - For **central government authorities** listed in Annex IV: EUR 154 000, except for certain contracts awarded in the field of defence (those involving products of Annex V),
  - For contracting authorities not listed in Annex IV: EUR 236 000.
- Thresholds for **service contracts**:

- The majority of **Annex II A** service contracts awarded by **central government authorities** listed in Annex IV: EUR 154 000 (except certain contracts for research and development, telecommunications services),
- **Annex II A** service contracts awarded by contracting authorities not listed in Annex IV and **Annex II B** services: EUR 236 000

The value of the contract for the purpose of the threshold rules is its **estimated value net of value added tax**. The main principles applicable to the **valuation of contracts** are:

- The calculation shall be based on the **total amount payable**, including any form of option and any renewals of the contract. Prizes and payments to candidates or tenderers shall also be taken into account.
- The estimate must be valid at the time of **sending the contract notice** or where such notice is not required, at the time the contract award procedure is started.
- **public works** contracts: take into account the amount payable for the works and the total estimated value of **supplies** necessary for executing the work and placed at the contractor's disposal by the contracting authorities.
- It is prohibited to **subdivide** a contract to prevent its coming within the scope of the Directive.
- **Aggregation rules** (when the value is not based on each individual contract but the contracting authority must add the value of a number of similar contracts and the Directive will apply if these together exceed the threshold.):
  - In case of contracts awarded at the same time in the form of **separate lots**, the main principle is that account shall be taken of the total estimated value of all such lots. **Exception:** there is possibility to waive the application in respect of lots less than EUR 80 000 for services and supplies and EUR 1 million for works, provided that the aggregate value of those lots does not exceed 20% of the aggregate value of the lots as a whole.
  - Public supply or service contracts which are **regular** in nature or which are intended to be **renewed** within a given period. In this case, the calculation shall be based either on the total value of contracts of the same type in the preceding 12 months or by estimating the value in the next twelve months.
  - For **framework agreements** and **dynamic purchasing systems:** all the contracts envisaged during their total term shall be aggregated.
- Special rules:
  - Public **supply contracts** relating to the leasing, hire, rental or hire purchase: total estimated value of the term of the contract, if no fixed term: monthly value multiplied by 48
  - Public **service contracts:** insurance, banking, design contracts: different forms of remuneration explicitly mentioned, if no indication of time: monthly value multiplied by 48

## **II. Main guiding principles of the Directive and the detailed provisions for their concrete implementation**

**Principles** of awarding contracts: contracting authorities shall treat economic operators equally and non-discriminatory and shall act in a transparent way (Article 2).

## 1. Equal treatment, non-discrimination, competition

- Provisions requiring **recognition** of rules applicable in other Member States, for ex:
  - Recognition of **legal status**: prohibition to reject candidates or tenderers entitled to provide the relevant service under their domestic rules solely on the ground that under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons,
  - **Recognition of documents and certificates** delivered by the competent authorities of the country of origin: for example in the context of the compliance with the qualification requirements,
  - In the context of compliance with the **terms of reference**: recognition of certificates from bodies which comply with applicable European standards
- Provisions ensuring equal access when drawing up the **technical specifications**:
  - General requirement of affording **equal access**,
  - Obligation to accept **equivalent means of proof/solutions**:
  - Priority to refer to national standards transposing **European standards**, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies, to national standards only when these do not exist. Each reference shall be accompanied by the words “**or equivalent**”,
  - **Environmental requirements**: obligation to accept any appropriate means of proof to eco-labels such as a technical dossier or a test report,
  - General prohibition to refer to a **specific make or source**, or a particular **process**, or to **trade marks, patents, types** or a **specific origin** or **production** with the **effect of favouring or eliminating** certain undertakings or certain products. Such reference is only permitted on an exceptional basis, where a sufficiently precise and intelligible description of the contract is not possible, in this case, the reference shall be accompanied by “**or equivalent**”.
- Specific **obligation of non-discrimination** in case of granting special or exclusive rights: when a contracting authority grants special or exclusive rights to carry out a public service activity, the act by which this right is granted shall provide that in respect of the supply contracts awarded to third parties, the entity must comply with the principle of non-discrimination on the basis of nationality.
- **Choice of procedure**: obligation to the use of **open and competitive procurement procedures** except in duly specified circumstances: contracting authorities shall award public contracts by using the open or restricted procedure. Competitive dialogue, negotiated procedure only in specific circumstances explicitly provided for in the Directive.
- **Minimum number of participants** in restricted and negotiated procedures: restricted 5 negotiated with prior publication 3. In any event, the number of participants invited shall be sufficient to ensure genuine competition. If candidates meeting the selection criteria and minimum capacity levels are below the minimum number, still possible to continue but no possibility to include candidates who did not request to participate.
- **Objective selection and award criteria** (important to distinguish between the two):
  - Criteria for qualitative selection/

- **Personal situation of the candidate and tenderer:** candidates who must be excluded (if conviction by final judgement for participation in a criminal organisation, corruption, fraud, money laundering) and candidates who may be excluded (implementing provisions to be provided by Member States (ex. bankrupt or being wound up, subject to proceedings on the declaration of bankruptcy, convicted by final judgement for professional offence, guilty of grave professional misconduct, not fulfilled payment of social security contributions, payment of taxes, guilty of serious misrepresentation in supplying the information required under this section).
- **Suitability to pursue the professional activity:** may be requested to prove its enrolment as prescribed in its Member State of establishment, on one of the professional or trade registers, authorisation or membership if required in the member state of origin.
- **Economic and financial standing:** means of proof (bank statements, balance-sheets or extracts, statement of overall turnover). Possibility to rely on the capacities of other entities (prove that it will have at its disposal).
- **Technical and/or professional ability:** means of proof (works carried out over the past five years, list of principal deliveries/services provided in the past three years, technicians or technical bodies involved, technical facilities, check by the contracting authorities in case of complex products, educational and professional qualifications of the provider, environmental management measures, average manpower, tolls, samples, subcontracting proportion)
- **Quality assurance standards:** systems based on European standards.
- **Environmental management standards:** Community Eco-Management Audit Scheme or European environmental management standards.
- **Official lists of approved economic operators/certification by certification bodies:** economic operators from other Member States may not be obliged to undergo such a registration or certification process – obligation to accept equivalent certificates
- **Contract award criteria:**
  - **Most economically advantageous tender:** various criteria linked to the subject-matter (quality, price, technical merit, aesthetic and functional characteristics). In this case, the contract notice (or documentation) shall indicate the relative weighting, or if not possible for demonstrable reasons, the descending order of importance.
  - **Lowest price.**
- **Abnormally low tenders:** no automatic exclusion - request details in writing.

## 2. Transparency

Ensured by various information and communication rules, such as/

- **Publication of notices** (form of publication: standard forms, not yet obligatory, at the same time as at national level)):
  - **Prior information notice:** services Annex II A, supplies: estimated total value of contracts/framework agreements for the next 12 months, works: essential characteristics and estimated total value for the next 12 months. To be published on the buyer profile or by the Commission as soon as possible after the beginning of the budgetary year

- **Contract notice:** open, restricted, negotiated with publication, set up a dynamic purchasing system
- **Simplified contract notice:** contracts awarded based on a dynamic purchasing system
- **Contract award notice:** public contracts/framework agreements
- **Content of the contract notice (standard forms), content of the invitation to submit a tender, participate in the dialogue or negotiate:** specifications, descriptive document/reference to access them, deadline for receipt, etc.
- **Informing candidates or tenderers:** of any decisions reached regarding the procedure, if requested: reasons for rejection
- **Reports:** for each contract, framework agreement, a written report has to be made,
- **Statistics:** statistical reports to be provided for each central contracting authority