Opinion of the Economic and Social Committee on 'Public contracts'

(96/C 212/03)

On 4 July 1995, the Economic and Social Committee, acting under the second paragraph of Rule 23 of its Rules of Procedure, decided to draw up an Opinion on 'Public contracts'.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 8 May 1996. The Rapporteur was Mr Gafo-Fernandez.

At its 336th Plenary Session (meeting of 29 May 1996), the Economic and Social Committee adopted the following Opinion by 108 votes to one, with three abstentions.

1. Introduction

1.1. The best guide to the importance of public contracts is the Cecchini report on the cost of failure to complete the internal market. The report, drawn up in 1985, estimated public contracts to be worth MECU 530 000 annually, equivalent to 15 % of the EU's GDP. A mere 2 % of the contract total went to firms from other Member States, which could indicate a lack of 'communitarization' and suggests that much remains to be done. The subsequent studies being drawn up by the Commission provisionally indicate that 30 % of the total represents national government, 25 % local authorities and the remaining 45 % public and private-sector enterprises.

1.2. To rectify this situation, since the 1970s the European Union has been building up a large body of legislation aimed at making public contracts transparent and non-discriminatory. Legislation has always taken the form of Directives, which, since 1986, have been based on Article 100a.

1.3. It is important to define the public contracts which are subject to these rules. A public contract can be defined as the putting-out to tender of a supply, works or service contract by a public-sector entity or equivalent organization. Public-sector entities include central government, regional and local authorities, and even private companies, where these are entrusted with the operation of services of general economic interest within the meaning of Article 90 of the Treaty and are thus equivalent to public undertakings.

1.4. It was inevitable that the Directive should be the vehicle chosen, as the Community legislation had to be integrated into an area of particular sensitivity for the public authorities, i.e. government and public-sector contracts, making it necessary to adapt Community rules to the usages of each Member State. However, this approach has given rise to a number of problems, such as:

— Delays in implementing the Directives in national law, with particular problems at regional and local level.

— Different interpretations in the various Member States of the obligations contained in the Community Directives.

1.5. On 15 April 1994 the European Union signed the new Agreement on Government Procurement (GPA) in parallel with the conclusion of the Uruguay GATT Round. Amongst other changes, the GPA amended the thresholds and the European Union has to comply. The Commission proposal for a directive (COM(95) 107) was the means by which this was to be achieved. The Committee gave its Opinion on 5 July 1995 [1].

1.6. Community legislation breaks down into two main groups of Directives:

— public works and supply and services establishing minimum conditions for harmonization;

— remedies (permitting three kinds of action: the adoption of provisional measures (e.g. the suspension of illegal public contract decisions), the cancellation of the contract and the payment of compensation in the form of damages to affected enterprises.

A distinction has to be made between generally applicable Directives and Directives covering the 'excluded sectors' (supply of water, energy, transport and telecommunications) which were adopted during a second phase. The latter Directives are different in certain

[1] OJ No C 256, 2. 10. 1995.

respects, such as the definition of contracting entity, minimum thresholds, technical specifications, and publication, competition and award conditions.

1.7. Naturally not all public contracts are large enough to warrant application of these rules. To this effect a series of thresholds have been established which, as amended to reflect the GATT agreement, are as follows:

— Works contracts: ECU 5 000 000.

— Supply and service contracts: ECU 130 000 for central government, ECU 200 000 for other public-sector entities covered by the general Directives, and between ECU 400 000 and 600 000 for the excluded sectors.

All thresholds are exclusive of VAT and are adjusted in ecu terms every two years.

1.8. Action is being taken on four fronts in an attempt to achieve transparency and eliminate discrimination between firms from different Member States:

— Publication of contracts: Requirement for publication in the Official Journal, with minimum deadlines and on-line access system, e.g. TED (Tender Electronic Data).

— Clear terms and conditions: Mandatory technical requirements and Community standards or, in the absence of these, national standards clearly accessible to firms from different Member States based on a hierarchy defined in the Directives (attempt to prohibit the use of technical standards intended to restrict or distort competition). Transparency is also needed with regard to the type of tender (open, restricted or negotiated) and to the selection criteria.

— Transparent selection process: Based on application of the above criteria, publication and, where appropriate, reasoned justification of the rejection of unsuccessful bids. Certification of the transparency of the contract procedure would also fall under this heading.

— Ex post supervision: based on the European Commission's own 'Surveillance' system or possibly complaints by companies who feel they have been discriminated against, with possibility of recourse to national courts or the European Court of Justice in Luxembourg.

1.9. Over recent years the Committee has had the opportunity to give its views on these proposed Directives [1]. These Opinions may be summarized as follows:

1.9.1. The Committee pointed out that the practical difficulties entailed in establishing the legal framework for opening up public contracts and proposed monitoring the situation and adjusting the Directives in the light of experience.

1.9.2. It insisted on the need to improve transparency in the drawing-up of contracts and selection of bids, stressing the overriding importance of the remedies Directives. However, it expressed its doubts as to whether lower minimum thresholds or the extension of the statistical information obligation would offset the additional administrative cost involved. It also highlighted the need to improve SME access to these contracts.

1.9.3. The Committee also called for the adoption of a flexible approach with regard to the use of suppliers for formulating the technical specifications of a contract, so as to find a balance between the possible distortion of competition and the need to establish precise specifications.

2. Current situation

2.1. There are no exact figures on the number of public contracts open to full Community competition and their economic significance. EUROSTAT has begun work on this but is apparently behind schedule. The European Commission has some figures, which show the huge number of contracts of this type (with the attendant administrative problems) and their macroeconomic importance.

2.2. The Committee would like to place on record that this lack of statistical transparency, attributable to the Member States' unwillingness to facilitate compi-

[1] — Committee Opinion on procurement procedures of entities operating in the water, energy, transport and telecommunication sector of 25 March 1992, OJ No C 106, 27. 4. 1992.
— Committee Opinion on public works contracts of 25 March 1992, OJ No C 106, 27. 4. 1992.
— Committee Opinion on public works contracts of 22 October 1992, OJ No C 332, 16. 12. 1992.
— Committee Opinion on public supply contracts of 22 October 1992, OJ No C 332, 16. 12. 1992.

lation of the data, is one of the obstacles to increased awareness of the magnitude of the problem, this being essential for the completion of the internal market.

2.3. The effective opening up of public contracts will require the completion of internal market proposals, but could entail a tangible, and in some cases very large, reduction in spending by the public bodies subject to the Directives on public works, supply or services. It is worth highlighting the important contribution which this more efficient use of public funds could make to the reduction of public-sector deficits required with a view to economic and monetary union.

2.4. Nor is it possible to ignore the social dimension of this opening up of public contracts. This must on no account entail a reduction of the level of social protection in each Member State. This will require close attention to these aspects in the conditions of sub-contracting and provision of services by firms from non-Community countries. An initial, positive but inadequate, step in this direction has been taken by the Council of Ministers, which, after several years of debate, approved a common position on the draft Directive on transfrontier subcontracting (grouping of workers).

2.5. An important precondition for the effective opening up of public contracts will be a change of mentality on the part of the bodies putting contracts out to tender, in the sense of recognition of the undoubted advantages for the public of application of these principles, based on greater competition, efficiency and cost-effectiveness in the execution of works, supply or service contracts, with the same guarantees of quality and reliability.

2.6. The European Commission has instituted numerous proceedings for delays in implementing Community legislation and for inadequate or faulty application of the law by the public authorities of Member States.

2.7. The Court of Justice has delivered various judgments and instituted a large number of proceedings in connection with the above. The case law in this area is beginning to form a coherent body of law which could be used to accelerate ex post proceedings — especially in the national courts. The principal conclusions of the rulings are, in summary:

— Direct applicability of these Directives, even if the Directive has not been transposed into national law or the national legislation has not been adapted precisely to the general principles established in these Directives (case 10/76).

— The principle of equal treatment for all bidders (case 243/89).

— Delimitation of the exceptions and derogations to the Directives, with special reference to negotiated procedures for works and supply contracts (case 194/88).

— Prohibition of unfair or unjustified preference given to regional or local firms (case 21/88).

— Prohibition of reserved access to a contract for a group of firms on non-objective grounds (case 272/91).

— Prohibition on using certain unjustified or disproportionate social criteria in the award of a contract, such as providing work for the long-term unemployed (case 10/76) or the use of immigrant workers of a specific nationality (case 113/89).

— Obligation to advertise a contract beforehand, except for unforeseeable and duly justified reasons of 'absolute urgency' (case 24/91).

— Admission to the contract of a firm linked to a group of firms, although the former lacks the equipment or resources to carry out the work (case 389/92).

2.8. The European Commission has set up two Advisory Committee for Public Contracts, one consisting of national officials, and the other of representatives of the Member States' economic and social bodies. The Committees' task is to advise the Commission on the application of the Directives, as well as to serve as a channel of communication and point of reference at national level.

2.9. In its June 1995 report on legislative and administrative simplification in the European Union, the Molitor Group made five specific recommendations on public contracts:

— Implementation of Directives within the deadlines.

— The Directive's objective of facilitating access to public contracts not to be changed or restricted, either directly or indirectly, by national measures.

— Possibility of replacing Directives with a set of clearly defined principles, backed up where necessary by a Regulation, in order to prevent disparities between Member States and to promote transparency. (This proposal has been expressly rejected by the European

Commission on the basis of legal considerations and the political inadvisability of restricting, via a Regulation, the Member States' flexibility to adapt Community standards to national conditions.)

— The Member States to guarantee that the sanctions applicable in the event of infringement of Community rules on public contracts will be applied with equal rigour throughout the Community.

— Whilst maintaining the principle of putting whole contracts out to tender, greater use should be made of national or international sub-contracting to facilitate the participation of SMEs.

2.10. The Committee is preparing an Opinion on procedures for certification and mutual recognition of national specifications and standards. The Committee feels that, as far as possible, the adoption of Community standards should be accelerated as a key element in limiting possible distortions of the opening up of public purchasing, deriving from the application of national standards or specific sectoral standards by any particular country.

2.11. In connection with public contracts, the Committee considers that sub-contracting is a form of organization of labour suited to the specialized aspects of the execution of works. Here there is a specific role for small and medium-sized enterprises.

It should be borne in mind that within the sub-contracting sector infringements of contractual conditions and safety standards do occur. The Committee would take this opportunity to recommend a Council initiative to draw the Member States' attention to the need for supervision and compliance with the law and contractual conditions in this important sector of economic activity.

2.12. The ESC has noted that in a number of Member States national associations are being set up to facilitate the application of these principles to public purchasing [1]. The ESC wholeheartedly supports these initiatives, as they can contribute both to the dissemination of information and to improved transparency, and to the training of those persons responsible for application of the principles in practice.

3. Main obstacles to effective opening-up of public contracts

3.1. In December 1995 the Committee held a series of hearings in Düsseldorf and Bonn with representatives of the German Federal and Land civil services and the various economic and social organizations applying the Community standards in order to pinpoint the problems over application of the Directives encountered by both bodies issuing calls for tender and tendering bodies, and in order to assess the Directives' cost-efficiency. These hearings were an extremely useful way of finding out directly about the legal and practical problems raised by application of the legislation, both from the point of view of bodies issuing calls for tender and tendering enterprises.

3.2. As a follow-up to these hearings, and in order to confirm the opinions canvassed, the Committee drew up a questionnaire. The questionnaire was sent to a large number of bodies involved in public contracts. Although the total number of replies (about 80) can be considered as only partially representative, comparing the replies with the general impression thus gained makes it possible to pinpoint a number of obstacles. The Committee is aware that the European Commission is in the process of drawing up a study based on a large number of questionnaires and watertight scientific methods, and would like to congratulate it on this initiative. It hopes to be informed of the conclusions in connection with the work of the Single Market Observatory.

3.3. The replies to the questionnaire reveal that whilst all bodies issuing calls for tender and tendering enterprises were aware of the existence of relevant national legislation, there were widespread reasonable doubts as to the cost-efficiency of the system, especially in relation to the delays involved and the costs associated with linguistic barriers and the administrative costs of the system.

3.4. The main obstacles, grouped in accordance with objective criteria, are summarized below. The list is not exhaustive.

3.5. *Problems connected with the legislation and its application*

— The transitional periods which the Directives allow for certain Member States.

[1] Forum Öffentliches Auftragswesen (Forum ÖA) e.V.
Gustav-Heinemann-Ufer 84-88,
D-50968 Köln
Associazione 'Verso l'Europa'
Via S. Bartolomeo — Pal Vitelli
I-06012 CittC Di Castello (PG)
The Association for Regulated Procurement (ARP)
Windsor House
Temple Row
Birmingham B2 5LF
United Kingdom
Nederlandse Vereniging voor Aanbestedingsrecht
Postbus 75505
NL-1070 AM Amsterdam
Asociación Espanola de Contratación Pública y Regulada
Maria De Molina, 44
ESP-28006 Madrid
ESB (Forum on Public Procurement in Ireland (FPP)
27 Lower Fitzwilliam Street
Dublin 2, Ireland.

— Delays in implementing the Directives in national law. Particular problems at regional and local-authority level. Direct applicability to public-sector undertakings and similar organizations.

— In some cases inadequate implementation of Community legislation in national law.

— Resistance of national, and particularly local, authorities to applying the public purchasing standards in their jurisdiction.

— Specific problems in relation to activities considered vital to the national security of a Member State or analogous activities.

— Revision of thresholds. Problems arising from exchange rate fluctuations.

3.6. *Drawing-up of contracts*

— Lack of uniformity of technical standards (Community, national or sectoral) to be applied in assessing bids and ethical standards for tendering enterprises.

— Approval of firms and certification of the quality of tenders.

— Transparency of the selection criteria applied.

— Transparency and non-discrimination in determining type of contract (open, restricted by invitation or negotiated).

— Breaking-up of contracts into smaller projects in order to circumvent the thresholds for opening-up to Community bids.

— Application of social conditions of country in which contract is to be awarded and of that in which the issuing entity is based.

3.7. *Publication of contracts*

— Standardization of notices.

— Insufficient time for publication in OJ.

— Access for interested firms, especially SMEs, to relevant data and especially data bases.

— General problems connected with sub-contracting, which is a form of organization of labour suited to the specialized aspects of the execution of works.

— Drawing-up of restricted lists in the event of contracts by invitation or on a negotiated basis.

— In general, SMEs' difficulties in participating in calls for tender under satisfactory conditions.

— General problem of confidentiality for firms.

3.8. *Selection*

— Transparency and proper application of selection criteria.

— Explanation (problem of commercial confidentiality) to firms requesting it of reasons for rejection of bid.

3.9. *Remedies*

— Intensification and reinforcement of supervisory and information powers of European Commission.

— Role of the national courts and European Court of Justice. Access for affected firms and establishment of body of laws.

— Applicability of decisions: preventive action, damages and sanctions.

— Lack of a harmonized framework for sanctions and different attitudes of national authorities towards failure to comply with public contract obligations.

4. Specific ideas for improving the application of the public contracts system in the European Union

4.1. Some initial ideas on the specific measures to be taken — emerging from the replies to the questionnaires are as follows:

4.2. Stress that the most urgent, priority task is for all Member States to complete the drafting of national laws on the application of the Directives on public contracts and, further, to adjust their laws to the general spirit of the Community legislation where implementation has proved insufficiently compatible.

4.3. The codification of the law and its implementation must precede any change in existing Community law, which should possibly be based on the accumulated experience of several years of full operation of the present system.

4.4. Assess the appropriateness of stepping up training programmes, financed by the European Commission and possibly organized through the socio-occupational groups in each country, so as to raise the awareness of and prepare staff in both the contracting entities and

firms, with special attention to SMEs interested in participating in these public contracts.

4.5. Using the structures already in existence in some Member States set up associations or forums for the promotion of public contracts. Their job would be, inter alia, to develop relevant training programmes and to serve as a point of reference at national level for resolving problems of interpretation of Community and national legislation.

4.6. Develop new alternatives and procedures for improving the advertising of contracts, e.g. via improved access and electronic dissemination, and promote the participation of SMEs via the formation of European Economic Interest Groupings (EEIGs), which are already subject in this respect to national or Community rules.

4.7. Lay down via a Commission communication the criteria for the application of technical standards geared to the priority criteria listed in the Directives.

4.8. Step up coordination between the European Commission and the national authorities in this area and with the public contract forums in order to accelerate the change in mentality with regard to the management of public contracts, to make it easier to pinpoint and overcome obstacles and to provide technical support to public bodies at local or regional level putting out to tender contracts covered by the Directives.

4.8.1. The Committee considers that the Commission should, as a matter of urgency, relaunch the Advisory Committee set up with the European economic and social interest groups. This could serve as an essential complement to the national associations, enabling the Commission to receive suggestions from tendering enterprises and at the same time to communicate to these its concerns and priorities.

4.9. Ask the Member States to set up national bodies to collect and forward to the European Commission, within a reasonable time, aggregate national-level data based on standardized criteria on the size and openness of public contracts.

Done at Brussels, 29 May 1996.

The President

of the Economic and Social Committee

Carlos FERRER