

POSITION OF EUROGAS ON POSSIBLE DEVELOPMENTS IN THE LEGISLATIVE REGIME GOVERNING PROCUREMENT BY THE UTILITIES

1. Eurogas is aware of the ongoing debate in the Commission services to amend the legislative regime governing procurement by the utilities. Although there are as yet no definite proposals, Eurogas considers it opportune to recall the main elements of its position on procurement policy, and in that context already indicate its views on the points understood to be in discussion. Eurogas emphasises its readiness to participate in the dialogue with Commission services.
2. The views of Eurogas set out in its position paper on the Commission's Communication "Public Procurement in the European Union" are the starting point for input to the ongoing discussions. Eurogas welcomes the indications that the Commission is taking a fresh look at the approach to procurement policy and seeking to develop a more flexible and simpler approach, called for by Eurogas and other industry associations.
3. Eurogas recalls its main views from the position paper in this respect :
 - a mechanism should be introduced to permit the exemption of contracting entities other than the telecommunications sector operating in a liberalised market;
 - a changed approach is needed with regard to the artificial requirements posed by Article 13 of Directive 93/38 (80 percent rule);
 - there should be no weakening of the fundamental distinction between utilities and the public sector proper;
 - market means should be promoted to facilitate qualification of suppliers possibly by way of a shared approach on pre-qualification, eg a vendors' register, and involving mutual recognition of standards;
 - electronic procurement should be promoted, but a distinction needs to be made between high-value, specialist purchasing (the bulk of gas sector procurement) for which e-commerce is not practicable and off-the shelf items, for which SIMAP or some such scheme may be applicable over time;
 - as long as the Directive still applies, the systems of negotiated procedures and framework contracts with regard to utilities should be maintained;
 - the system of award criteria, especially with regard to high-value complex procurement should not be reduced to mathematical formulae;
 - in the absence of appropriate European standards, utilities should not be required to prejudice the safety of equipment or operations by any amendments to the provision on purchase specifications;
 - procurement legislation is not an appropriate vehicle for enforcing consideration of environmental aspects in purchasing of works, suppliers and services, but EU policy in this area should promote complementary approaches.

REPORTED DISCUSSIONS ON AMENDMENTS TO DIRECTIVE 93/38
CONCERNING SECTORS OTHER THAN THE TELECOMMUNICATIONS SECTOR*

4. Eurogas fully supports the development of an approach which will permit the exemption of liberalised entities from the Directive. Eurogas could endorse a redefinition of the concept of "special or exclusive rights" derived from EU case law, to determine the scope of the sectors covered by the Directive. Any mechanism to be applied in addition to allow activities exemption if they operate in a competitive market should be transparent and efficient. Eurogas would favour a system under which a Member State seeks exemption on behalf of national entities in accordance with a list of pre-determined criteria. It is important that a transparent system involving a minimum administrative burden delivers a quick decision in the interests of companies' business plans. If no decision is given in, eg six months from the application date, then there should be a positive presumption.
5. Furthermore, there should be a clear understanding that the Remedies Directives should not apply to exempted entities.
6. Eurogas would prefer that the same legal framework, including the possibilities of exemption can apply to all players in a national gas sector, and indeed operate on an EU basis. However, it is accepted that any system would have to take into account the different speeds of progress in the different Member States. The approach, therefore should be flexible enough to allow for evolution, be in step with the liberalising legislation; and although it should respect the principles of subsidiarity, be as harmonised as possible.

ARTICLE 13

7. If utilities are to remain covered by the Directive, it is important to rethink the approach of Article 13. The requirements of Article 13 stem from assumption on simple structures which are not realistic. When Article 13 was first devised, it already represented a blunt approach to a complex situation. In view of the evolving regulatory regimes and the consequences they will have on the company activities, Article 13 is even less appropriate now, as it has implications for corporate governance and company structures, which are not intended to be in the province of procurement legislation.
8. Eurogas will elaborate on the problems caused by this Article, if possible in co-operation with other utilities.

QUALIFICATION SYSTEMS

9. Eurogas welcomes the report that the Commission is not planning to develop a qualification standards for use by utilities. This would have been an impracticable approach.
10. Nonetheless Eurogas considers that there would be benefits for contracting entities, for large contractors, and also for SMEs if cost effective market based systems for facilitating qualification systems could be promoted, which avoid any discriminatory practices. Eurogas favours recognition of the value of sectorial initiatives (eg Achilles, First Point) which meet these criteria, benefit all parts of the supply chain, are not bureaucratic and do not impair the discretionary role of management in deciding on complex, specialist, procurement.

* The comments show awareness of working document CC 99/89 - EU.

ELECTRONIC PROCUREMENT

11. Eurogas is concerned that the policy on promoting electronic procurement fails to distinguish between the needs of complex, high-value-specialist procurement, and lower-value, off-the shelf type items. Eurogas agrees that over-time e-commerce holds potential cost benefits, but its use is more evident with regard to simpler purchases. For the complex, high-cost purchasing, e-commerce will evolve more slowly. Eurogas is ready to inform officials of its ideas on gas industry co-operation in this area including on the outcome of any pilot schemes to facilitate evaluation of future e-commerce activities.
12. Eurogas also notes that it will probably be some time before technical solutions to verify electronic signatures and meet other security requirements will be available.

AWARD CRITERIA

13. Eurogas considers that the current version of Article 34 is appropriate. It is sufficient to require the contracting entities to state all the criteria which they intend to apply to the award, where possible in descending order of importance.
14. A reported idea of assigning a co-efficient to each criterion and to sub-criteria would be too formulistic and calculating. In complex procurement, such an analysis is impracticable, time consuming and would not lead to the most efficient outcome. Management discretion in awarding contracts remains indispensable for the contracting entities.

TECHNICAL SPECIFICATIONS

15. Eurogas supports the existing approach and wording in the Directive and would oppose an amendment which could lead to companies being obliged to recognise standards which would not meet the technical requirements of the purchase.
16. Eurogas wholly supports the use of EU standards when available. In, however, the absence of such standards, Eurogas would be concerned about the safety and liability implications, if a company had to recognise national standards of European countries and international standards without being confident of their suitability, compatibility and performance. This is especially important in cases of modifications or maintenance of existing infrastructure, which requires materials or components equal to or comparable with the existing ones.

ENVIRONMENTAL ASPECTS

17. Eurogas considers that the market and general Health and Safety considerations will promote improved environmental standards on the part of contractors. The gas industry encourages this development, but it would be inappropriate for procurement legislation to seek to impose environmental specifications in purchasing.