

EUROGAS VIEWS ON PROPOSED DIRECTIVE CO-ORDINATING THE PROCUREMENT PROCEDURES OF ENTITIES OPERATING IN THE WATER, ENERGY AND TRANSPORT SECTORS (COM(2000)276)

1. Eurogas has studied the proposed new Directive co-ordinating procurement procedures by the Utilities (COM(2000)276). By and large, Eurogas considers that aspects of the proposal offer potentially an improved approach for the utilities and 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. Nonetheless Eurogas considers that there is scope for improvement; certain Articles require modification.
2. The views of Eurogas set out in its position paper on the Commission's Communication "Public Procurement in the European Union" (S/EUR/00/1210 sent to the Commission 17.04.00) are the starting point for the assessment by Eurogas of this new proposal. In summary :
 - 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 clear distinction needs to be made between off the shelf items and high-value, specialist purchasing (the bulk of gas sector procurement) for which solutions are now emerging;
 - 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, requiring the publication of relative weighting, is not applicable for high-value complex procurement;
 - 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.

ARTICLE 2 : CONTRACTING ENTITIES

3. Eurogas can endorse a redefinition of the concept of "special or exclusive rights" which is understood to be derived from EU case law. Eurogas long argued that the network-based concept of special or exclusive rights was inappropriate and the modification proposed represents an improvement.

ARTICLE 26 : SERVICE CONTRACTS AWARDED TO AN AFFILIATED UNDERTAKING OR TO A CONTRACTING ENTITY FORMING PART OF A JOINT VENTURE

4. If any utilities are to remain covered by the Directive, it is important to rethink the approach of Article 13. The requirements of Article 26 stem from assumptions on simple structures which are not realistic. When Article 13 of 93/38 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 26 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.
5. Eurogas has elaborated on the problems caused by this Article (see attached), which is a problem common to other utilities.

ARTICLE 27 : DELETION OF ARTICLE 9.1B

6. Following the proposed deletion of Article 9/1b of 93/38/EEC, the Directive no longer contains an exemption for energy purchases. The Advisory Committee on Public Procurement studied the issue of whether or not this exemption should be deleted, but recommended it should stay in a revised text. Despite this, the Commission proposes its deletion, on the argument of the ongoing energy market liberalisation.
7. In the view of Eurogas this is an inappropriate change in the provisions, which introduces an unacceptable and legal uncertainty into the operation of the liberalised internal market, and is not coherent with the principles of the Gas Directive.

Previously it was never considered appropriate for the Procurement Directives to regulate in the field of energy policy. It is arguably even less appropriate now, when the market is undergoing significant changes, following the liberalisation measures.

8. Eurogas is concerned that the approach in the proposed Article 27 has not been adequately analysed in relation to the different approaches to liberalisation allowed for in the Gas Directive, and the developments in the different parts of the gas supply chain. As a result, far from complementing the Gas Directive, either the provision seeks to go further than it or, in different circumstances, the provision is incompatible with the Gas Directive.

ARTICLE 29 : GENERAL MECHANISM FOR THE EXEMPTION OF
ACTIVITIES DIRECTLY EXPOSED TO COMPETITION

9. Eurogas fully supports the development of an approach which will permit the exemption of liberalised entities from the Directive. Any mechanism to be applied to allow activities exemption if they operate in a competitive market should be transparent and efficient and speedy to avoid that there is a long period between the opening-up of the sector and the granted exemption. A transparent system involving a minimum administrative burden within a well defined time frame should deliver a quick decision in the interests of companies' business plans.
10. Furthermore, there should be a clear understanding that the Remedies Directives should not apply to exempted entities.
11. 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.

ARTICLE 34 : TECHNICAL SPECIFICATIONS

12. Eurogas opposes the proposed amendment to the technical specifications provision because the wording could lead to companies being obliged to recognise standards which would not meet the technical requirements of the purchase.
13. 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.

Eurogas suggests the wording of 93/38 Article 18 be retained.

ARTICLE 54 : AWARD CRITERIA

14. Eurogas considers that the current version of Article 34 in EC/93/38 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.
15. The proposal to specify relative weighting to each criterion 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.

