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I. INTRODUCTION

A. Forward

An estimated 9 percent of the European Economic Community’s (EEC) gross domestic product (GDP) is attributable to public supply and works contracts. Because of the economic significance of these contracts, the Council of the European Communities (Council) has directed that public supply and works contract offers be advertised throughout the Community and awarded without regard to the nationality of the contractor or supplier submitting a bid. The nondiscriminatory award of public contracts is consistent with the objectives of the Treaty of Rome (EEC Treaty), ensuring the right of establishment, free movement of goods, and the freedom to provide services.

Despite several revisions of the Council’s original directives, discriminatory awards of public contracts are a common practice among member states. Indeed, many states ignore the most fundamental provisions of these directives. In an attempt to heighten the member states’ compliance with public contract law and to close existing loopholes in the legal structure, the Commission of the European Communities (Commission) has drafted several proposals. These proposals, if adopted, would amend existing law in the area of public procurement, bringing the law closer to the original intent of the Council and the


2 See infra notes 20–83 and accompanying text. See also Public Supply Contracts, supra note 1 (“The principle of non-discrimination inherent in the provision for abolition of quantitative restrictions and measures having an equivalent effect ... must be applied scrupulously in the award of procurement ... contracts.”).


4 See infra notes 84–104 and accompanying text.

5 Id.
Commission. Quite recently, the Council has implemented a new directive based on one of these proposals which amends Community law governing public supply contracts. Other Council directives are anticipated.

Section I(B) of this Comment reviews treaty authority for EEC law in the area of public procurement. Sections II and III outline current EEC public procurement law and discuss compliance with and the effects of this law. Section IV reviews a recent Council directive and several recent Commission proposals, and section V analyzes the potential improvements and shortcomings of this legislation. In conclusion, this Comment questions whether recent Community attempts to open up public procurement are sufficient to liberalize this area by 1992.

B. Treaty Authority

Part two, title I of the EEC Treaty provides for the free movement of goods within the Community. Article 30 requires that "[q]uantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States." Title III, chapter 3 of the same part requires the free movement of services. Article 59 states "restrictions on freedom to provide services within the Community shall be progressively abolished . . . in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended." Also provided within title III is the right of establishment contained in chapter 2. According to article 52, "restrictions on the freedom of establishment of na-

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6 See infra notes 105–293 and accompanying text.
7 See infra notes 105–141 and accompanying text.
8 See infra notes 142–226 and accompanying text.
9 Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11, at art. 9 ("The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect . . . .") [hereinafter EEC Treaty].
10 Id. at art. 30. Articles 30–36 requiring the elimination of quantitative restrictions between member states regarding free movement of goods do not provide the Council with implementing authority. Public Supply Contracts, supra note 1. Thus, when the Council makes law in this area, it relies on the power of the approximation of laws contained in article 100. EEC Treaty, supra note 9, at art. 100. Article 100 allows "[t]he Council . . . acting unanimously on a proposal from the Commission . . . to issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market." Id.
11 Id. at art. 59 ("R]estrictions on freedom to provide services within the Community shall be progressively abolished . . . .").
12 Id. Council authority to issue directives that ensure freedom of services is found in articles 63(2) and 66 of the EEC Treaty. Id. at arts. 63(2), 66.
13 Id. at art. 52 ("R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished . . . .").
tions of a Member State in the territory of another Member State shall be abolished ...."14

In order to effectuate these Treaty mandates in the area of public procurement, contractors and suppliers15 from within the Community must have equal opportunity to bid for available public contracts.16 Moreover, their bids must be considered by the contracting authority17 in an indiscriminate manner.18 Realizing this, the Council and the Commission have sought to regulate public contract offerings, bid tenders, and awards.19

14 Id. Council authority to issue directives that seek to ensure the right of establishment is found in articles 54(2) and 57(2) of the EEC Treaty. Id. at arts. 54(2), 57(2).

There is no explicit requirement that the tenderer or candidate be a national of one of the member states, although, this is assumed by the various directives. The language of the public procurement provisions refers to the tenderer as a person from a member state. See, e.g., Directive 80/767 which amends Directive 77/62 and allows certain non-member states to participate in public supply contract offers. Directive 80/767, Council Directive of 22 July, 1980 Adapting and Supplementing in Respect of Certain Contracting Authorities Directive 77/62 Co-ordinating Procedures for the Award of Public Supply Contracts, 23 O.J. EUR. COMM. (No. L 215) 1 (1980) [hereinafter Directive 80/767]. This seems to indicate that prior to this directive, third party countries were not entitled to participate in EEC public contracts under the terms of the public supply directive. The language of Directive 80/767 extends the protections of Directive 77/62 to a specific group of third party countries, thus suggesting the continued exclusion of all other non-member states. Id. ("For purposes of the award of public contracts ... Member States shall apply in their relations conditions as favorable as those they grant to third countries [who are signatories to the Agreement on Government Procurement."]). See also, C5 ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW pt. C12, at C12,469 (1981) (general note to Directive 80/767) ("The net result [of this Directive] is that contracts from [contracting authorities] are to be awarded treating applicants from third countries signatory to the Agreement [on Government Procurement] in as favorable a way as applicants from within the Communities."); Explanatory Memorandum from the Commission of the European Communities, at 29-30, contained in, COM(88) 377 final [hereinafter Water, Energy, and Transport Memo].

16 A public works contract is defined as a contract "for pecuniary consideration concluded in writing between a contractor ... and an authority awarding contracts ... which have as their object one of the activities [set forth by the Council.]" Directive 71/305, supra note 15, at art. 1(b). The activities referred to in this definition are set forth in an annex and in article 2 of Directive 71/304. Id. See infra notes 32-33 and accompanying text for a partial list of these activities.

Similarly, a public supply contract is defined as a contract "for pecuniary consideration concluded in writing between a supplier ... and [a] contracting authority[y] ... for delivery of ... products." Directive 77/62, supra note 15, at art. 1(b).

17 The authorities who award public contracts are defined as "State, regional or local authorities and the legal persons governed by public law ... or, in Member States where this concept is unknown, equivalent bodies ...." Directive 71/305, supra note 15, at art. 1(b); cf. Directive 77/62, supra note 15, at art. 1(b). Authorities from each member state which satisfy this definition are listed in annexes to the directives. Directive 71/305, supra note 15, at annex I; Directive 77/62, supra note 15, at annex I.

18 Tendering for Public Contracts, supra note 1.

19 See generally id. See also Implementation of Program for Establishment, I Common Mkt. Rep. (CCH)
II. EEC Law Governing Public Procurement from 1969–1980


In response to the member states' discriminatory measures and practices regarding the supply of goods to other member states, the Council issued Directive 70/32 on December 17, 1969. This directive applies to any supply of goods, even those not provided by way of a public supply contract.

Directive 70/32 seeks to prohibit a number of discriminatory practices commonly occurring among the member states, including complete or partial bans on imported goods, reserved supply purchases, and preferential treatment of national suppliers. The directive prohibits strict guarantees or advance payment conditions unless both domestic and out-of-state suppliers are subject to the same requirements. Moreover, reciprocal agreements and use of domestic technical standards in contract offers are viewed as unfairly burdensome to the out-of-state suppliers and are, therefore, disallowed.

Directive 70/32 has not ended discriminatory abuses and arbitrary contract awards. It did, however, serve as notice to those guilty of such practices that their behavior would no longer be tolerated by the Community.

B. Council Directives 71/304 and 71/305

 Directive 71/304 sets forth new Council restrictions in the area of public works contract law and then lists those practices no longer tolerated in view of the new restrictions. Article 1 of the directive abolishes the restrictive practices referred to in the General Programmes. Several of these restrictions are reiterated in the text of article 3. These restrictions are, perhaps, overbroad and incorporate most abusive practices. For example, article 3(1)(a) abolishes any restriction "which prevent[s] beneficiaries from providing services under the same conditions and with the same rights as nationals of [the Member State from which the contract is being offered] . . . ." Article 3 also forbids any discriminatory administrative practice as well as any practice which, although applied generally, provides a de facto advantage for the domestic contractor.

Article 2 sets forth the scope and application of Directive 71/304. An annex lists all of the activities which fall within the scope of the directive. Subsection 2 of article 2 exempts certain activities from the application of the directive.

Directive 71/305 attempts to coordinate the procedures regarding the award of public works contracts by providing common technical specifications, advertising rules, and rules of participation. This directive is particularly important because its basic structure and content have served as a model for later directives which address restrictive practices in Community public contract awards.

Title I deals primarily with the scope of the directive and contains definitions of important terms. Included in this title, article 3 requires all public works contracts to be awarded subject to the provisions of the directive. Directive 71/305 recognizes two types of public works contracts: the open procedure contract and the restricted procedure contract. The open procedure contract may be bid upon by any interested contractor within the Community. Bids on a restricted procedure contract are accepted by invitation only. Regardless of

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28 See, e.g., Directive 71/304, supra note 26, at arts. 1, 3.
29 Some of the restrictive practices prohibited by the General Programmes are probationary periods, requiring deposits or security bonds, vocational training restrictions, and social security restrictions. See B2 ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW pt. B10, at B10,052 (1981) (general note to EEC Treaty, article 54).
30 Directive 71/304, supra note 26, at art. 3(1)(a).
31 Id. at arts. 3(1)(b)–3(1)(c).
32 Id. at annex. These activities include: construction; demolition; general building work; roofing; weatherproofing; general civil engineering; highway construction; installation of heat, ventilation, or electricity; woodwork; and painting. Id.
33 Id. at art. 2(2). These exemptions include: industrial installations of a mechanical, electrical, or energy-producing variety; construction of nuclear installations; and excavation, shaft sinking, dredging, and waste disposal work carried out in connection with mining operations. Id. at arts. 2(2)(a)–(c).
34 Directive 71/305, supra note 15. Indeed, even the subsections are divided and titled in later directives as they are in Directive 71/305. See, e.g., Directive 77/62, supra note 15.
35 See id. at art. 5.
36 Id. at art. 5(1).
37 Id. at art. 5(2).
the procedure chosen, only those contracts with an estimated value of at least 1,000,000 European Currency Units (ECU) must be awarded subject to the provisions of the directive. 38 Splitting contracts in order to bring their value under the 1,000,000 ECU threshold is expressly forbidden. 39

Article 3 also lists certain types of contracts which are exempt from the directive. 40 For example, concession works contracts are excluded from the application of the directive. 41 All contracts awarded by authorities involved in transport services and those offered by the water and energy services which deal primarily with production, distribution, transmission, or transportation, are also excluded from the application of the directive. 42

Finally, contracts which would otherwise fall within the scope of the directive may be excluded when certain extenuating circumstances exist. These circumstances, enumerated in article 9, include irregular tenders or absence of tenders, instances of technical or artistic work that require the services of a particular contractor, cases of extreme urgency caused by unforeseen circumstances, the need of secrecy or special security, and exceptional cases involving great risk. In order to discourage abuse of these exceptions, article 9 requires each member state to send a yearly report which states the number and total value of all contracts awarded under this provision. 43

Title II of the directive provides common technical standards for Community public works contracts. This measure is necessary in order to prevent member states from using local technical standards in contract offers to give domestic bidders an advantage. 44 Article 10 defines these common technical standards by reference to national standards. The article also prohibits the use of trademarks, patents, or brand name products in contract offers unless accompanied

38 Id. at art. 7(1)(a). The threshold amount represents the contract value net of value added tax (VAT). Id. See also Thys & Henry, supra note 3, at 449 n.23 (describing the nature of the European Currency Unit).
39 Id. at art. 7(2).
40 Id. at art. 3.
41 Id. at art. 3(1). If a concessionaire is given authority to grant public works contracts to subcontractors, however, the concessionaire is required to observe Community public procurement law. Id. at arts. 3(2)–(3).
42 Id. at arts. 3(4)–(5). One rationale behind these exclusions is that these industries have a "widely varying legal status," thus making it difficult to draft effective and uniform restrictions regarding public works contract awards within these sectors. Public Supply Contracts, supra note 1. See infra notes 274–293 and accompanying text.

Other contracts removed from the scope of Directive 71/305 include those contracts awarded by states pursuant to international agreements as well as those awarded in accordance with provisions of an international organization which conflict with Community law. Directive 71/305, supra note 15, at art. 4.
43 Id. at art. 9.
44 Id. at art. 10(1). "[T]he Council . . . has stressed that co-ordination [of procedures for the award of public works contracts] should be based on the . . . prohibition of technical specifications that have a discriminatory effect . . . ." Id. at preamble.
by the words "or equivalent." To insure an equal opportunity for all interested contractors throughout the Community to participate in public works procurement, title III of the directive requires each contracting authority to provide adequate notice of its contract offer.

When a contracting authority gives notice of an open procedure contract, it must accept tenders for at least thirty-six days after dispatch of the notice. In the case of a restricted procedure contract, the time limit for the receipt of requests to participate may be no less than twenty-one days after dispatch of notice. Additionally, contracting authorities must send all bidding invitations to selected candidates simultaneously and in writing. Notice of an open procedure contract must contain certain information regarding the contracting authority and the nature of the contract offered. The notice requirements for restricted procedure contracts are similar. This information is specified in articles 16 and 17 of title III. Title III concludes with article 19 which allows, though does not require, publication of public works contracts having a value less than the 1,000,000 ECU threshold but not less than 500,000 ECU.

Title IV, chapters 1 and 2, of Directive 71/305 provides common rules for the participation in the public works contract process. Article 23 of chapter 1 provides an extensive list of instances when a contractor may be excluded from consideration. According to this article, a contracting authority is not required to consider a contractor in bankruptcy or in the process of being declared bankrupt, a contractor convicted of professional misconduct, a contractor who has not fulfilled his social security obligations, a contractor who has defaulted

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45 Id. at arts. 10(1)–(2).
48 Id. at art. 13.
49 Id. at art. 14.
50 Id. at arts. 16(a)–(m). Required notice information includes: the date of dispatch, the award procedure chosen, the site and nature of the services to be provided, the project completion deadline, the address of the contracting authority, the final date for tender receipt, financing and payment terms, minimum economic and technical standards, and the period for which contractors will be bound to their tenders. Id.
51 Id. at arts. 17(a)–(d).
52 Id. at art. 19. Again, these figures represent contract value net of VAT. Id.
on tax obligations, or a contractor who has misrepresented material information in his contract tender.53 The article also stipulates what will constitute sufficient proofs that these potential infirmities do not exist.54 As a further assurance of the contractor's qualifications, articles 24 through 26 allow the contracting authority to require the contractor to provide proof of his or her trade, financial stability, and technical knowledge. The proof of competence requirements are set forth in articles 24 through 26 along with provisions regarding substitute proofs.55

Chapter 2 contains the criteria for bid selection. When choosing a winning bid, the contracting authority may consider the lowest priced bid or the most economically advantageous bid—which may include such considerations as deadlines, running costs, or technical merit.56 A contracting authority may refuse any bid it considers too low to be feasible, as long as it is able to justify this decision.57

Directive 71/305 has been the subject of many Commission proposals which seek to amend the law governing public works contracts.58 As of yet, no proposals have been adopted by the Council.


As discussed above, Directive 70/32, which governed Community supply arrangements, was largely inadequate. Thus, on December 21, 1976, the Council issued Directive 77/62 which attempted to end selective and abusive public procurement practices in the area of public supply contracts.59 The directive's approach to this reform mirrors that of Directive 71/305 and shares many similar provisions.60

Under title I of the directive, the provisions defining the scope of the directive and vital definitions are fundamentally the same as those contained in title I of Directive 71/305.61 Regarding exceptions to the application of the directive, Directive 77/62 recognizes the same exemptions as does Directive 71/305 with the addition of exempting contracts awarded by the telecommunications indus-

53 Id. at arts. 23(a)–(g).
54 Id. at art. 23.
55 Id. at arts. 24–26.
56 Id. at art. 29(1).
57 Id. at art. 29(5). In this case, the contracting authority must satisfy the Advisory Committee set up by the Council that its reasons for rejecting a tender it considers "abnormally low" are legitimate. Id.
58 See infra notes 142–145 and accompanying text.
60 See supra note 34 and accompanying text.
try in the areas of production, distribution, transmission, and transportation.\textsuperscript{62} In article 6, Directive 77/62 recognizes the same exceptions for extenuating circumstances as does Directive 71/305 with the addition of two others: one, an exception for goods purchased on the Community commodities market, and the other, an exception for contracts involving data-processing. Unlike Directive 71/305, Directive 77/62 does not recognize an exception for contracts involving high risk.\textsuperscript{63} The most significant dissimilarity contained in title I of Directive 77/62 is the minimum value threshold. Compared with the 1,000,000 ECU threshold requirement of Directive 71/305, article 5 of Directive 77/62 sets a considerably lower threshold for supply contracts at 200,000 ECU.\textsuperscript{64}

Title II of Directive 77/62 concerning common technical standards is similar to the corresponding title in Directive 71/305. Once again, common technical standards are supplied in an annex to the directive.\textsuperscript{65} Directive 77/62 also provides a list of alternative technical standards in article 7.\textsuperscript{66}

Title III notice requirements regarding publication, timing, and content are essentially the same in Directive 77/62 as they are in Directive 71/305.\textsuperscript{67} The only substantial difference between the two titles is found in article 16 of Directive 77/62 which allows, but does not require, publication of notices for public supply contracts valued under the 200,000 ECU threshold but not less than 100,000 ECU.\textsuperscript{68} Directive 77/62 also introduces an annex which contains model notices for both open and restricted procedure contracts.\textsuperscript{69}

Chapters 1 and 2 of title IV, containing criteria for the qualitative selection of tenderers and contract offers, are essentially the same in both directives.\textsuperscript{70} One notable difference is the addition of a clause in Directive 77/62 which


\textsuperscript{63} Directive 77/62, supra note 15, at arts. 6(f), 6(h). Compare id. at art. 6 with Directive 71/305, supra note 15, at art. 9(h).


\textsuperscript{65} Id. at annex II.

\textsuperscript{66} Id. at art. 7(1). According to article 7(1):

[1] It is appropriate to make reference, in order of preference, to:

(1) Community standards which are binding by virtue of an act of the Communities;
(2) other Community standards . . . or European standards . . . accepted by the country of the contracting authority;
(3) international standards accepted by the country of the contracting authority . . . ;
(4) the national standards of the country of the contracting authority;
(5) any other standard.

Id.

\textsuperscript{67} Id. at arts. 9–16. Compare id. with Directive 71/305, supra note 15, at arts. 12–19.

\textsuperscript{68} Directive 77/62, supra note 15, at art. 16. These values are net of VAT. Id.

\textsuperscript{69} Id. at annex III.

\textsuperscript{70} Id. at arts. 20–25. Compare id. with Directive 71/305, supra note 15, at arts. 23–29.
requires the contracting authority to keep confidential all information provided by contractors in their tender offers.71

Like the directive on public works contracts, Directive 77/62 also has been the subject of various Commission proposals suggesting needed amendments.72 In June 1988, the Council adopted a new directive which amends certain provisions of Directive 77/62.73


From 1973 to 1979, the EEC was involved in a series of trade negotiations which resulted in a number of international trade agreements including the General Agreement on Tariffs and Trade (GATT).74 Among the agreements approved by the Council on behalf of the EEC was the Agreement on Government Procurement (AGP).75 The AGP sought to “establish an international framework of balanced rights and obligations with respect to government procurement with a view to achieving liberalisation and expansion of world trade.”76 Because certain provisions of the AGP differed from those contained in Directive 77/62, and in light of the EEC’s obligations under the agreement, the Council amended Directive 77/62 by the provisions of Directive 80/767.77

Article 1 of Directive 80/767 extends the definition of “contracting authority” to a number of additional authorities listed in an annex to the directive.78 These contracting authorities are required to apply Community standards regarding the award of public supply contracts to third party bidders who are signatories to the AGP.79 Contracts awarded by the contracting authorities listed in annex I would be subject to the provisions of Directive 77/62 as long as they are valued at 140,000 ECU or more.80 Moreover, the time limit for the receipt of tenders

71 Directive 77/62, supra note 15, at art. 17(2) (“The contracting authorities shall respect fully the confidential nature of any information furnished by the suppliers.”).
72 See infra notes 105–108 and accompanying text; supra note 58 and accompanying text.
73 See infra note 92.
77 Id.
78 Id. at annex I.
79 Id. at art. 7.
80 Id. at art. 3. This amendment applies only to those contracting authorities listed in annex I. Otherwise, Directive 77/62 continues to apply to those contracts above the minimum value threshold of 200,000 ECUs. See supra note 64 and accompanying text.
on an open procedure contract is extended to forty-two days and, on restricted procedure contracts, to thirty days.\textsuperscript{81}

The same Council directive which amends certain provisions of Directive 77/62 also repeals various provisions contained in this directive.\textsuperscript{82} The changes are largely due to the renegotiation of the GATT.\textsuperscript{83}

III. Compliance with and Effect of Existing Public Contract Law

The effect of the existing directives concerning public contract law is very limited. This is due to both continued noncompliance by member states as well as structural infirmities within the provisions of Directives 71/305 and 77/62.\textsuperscript{84}

If the Council directives discussed above were completely effective, it is estimated that forty billion ECU of public contracts would be opened up to outside member state bidders.\textsuperscript{85} Commission statistics show, however, that in 1983, 100 percent of the Italian government's spending on public contracts went to Italian suppliers. The figures are as disappointing for France (99.9 percent), Germany (99.7 percent), and the United Kingdom (98.3 percent).\textsuperscript{86} While the number of notices published in the Official Journal of the European Communities (Official Journal) has increased dramatically, the value of contracts actually awarded to out-of-state contractors represents less than 1 percent of the national expenditure of any one member state.\textsuperscript{87}

Many states have avoided publication of contract notices in the Official Journal by splitting contracts, thus bringing individual contract values below the minimum value threshold despite the prohibition against such practices found in article 5(4) of Directive 77/62 and article 7(2) of Directive 71/305.\textsuperscript{88} This method of avoidance is particularly prevalent in the award practices of local and regional government authorities.\textsuperscript{89} Indeed, state authorities are guilty of more egregious

\textsuperscript{81} Directive 80/1767, supra note 15, at art. 6. Again, these amendments apply to only those contracting authorities listed in annex I of the directive. Id.

\textsuperscript{82} See infra notes 105–108 and accompanying text.

\textsuperscript{83} Id.

\textsuperscript{84} See generally Explanatory Memorandum from the Commission of the European Communities, contained in, COM(87) 134 final [hereinafter Memo on the Application of Public Procurement Law].

\textsuperscript{85} Legislation on Public Supply Contracts, supra note 1.

\textsuperscript{86} Id.

\textsuperscript{87} Id. From 1979–1983, the number of published notices rose from 1038 to 2583. Id. Transmitting and retrieving notice information has been facilitated by the establishment of the Community databank TED (Tenders Electronic Daily) which has replaced the cumbersome system of publication in the "S" supplement of the Official Journal. See Weiss, supra note 75, at 327.

\textsuperscript{88} Legislation on Public Supply Contracts, supra note 1. See Directive 71/305, supra note 15, at art. 5(4); Directive 77/62, supra note 15, at art. 7(2).

\textsuperscript{89} Legislation on Public Supply Contracts, supra note 1.
violations such as the outright failure to publish contract notices in the *Official Journal*.\(^90\)

Other common illegal contracting practices include single-tendering (examining one tender only) and private negotiating tendering (seeking out and proposing contracts to one particular contractor, usually from the contracting authority's home state).\(^91\) Both of these practices are difficult to detect because neither Directive 71/305 nor Directive 77/62 requires the contracting authority to publish the names of the winning bidders or the content of their bids.\(^92\) Thus, disappointed bidders are likely to assume that they have been legitimately underbid without having the means to question the decision of the contracting authority.

Noncompliance is not the sole reason why existing public contract law has such limited effect. The directives themselves provide many loopholes that are exploited by uncooperative contracting authorities.\(^93\) One such loophole is the allowance of the restricted contract procedure in both directives. Because the contracting state is not required to justify its choice of the restricted procedure to the Commission, and because tender invitations are secret, contracting authorities will often invite only national contractors to submit bids on their available contracts.\(^94\) Similarly, both directives contain provisions allowing single-tendering award procedures in exceptional cases.\(^95\) The Commission has found the number of illegal contracts awarded in the name of this exception unacceptable.\(^96\)

The Commission views the failure of existing public procurement law to apply to contracts awarded by the water, energy, transport, and telecommunications industries as a serious shortcoming.\(^97\) It is argued that full liberal-

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\(^90\) Memo on the Application of Public Procurement Law, *supra* note 84, at 1. For example, in West Germany, only two of their ten states publish contract offers in the *Official Journal*. France is also negligent with participation by only 20 of their 50 départements. *Legislation on Public Supply Contracts, supra* note 1.

\(^91\) Id.


\(^93\) *See, e.g.*, Memo on the Application of Public Procurement Law, *supra* note 84, at 1–2 ("The most serious and frequent infringements include ... misuse of the exceptional award procedures ... .")

\(^94\) *Legislation on Public Supply Contracts, supra* note 1; Memo on the Application of Public Procurement Law, *supra* note 84, at 1–2.


\(^96\) Memo on the Application of Public Procurement Law, *supra* note 84, at 1. *See also Legislation on Public Supply Contracts, supra* note 1; Tendering for Public Contracts, *supra* note 1.

\(^97\) *Legislation on Public Supply Contracts, supra* note 1; Tendering for Public Contracts, *supra* note 1. *See*
ization of public contract law will not be realized until these exceptions are repealed.\textsuperscript{98}

Finally, the most critical insufficiency of the existing public contract law is its failure to provide a uniform enforcement mechanism.\textsuperscript{99} The law in its present state does not provide the contractor with a consistent and speedy remedy when contracting authorities are found in breach of Community public procurement law.\textsuperscript{100} Furthermore, the Commission is not empowered to suspend contract awards when their validity has been called into question.\textsuperscript{101} Thus, when the Commission levies penalties, they are often imposed late and have little deterrent effect.\textsuperscript{102}

It is clear that existing public contract law has not had the effect desired by the Council and the Commission. Without further legislation, it is not likely that the state of public contract law in the EEC will improve to any significant extent. Realizing this, the Council has recently adopted a new directive amending the rules governing public supply contract awards.\textsuperscript{103} Moreover, the Commission has proposed certain Council directives which would attempt to modify Community public procurement law, bringing it into conformity with the EEC Treaty mandates of free exchange of goods and services and freedom of establishment.\textsuperscript{104}

IV. RECENT COMMUNITY LEGISLATION: 1978–1988


On June 19, 1986, the Commission proposed a Council directive to modify the existing law on public supply contracts. This proposed directive would amend Council Directive 77/62 and would repeal certain sections of Council
Directive 80/767.105 The proposal was amended several times106 in order to address the renegotiation of the GATT Agreement and to incorporate several amendments suggested by the European Parliament (Parliament).107 On March 22, 1988, the Council adopted Directive 88/295 based upon these proposals.108

Article 2 of Directive 88/295 amends article 1 of Directive 77/62 by redefining “public supply contracts”109 and adding definitions of “open procedures,” “restricted procedures,” and “negotiated procedures.”110 Article 3 of the new directive, which replaces article 2 of Directive 77/62, exempts public supply contracts awarded by carriers from the provisions of Directive 77/62.111 Article 3 also limits the types of contracts awarded by the water, energy, and telecommunications industries that would be exempt from the provisions of Directive 77/62. The water, energy, and telecommunications industries, however, continue to enjoy liberal exemptions. Finally, article 3 exempts contracts for supplies which are declared secret or require special secured delivery from the provisions of Directive 77/62.112


109 Directive 88/295 defines public supply contract as: "[C]ontracts for pecuniary interest concluded in writing involving the purchase, lease, rental or hire purchase . . . of products between a supplier . . . and . . . [a] contracting authority . . . ." Id. The annexed list of contracting authorities referred to in article 1(b) of Directive 77/62 is replaced by a new annex I appended to Directive 88/295. Id. at annex I.

110 Id. at art. 2. According to article 2:

(d) "Open procedures" are those national procedures whereby all interested suppliers can present an offer;
(e) "Restricted procedures" are those national procedures whereby only those suppliers invited by the contracting authority may submit tenders;
(f) "Negotiated procedures" are those national procedures whereby contracting authorities consult suppliers of their choice and negotiate the terms of the contract with one or several of them.

Id.

111 Id. at art. 3 ("This Directive shall not apply to . . . public supply contracts awarded by carriers by land, air, sea or inland waterway . . .").

112 Id.
Article 5 of the new directive deletes the open and restricted procedures defined in article 4 of Directive 77/62. The definitions of open, restricted, and negotiated contracts contained in article 2 of Directive 88/295, along with a later provision regulating their use, renders article 4 of Directive 77/62 superfluous.

Article 6 of Directive 88/295, which replaces article 5 of Directive 77/62, redefines the minimum value threshold and provides contract valuation guidelines. Generally, all supply contracts having a value of 200,000 ECU or more are now subject to the provisions of the amended Directive 77/62. Those contracting authorities listed in annex I of Directive 80/767 who offer public supply contracts valued at 130,000 ECU are also subject to the revised provisions of Directive 77/62. Provisions for the calculation, amendment, and publication of threshold values in national currencies and pursuant to the terms of the GATT Agreement are provided in article 6 of the new directive as well. Once more, splitting contracts in order to avoid the application of the directive is forbidden.

Article 6 of Directive 77/62 which exempts certain contracts from the requirements of open, restricted, and negotiated contract procedures is replaced by article 7 of Directive 88/295 which specifies when these procedures are to be used. The open contract procedure is made the preferred procedure in most cases. The restricted contract procedure may be used when justified. The special nature of the products to be procured as well as the "need to maintain a balance between contract value and procedural costs" are listed as two situations constituting justification. A contracting authority may resort to the negotiated contract when it has received irregular or unacceptable tenders in response to an open or restricted contract offer. A contracting authority may award a public supply contract by negotiated procedure without a prior call for tenders when certain extenuating circumstances exist. Whenever a contract-
ing authority resorts to the restricted or negotiated procedures, it must prepare a report containing certain relevant information regarding the contract award.\textsuperscript{122} This report, or any part of it, must be communicated to the Commission upon its request.\textsuperscript{123}

Article 8 of Directive 88/295 replaces article 7 of Directive 77/62 which concerns common technical standards.\textsuperscript{124} Annex II, appended to the new directive, defines the technical specifications normally to be applied.\textsuperscript{125} Article 8 of Directive 88/295 also recognizes certain circumstances when a contracting authority may resort to alternative technical standards.\textsuperscript{126} In such instances, the contracting authority must, whenever possible, note this deviation on its tender notice, and, in any event, record the reasons for the deviation in its internal documentation.\textsuperscript{127}

In the absence of appropriate technical standards, article 7 of the new directive provides a list of acceptable alternatives.\textsuperscript{128} Unless the subject of the contract requires it, no contracting authority may require the use of brand name goods, trademarks, or patents unless accompanied by the words "or equivalent," and then, only when a generic description is impossible.\textsuperscript{129}

Articles 9, 10, 11, 12, and 13 of Directive 88/295 amend title III of Directive 77/62 which provides common advertising rules. Article 9 of the new directive introduces three situations when a contracting authority is obligated to publish a notice in the Official Journal. In addition to requiring all contracting authorities

\begin{itemize}
\item initially different from the original; when the materials involved are used solely for research, experiment, study, or development; when, for artistic or technical reasons, a particular supplier is sought to manufacture or deliver goods; when, for unforeseen reasons of extreme urgency not brought about by the contracting authority, the provisions of the open procedure cannot be met; and for additional replacement deliveries by an original supplier.\textsuperscript{122} \textit{Id.} The report must contain at least the following: the name and address of the contracting authority; the value, quantity, and nature of products purchased; the number of participation requests received; the number of candidates invited to submit tender offers; and the number of offers rejected and the reasons for their rejection. \textit{Id.}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} Id. at art. 8.
\item \textsuperscript{125} Id. at annex II. Generally, the proper standards to be used are national standards which implement European standards, or common technical specifications. \textit{Id.} at art. 8. Both "European standards" and "common technical specifications" are defined in annex II of Directive 88/295. \textit{Id.} at annex II.
\item \textsuperscript{126} Id. at art. 8. A contracting authority may depart from the required technical standards when they do not ensure uniformity, when their application would conflict with Community law governing specific service or product areas, when their use would require contracting authorities to use incompatible supplies or result in disproportionate expense and difficulty, or when the project is "genuinely innovative" and use of the standards would be inappropriate. \textit{Id.}
\item \textsuperscript{127} Id. This documentation would be communicated to the member states or the Commission upon its request. \textit{Id.}
\item \textsuperscript{128} Id. In order of preference, they are "(a) national standards implementing international standards accepted in the country of the contracting authority; (b) other national standards of the country of the contracting authority; (c) any other standard." \textit{Id.}
\item \textsuperscript{129} Id.
to provide notice of open and restricted contract offers, contracting authorities listed in annex I of Directive 80/767 must also publish a notice of all public supply contracts having a value of at least 750,000 ECU which they anticipate in the next twelve months. The Council is currently deciding whether to extend this obligation to other contracting authorities. Moreover, every contracting authority who awards a public supply contract must publish a notice containing the result of the award process except where the disclosure of that information would hinder law enforcement, contradict public policy, prejudice legitimate commercial interests, or compromise fair competition between suppliers. The form and substance requirements of each notice is provided by way of model notices contained in annex III of Directive 88/295. Article 9 of the new directive also provides the requirements for the transmission of these notices, publication deadlines of the Official Journal, restrictions on publication in other journals, provisions regarding the assumption of costs, and limitations on length.

Article 10 of the new directive extends the period within which a contracting authority must receive tenders on open contracts from thirty-six days to fifty-two days. Similarly, article 11 requires a contracting authority who offers restricted or negotiated contracts to accept requests to participate for at least thirty-seven days after dispatch of notice. All bidding invitations must be sent simultaneously, in writing, and accompanied by all supporting documents. In the case of restricted procedure contracts, the contracting authority must give tenderers at least forty days after the dispatch of invitations to respond with offers.

Article 17 of the new directive requires member states to submit yearly reports containing the number and value of contracts awarded above and, in certain instances, below the minimum value threshold. This report would also contain a categorical breakdown of contract awards by procedure, product, nationality of chosen bidder, and, in the case of Directive 80/767 public contracts, the number and value of each contract awarded to a signatory of the GATT AGP.

130 Id. at art. 9.
131 Id. at annex III.
132 Id. at art. 9.
133 Id. at art. 10. See Directive 77/62, supra note 15, at art. 10(1).
134 Directive 88/295, supra note 92, at art. 11. This minimal acceptance period is 16 days longer than that required by article 11(1) of Directive 77/62. See Directive 77/62, supra note 15, at art. 11(1).
135 Directive 88/295, supra note 92, at art. 11.
136 Id. This gives tenderers 29 days more within which to submit their bids than did article 11(3) of Directive 77/62. See Directive 77/62, supra note 15, at art. 11(3).
137 Directive 88/295, supra note 92, at art. 17. Only those contracting authorities listed in annex I of Directive 80/767 are required to report contract awards which fall below the minimum value threshold stipulated in article 6 of the new directive. Id.
138 Id.
Title II of the new directive deletes articles 2, 3, 4, 5, and 6 of Directive 80/767. The deleted articles contain, among other provisions, the subject, amount, and tender requirements of supply contracts offered to signatories of the GATT AGP. These requirements are replaced by the appropriate procedures of Directive 88/295 discussed above. With several exceptions, the member states were given until January 1, 1989 to implement all necessary measures to ensure compliance with the directive.

B. Commission Proposal COM(88) 354 final Concerning the Procurement of Public Works Contracts


Article 2 of the proposed directive would enlarge the definition of public works contracts contained in article 1(a) of Directive 71/305 by including contracts from new fields of industry and development. Further, the proposal would amend the definition of contracting authority and add new definitions of a “work,” a “public works concession,” “open procedures,” “restricted procedures,” and “negotiated procedures.”

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139 Id. at art. 19.
141 Directive 88/295, supra note 92, at art. 20. The Hellenic Republic, the Kingdom of Spain, and the Portuguese Republic are given until March 1, 1992 to implement Directive 88/295. Id.
146 Id. at art. 2. These new fields are listed under the following subheadings: general building and civil engineering and demolition work; construction of flats, office blocks, hospitals and other buildings; civil engineering: construction of roads, bridges, railways, etc.; installation; and building completion work. Id. at annex II.
147 Id. at art. 2. The new definition of contracting authority would include “bodies governed by public law.” Id. A body governed by public law is defined as a body “established for the specific purpose of meeting needs in general interest, other than those having an industrial or commercial character . . . .” Id.
148 Id.
Article 3 of the proposal would obligate member states to insure compliance with the directive whenever they finance more than half of the cost of the contract with public funds. This article would apply whenever such financing exists, even if the contract itself is awarded by an entity other than the member state.\(^{149}\) Additionally, article 4 of the proposed directive would require concessionaires offering public works contracts valued at over 5,000,000 ECU to abide by the advertising rules of Directive 71/305.\(^{150}\) Article 6 of the proposed directive establishes a deadline whereby all contracts awarded by the water, energy, and transport services would become subject to the provisions of the amended Directive 71/305.\(^{151}\)

Article 8 of the proposed directive would set the minimum value threshold for public works contracts at 5,000,000 ECU—an increase of 4,000,000 ECU from the original threshold set in Directive 71/305.\(^{152}\) The new article also provides a process for revising the minimum value as well as instructions for valuating various types of works contracts. As before, the proposed directive would prohibit the splitting of contracts.\(^{153}\)

Article 9 of the proposed directive would allow the award of public works contracts by open, restricted, or negotiated procedures as defined previously in article 2.\(^{154}\) Contracting authorities would be required to use the open procedure contract or the restricted procedure contract in most cases.\(^{155}\) The negotiated contract, with or without a prior call for tenders, would be allowed in circumstances similar to those which are recognized by article 7 of Directive 88/295.\(^{156}\)

Article 10 of the proposed directive would require the contracting authority to disclose to all interested contractors the reasons for the rejection of their applications or tenders.\(^{157}\) Additionally, after each contract award, the proposal would require the contracting authority to make a report containing the contracting authority's name and address, the value of the contract awarded, the names and business addresses of all participants, the name of the winning bidder

\(^{149}\) Id. at art. 3.

\(^{150}\) Id. at art. 4.

\(^{151}\) Id. at art. 6. The proposed deadline is July 1, 1990. Id.

\(^{152}\) Id. at art. 8. The minimum value threshold is net of VAT. Id. See Directive 71/305, supra note 15, at art. 7.

\(^{153}\) COM(88) 354 final, supra note 145, at art. 8.

\(^{154}\) Id. at art. 9. This article is modeled after article 7 of Directive 88/295 which regulates these procedures for public supply contracts. See Directive 88/295, supra note 92, at art. 7.

\(^{155}\) COM(88) 354 final, supra note 145, at art. 9. See also Explanatory Memorandum from the Commission of the European Communities, at 8, contained in, COM(88) 354 final [hereinafter Public Works Contract Memo]. "[Article 9] amending Article 5 of [Directive 71/305] follows the structure of Article 6 of [Directive 88/295] but differs from it in the substantive rules for use of the various procedures, in order to take account of the specific features of works contracts." Id.

\(^{156}\) COM(88) 354 final, supra note 145, at art. 9. See Directive 88/295, supra note 92, at art. 7.

\(^{157}\) COM(88) 354 final, supra note 145, at art. 10. This information would have to be sent to the contractor within fifteen days of his or her request. Id.
and the reasons for his or her selection, and the names of the rejected bidders and the reasons for their rejections. The contracting authority would have to communicate this report, or any part of it, to the Commission upon its request.\footnote{\textit{Ibid.}}

Article 12 of the proposed directive would amend article 10 of Directive 71/305 concerning technical standards.\footnote{\textit{Ibid.} at art. 12.} If amended, article 10 will be essentially the same as article 8 of Directive 88/295 governing the procurement of public supply contracts.\footnote{See Directive 88/295, \textit{supra} note 92, at art. 8, annex II.} Thus, a new annex III defining technical standards by reference to European standards would be added in order to amend the specifications contained in title II of Directive 71/305.\footnote{COM(88) 354 final, \textit{supra} note 145, at annex III. See Directive 71/305, \textit{supra} note 15, at annex II. The proposed article would also allow the use of alternative specifications when deviation from the normal standards is necessary. COM(88) 354 final, \textit{supra} note 145, at art. 12.}

Articles 14 through 21 of the proposed directive would enlarge the notice requirements of Directive 71/305. Most notably, article 14 of the proposed directive would require the contracting authority to publish a notice containing the essential elements of any anticipated public contract as soon as the decision approving the planning of the contract has been made. Also, article 14 of the proposed directive would require notice of all contracts awarded to a concessionaire or by a concessionaire to a third party. Finally, the article would require contracting authorities to publish the results of all contracts awarded unless disclosure would hinder law enforcement, contradict the public interest, prejudice legitimate commercial interests, or compromise fair competition between contractors. As in article 9 of Directive 88/295 discussed above, article 14 of the proposed directive also provides publication requirements and deadlines, restrictions on publication in other journals, cost considerations, and length limitations.\footnote{\textit{Ibid.} at art. 14. Annexes IV–VI of the proposed directive contain model notices illustrating the form and substance of all notices which would be required by the amended Directive 71/305. \textit{Ibid.} at annexes IV–VI.}

Articles 15 and 16 of the proposed directive would lengthen the time limits for the receipt of tenders and requests to participate in public contracts. Contracting authorities would have to accept tender offers for at least fifty-two days after sending notice of an open procedure contract offer.\footnote{\textit{Ibid.} at art. 15. This mandatory period of acceptance is 14 days longer than the corresponding period in Directive 71/305. See Directive 71/305, \textit{supra} note 15, at art. 13.} In restricted and negotiated procedure contracts, the contracting authority would be required to accept requests to participate for at least thirty-seven days after dispatch of notice.\footnote{COM(88) 354 final, \textit{supra} note 145, at art. 16. Likewise, this acceptance period is 16 days longer than the corresponding period in Directive 71/305. See Directive 71/305, \textit{supra} note 15, at art. 14.} Other provisions regarding the delivery of supplemental, supporting,
and contract documents as well as the requirements for requests and invitations

to participate are also included in these articles.\textsuperscript{165} Article 21 of the proposed
directive would replace article 19 of Directive 71/305 which allows, but does not
require, publication of public works contracts with a minimum value between
1,000,000 ECU and 500,000 ECU. The proposal would allow notice publication
of any public works contract even though it may not be subject to the provisions
of the directive.\textsuperscript{166}

Articles 23 and 24 of the proposed directive would enlarge title IV of Directive
71/305 which provides common rules of participation. Article 23 would allow
contracting authorities to consider variants submitted by a tenderer in certain
circumstances. First, the contracting authority would have to state in its tender
notice that variants will be accepted. Also, the contracting authority would be
permitted to require all variants to meet minimal specifications stipulated and
recorded in the contract documents.\textsuperscript{167} Article 24 would require contracting
authorities to obtain from the tenderer information regarding the share of the
contract which the tenderer plans to subcontract to third parties. The proposed
article would also require the principal contractor to take full responsibility for
all subcontracts.\textsuperscript{168} Article 25 of the proposed directive would further alter title
IV of Directive 71/305 by requiring minimum participation in order to guar­
antee real competition for public works contracts. Article 25 would require the
contracting authority to invite at least five contractors to bid on a restricted
procedure contract and at least three contractors to participate in a negotiated
procedure contract.\textsuperscript{169}

Articles 26 and 27 of the proposed directive which deal with labor conditions
would allow the contracting authority to consider any beneficial effects on
unemployment or depressed economic areas when awarding a public works
contract.\textsuperscript{170} These articles would also require the contracting authority to include
in its contract documents all labor obligations and conditions of employment

\textsuperscript{165} COM(88) 354 final, \textit{supra} note 145, at arts. 15, 16. Articles 17–19 of the proposal stipulate
alternative tender deadlines for cases of urgency and for contracts offered to or by a concessionaire.\textit{Id.} at arts. 17–19.

\textsuperscript{166} \textit{Id.} at art. 21. "Contracting authorities may arrange for the publication in the \textit{Official Journal of
the European Communities} of notices announcing public works contracts which are not subject to the
15, at art. 19.

\textsuperscript{167} COM(88) 354 final, \textit{supra} note 145, at art. 23.

\textsuperscript{168} \textit{Id.} at art. 24 ("For each sub-contract the principle contractor shall retain full responsibility.").

\textsuperscript{169} \textit{Id.} at art. 25.

\textsuperscript{170} \textit{Id.} at arts. 26, 27. Proposed article 26 states:

\textit{Contracting authorities may in the award of contracts have regard to the desirability of
encouraging responses to the problems of the long term unemployed and young (sic) people
particularly in regions, employment areas and urban communities affected by levels of un­
employment structurally higher than the average for the Community} . . . .

\textit{Id.}
which must be observed by the contractor. In response, the tenderer would be required to provide the contracting authority with a statement attesting to the consideration of the obligatory labor conditions when calculating his or her bid.\textsuperscript{171}

Article 28 of the proposed directive would enlarge chapter II, title IV of Directive 71/305 by liberalizing the award criteria for public works contracts. The proposed article would amend article 29 of Directive 71/305 by allowing a contracting authority to award a contract to a preferred bidder even though his or her bid is not the lowest or most economically advantageous. In such a case, the contracting authority would have to base the contract award "on other criteria, within the framework of rules whose aim is to give preference to certain tenderers, on conditions that the rules invoked are compatible with the Treaty."\textsuperscript{172}

Similar to article 17 of Directive 88/295, the proposed directive would require the contracting authority to submit a report every two years to the Commission containing relevant statistical data regarding their public contract offers.\textsuperscript{173} Article 36 of the proposed directive would repeal Directive 72/277 concerning the details of publication of notices of public works contracts.\textsuperscript{174} The subjects detailed in that directive would be superfluous and contradictory in light of the text and annexes of the proposed directive.

C. \textit{Commission Proposal COM(87) 134 final Regarding the Application of Public Procurement Law}

In an attempt to heighten compliance with Community public procurement law, the Commission has issued a proposal that deals exclusively with policing the law and providing remedies for breach. The Commission submitted this proposed directive to the Council on July 1, 1987.\textsuperscript{175}

\textsuperscript{171} \textit{Id.} at art. 27. \textit{See also} Public Works Contract Memo, \textit{supra} note 155, at 14.

\textsuperscript{172} COM(88) 354 final, \textit{supra} note 145, at art. 25. The article would require member states which have such provisions to inform the Commission and, each year, submit a report to the Advisory Committee for public contracts describing state implementation of these provisions. \textit{Id.} at art. 31. Similarly, member states would be given until December 31, 1992 to continue any national practice of preferential treatment which seeks to reduce regional disparity and foster economic growth in depressed areas as long as these practices are compatible with the EEC Treaty. \textit{Id.} at art. 30.

\textsuperscript{173} \textit{Id.} at art. 32. This report must contain at least the following information: the number and value of contracts awarded above and below the minimum value threshold and a categorical breakdown of these awards by procedure, work type, and nationality of winning contractor. \textit{Id.}

\textsuperscript{174} \textit{Id.} at art. 36. \textit{See supra} note 46.

Article 1 of the proposal directs member states to take necessary steps to ensure "effective administrative and/or judicial remedies . . . ." These remedies include setting aside decisions of the contracting authority which violate Community law and indemnifying injured contractors. In order to ensure timely and effective remedy, the administrative body or the court having jurisdiction in a particular case is allowed to suspend the award decision pending further investigation. The administrative body or the court is also empowered to cure a contract offer by removal of any document included in the offer which contains discriminatory technical, economic, or financial specifications. Contractors who have incurred costs for unnecessary studies, forgone profits, or lost opportunities as a result of an unlawful contract award would be eligible for damages.

Article 2 of the proposed directive would allow the Commission to intervene in any administrative or judicial proceeding in order to protect Community public interest and assure compliance with Community law. Article 3 of the proposal would empower the Commission to suspend a contract award for up to three months in cases of urgency. Suspension is allowed at any point during the award process whenever "a clear and manifest infringement has been committed . . . ." Such clear and manifest unlawful activity includes: failure to publish an invitation to tender; improper recourse to restricted, negotiated, or single-tender procedures; use of improper tender notices or other award documents; or exclusions of contractors for reasons which violate Community law.

On May 18, 1988, the Parliament published a favorable opinion endorsing the directive proposed in COM(87) 134 final. The opinion suggests several minor amendments including: additional assurances of rapid dispute settlement, time limitations on the suspension of contracts, opinion require-
ments, and new review procedures. The Commission has adopted most of the Parliament’s amendments and will modify its proposed directive accordingly. As of the end of 1988, the Council had not yet reviewed the Commission’s proposal.

D. Commission Proposals COM(88) 377 final and COM(88) 378 final Concerning Public Procurement in the Fields of Water, Energy, Transport, and Telecommunications

Supply and works contracts awarded by contracting authorities in the water, energy, transport, and telecommunication sectors are currently excluded from Community law governing public procurement. Although the need to open up procurement in these fields is great, “[t]he reason given for the exclusion was . . . that some bodies with activities in the sectors concerned had public status while others were private.” In some member states, these activities are allocated to both private and public entities. Thus, entities offering supply and works contracts within these four sectors are not reconcilable with existing definitions of “contracting authority” contained in directives governing public procurement. Because these entities do not qualify as contracting authorities, they have escaped the reach of Directives 71/305, 77/62, 80/767, and 88/295.196

187 Id. at 78 (“Where the powers referred to in paragraph 2 [of article I] are exercised exclusively by an administrative authority, reasons for its decision shall always be given.”).
188 Id. at 78, 79.
189 New Development, Public Procurement, 21 BULL. EUR. COMM. (No. 5) 22 (1988).
191 See Public Procurement in Four Sectors, supra note 190.
194 See Directive 71/305, supra note 15, at art. 1(b) (contracting authorities are “state, regional or local authorities and the legal persons governed by public law . . . .”); Directive 77/62, supra note 15, at art. 1(b) (containing the same definition of a contracting authority as Directive 71/305); COM(88) 354 final, supra note 145, at art. 2 (“Contracting authorities’ shall be the State, regional or local authorities, bodies governed by public law, associations formed by . . . such authorities or bodies governed by public law.”). Indeed, the line between private and public is often blurred by public concessions and public funds to private enterprises.
195 See supra note 191.
As a result, most of the contracts offered by entities in these sectors are awarded to national contractors and suppliers.\textsuperscript{197}

Commission proposals in COM(88) 377 final\textsuperscript{198} and COM(88) 378 final\textsuperscript{199} attempt to amend this situation by foregoing the private/public distinction and, instead, basing the scope of their proposed directives upon certain “objective conditions” which result in inefficient procurement practices.\textsuperscript{200} The Commission proposals recognize two situations which encourage uneconomical contract awards. The first exists when a member state has imposed conditions, whether technical, economic, or legal, which disadvantage potential competitors and insulate certain privileged entities from the forces of a free market.\textsuperscript{201} Often the result of preferential state treatment, these conditions allow the creation of monopolies which effectively foreclose entry into the four sectors by interested competitors.\textsuperscript{202}

According to the Commission, the second situation allowing market distortion exists when contract awards in the four sectors are exposed to state influence. While state influence in the form of financing and direct control is most prevalent in a public structure, private entities, which may require state approval, are also heavily influenced by state authority. State influence often discourages, if not bars, out-of-state contractors and suppliers from pursuing foreign contracts. Consequently,

[w]here the two conditions, insulation from the market and exposure to State influence, are both present to a significant degree . . . the result is that substantial markets are essentially closed to suppliers or contractors from other Member States, however competitive they may be. Indeed, the result in some cases appears to be a firmly closed, vicious circle in which outside firms do not even try,

\textsuperscript{197} Public Procurement in Four Sectors, supra note 190; Water, Energy, and Transport Memo, supra note 15, at 4; Telecommunications Memo, supra note 191, at 4.


\textsuperscript{200} According to the Commission, the proposals would cover those entities who are subject to “underlying objective conditions which lead [contracting authorities] to pursue procurement policies that are uneconomic in the sense that they do not ensure that the best offer from any supplier or contractor in the Community is systematically preferred . . . .” Water, Energy, and Transport Memo, supra note 15, at 4; Telecommunications Memo, supra note 191, at 6. “[A]ny Community approach to the problem which sought to base itself simply on a distinction between public and private entities would confront enormous difficulties at the outset and probably be doomed to failure.” Water, Energy, and Transport Memo, supra note 15, at 4; Telecommunications Memo, supra note 191, at 6.


since to do so would be a waste of resources and impossible for a responsible manager to justify.\textsuperscript{203}

In order to avoid the market distortions caused by these conditions, the Commission proposals apply to all entities, whether public or private, which may be subject to such influences.\textsuperscript{204} Because the scope of these proposed directives is necessarily broad, they affect more than just state administrative bureaucracies. Therefore, the Commission has felt it necessary to allow a great deal of flexibility regarding choice of contract procedure. The objective of these proposals is not to limit available contract procedures. Rather, the proposals seek to insure that the chosen procedure is exercised in a nondiscriminatory fashion, based upon objective criteria, and is transparent to the Community.\textsuperscript{205} The Commission believes that such a procedure will "help create the climate of mutual confidence without which the market opening would not take place in real terms."\textsuperscript{206}

Because the operation of both proposals is similar, many procedures are set out in full in COM(88) 377 final and incorporated by reference in COM(88) 378 final.\textsuperscript{207} Title I, containing general provisions, is the "cornerstone" of both proposed directives.\textsuperscript{208} Within this title, article 1 of COM(88) 377 final and article 3 of COM(88) 378 final consolidate and define important terms.\textsuperscript{209} Article 2 of COM(88) 377 final and article 1 of COM(88) 378 final define the scope of the proposed directives. As mentioned above, the proposals would apply to both public and private entities within the four sectors which are engaged in specified activities typically subject to market distorting influences.\textsuperscript{210} Articles 2 through 7 of COM(88) 377 final and article 2 of COM(88) 378 final would exempt

\textsuperscript{204} See \textit{infra} note 210 and accompanying text.
\textsuperscript{205} See Water, Energy, and Transport Memo, \textit{supra} note 15, at 6; Telecommunications Memo, \textit{supra} note 191, at 10–11.
\textsuperscript{206} Water, Energy, and Transport Memo, \textit{supra} note 15, at 6; Telecommunications Memo, \textit{supra} note 191, at 10–11.
\textsuperscript{207} See Water, Energy, and Transport Memo, \textit{supra} note 15, at 3; Telecommunications Memo, \textit{supra} note 191, at 11–12. Most of the provisions found only in COM(88) 378 final concern the requirements of software service contract awards. See \textit{generally} COM(88) 378 final, \textit{supra} note 199.
\textsuperscript{210} COM(88) 377 final, \textit{supra} note 198, at art. 2; COM(88) 378 final, \textit{supra} note 199, at art. 1. In the first nine annexes to COM(88) 377 final, and in the first annex to COM(88) 378 final, the Commission provides an extensive list of contracting authorities which fulfill the general criteria specified in these articles. COM(88) 377 final, \textit{supra} note 198, at annexes I–IX; COM(88) 378 final, \textit{supra} note 199, at annex I.
contracting authorities engaged in specified activities which have traditionally been open to inter-Community competition. Suppliers and contractors engaged in certain other activities would also be excluded from the operation of the proposed directives because their inclusion would be counterproductive.\textsuperscript{211} Finally, article 8 of COM(88) 377 final sets the minimum value threshold for both proposals. Both proposals would require all supply contracts worth 200,000 ECU or more, and all works contracts worth 5,000,000 ECU or more, to be awarded subject to the provisions of the proposed directives.\textsuperscript{212} These articles also contain provisions concerning valuation and splitting of public supply and works contracts awarded within the four sectors.\textsuperscript{215}

The technical specifications contained in title II of both proposals are essentially the same as those contained in the new directive and proposal governing public supply and works contracts generally.\textsuperscript{214} Thus, the proposals would require reference to European standards with certain exceptions.\textsuperscript{215} Likewise, title III of both proposals establishing the procedures for the award of contracts within the four sectors contains many articles similar to those governing procedure and advertising of public supply and works contracts generally. As discussed above, article 12 of COM(88) 377 final would allow contracting authorities within the four sectors to choose between the open, restricted, or negotiated contract procedures.\textsuperscript{216} The remaining articles in title III of COM(88) 377 final establish procedure requirements, notice requirements, and tender/notice time limits.\textsuperscript{217}

Title IV of both proposals contains new qualification and selection procedures as well as an award criteria provision similar to those discussed earlier. Unlike the qualification and selection criteria of the directives governing public supply and works contracts generally, article 19 of COM(88) 377 final would allow the contracting authority to develop its own qualification and selection criteria as

\textsuperscript{211} COM(88) 377 final, supra note 198, at arts. 2–7; COM(88) 378 final, supra note 199, at art. 2. See Water, Energy, and Transport Memo, supra note 15, at 9–13; Telecommunications Memo, supra note 191, at 10.

\textsuperscript{212} A public supply contract worth 200,000 ECUs would be "enough to purchase 7 kilometers of large capacity cable in optical fibers, 2 standard buses, a 275 Kv circuit breaker, a reserve feed water pump, or a small crane." Public Procurement in Four Sectors, supra note 190. A public works contract worth 5 million ECUs would be "enough to upgrade 10 kilometers of railway track, to build 2 kilometers of TGV on flat land, or carry out dredging and repairs in an important port." Id. See COM(88) 377 final, supra note 198, at art. 8; COM(88) 378 final, supra note 199, at art. 3. Article 4 of COM(88) 378 provides a minimum value threshold of 200,000 ECUs for software service contract awards. COM(88) 378 final, supra note 199, at art. 4.

\textsuperscript{213} COM(88) 377 final, supra note 198, at art. 8; COM(88) 378 final, supra note 199, at art. 3.

\textsuperscript{214} COM(88) 377 final, supra note 198, at arts. 9–11; COM(88) 378 final, supra note 199, at art. 5. See Directive 88/295, supra note 92, at art. 8; COM(88) 354 final, supra note 145, at art. 12.

\textsuperscript{215} COM(88) 377 final, supra note 198, at art. 9; COM(88) 378 final, supra note 199, at art. 5.

\textsuperscript{216} COM(88) 377 final, supra note 198, at art. 12; COM(88) 378 final, supra note 199, at art. 6.

\textsuperscript{217} COM(88) 377 final, supra note 198, at arts. 12–18; COM(88) 378 final, supra note 199, at art. 6.
long as it is objective, nondiscriminatory, and reflective of the basic framework requirements set forth in the article. Any criteria or rules developed by the contracting authority would be made available to any interested supplier or contractor upon demand.

Article 20 of COM(88) 377 final contains rules regarding the establishment of a qualification system. If based upon valid criteria, this system would allow a contracting authority to keep and hire from a record of qualified contractors and suppliers. Article 20 also contains notice requirements indicating the existence of a qualification system as well as provisions regulating the application, acceptance, and denial of contractors and suppliers seeking to become qualified, and the removal of contractors and suppliers already on a contracting authority's qualified list. The remaining articles in title III of COM(88) 377 final concern the selection of qualified contractors and suppliers and are similar to those governing the award of public supply and works contracts generally.

Article 24 of COM(88) 377 final would allow contracting authorities to reject any bid where more than half of its value represents the "value of products manufactured or services performed outside the Community or a combination thereof." The Commission has included this provision so that third states might not unilaterally benefit from the open Community market. COM(88) 377 final gives member states until March 1, 1990 to implement all necessary provisions required to effectuate the proposed directive if adopted. Similarly, the deadline provided in COM(88) 378 final is December 31, 1989.

V. COMMUNITY STRATEGIES TO OPEN UP THE PUBLIC PROCUREMENT MARKET BY 1992

Recent Community legislation addresses four problem areas which continue to frustrate the Council's initial efforts to open up public procurement in the

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218 COM(88) 377 final, supra note 198, at art. 19; COM(88) 378 final, supra note 199, at art. 7. At the very least, contracting authorities may not "impose obligations of an administrative, technical or financial nature on some suppliers or contractors that are not imposed on others . . . [nor] require tests or proofs that duplicate objective evidence already available." COM(88) 377 final, supra note 198, at art. 19; COM(88) 378 final, supra note 199, at art. 7.
219 COM(88) 377 final, supra note 198, at art. 19; COM(88) 378 final, supra note 199, at art. 7.
220 COM(88) 377 final, supra note 198, at art. 20; COM(88) 378 final, supra note 199, at art. 7.
221 See Public Procurement in Four Sectors, supra note 190.
224 COM(88) 377 final, supra note 198, at art. 31.
Public Procurement in the EC

Community. These areas of concern are: nationalistic award policies, uneven enforcement of Community rules by the different member states, minimal transparency in procurement procedures, and the exemption of a significant number of public contracts from existing procurement law. If the approach to these concerns, advocated by the Council and Commission in Directive 88/295, COM(88) 354 final, COM(87) 134 final, COM(88) 377 final, and COM(88) 378 final, proves ineffective, 1992 will arrive without public procurement being opened up to Community wide competition in any “real terms.”

A. Nationalistic Public Contract Awards

The structure of the EEC, a cooperative community consisting of independent, sovereign states, has served as an impediment to the efficient operation of Community public procurement law. Political pressures and force of habit have led to the common and costly state practice of “buy[ing] ‘national’ for its own sake.”

In spite of various attempts, it has not yet been possible to break down the obstacles to entry into the national public markets, much less open up regional and local markets. Despite the drawbacks and costs that result from this partitioning, public procurement contractors remain bound to their traditional suppliers. There are many reasons for this situation. Foremost is the existence of short-sighted and short-term political constraints that encourage the natural tendencies of local, regional, and national contractors. The resulting costs to the economy as a whole are enormous.

Indeed, some states have made overt attempts to insulate national contractors and suppliers from Community competition. The cost of such pre-

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229 See infra notes 242–259 and accompanying text for another example of how the Community structure has hindered an open public procurement market.

230 See Public Procurement in Four Sectors, supra note 190; Public Supply Contracts, supra note 1. See also 1985 White Paper, supra note 227, at 39.

231 More Competition Sought, supra note 191. Choosing national contractors and suppliers is a particularly common practice among regional and local authorities where it is estimated that some 40 percent of all government expenditures is incurred. See Communication by the Commission to the Council, Public Supply Contracts Conclusions and Perspectives, COM(84) 717 final [hereinafter Commission Communication]; Weiss, supra note 75, at 327.

232 See 1985 White Paper, supra note 227, at 39 (“[T]he Commission will see to it that a rigorous policy is pursued in regard to state aids so that public resources are not used to confer artificial advantage to some firms over others.”); Commission Communication, supra note 231, at 15 (“[T]he desire for competition is not universally shared by all the participants in the market . . . .”).
ferential treatment in the supply market alone is estimated at forty billion ECU.233

The Community's approach to the evils of nationalistic award practices is threefold. First, and most specifically, the Commission seeks to end state preferential treatment in the form of state aids which often lead to monopolies and bar interested competitors from entering the market.234 As discussed above, state aids are common in the water, energy, transport, and telecommunications sectors.235 In an attempt to address this problem, Commission proposals in COM(88) 377 final and COM(88) 378 final would require contracting authorities within these sectors to abide by the public procurement directives.236 Indeed, the Commission has promised to act whenever state aids “distort competition” and “undermine efforts to increase European competitiveness.”237

On a more general level, the Commission seeks to make public procurement more transparent, thereby exposing national favoritism to the scrutiny of the Community.238 By requiring contracting authorities to prepare periodic reports which detail the number and value of each contract awarded to a particular contractor or supplier, the Commission will be able to monitor better award practices and detect any pattern of national preference.239

Finally, the Commission has proposed a directive that would allow it to intervene whenever a contracting authority awards a contract to a national contractor or supplier in lieu of a more economically advantageous tender.240 By giving the Council directives “teeth,” it is hoped that Community law will serve as more of a deterrent and, consequently, ensure increased compliance by member states.241

B. Ineffective Enforcement and Remedy

According to article 189 of the EEC Treaty, “[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”242

In the case of the public procurement directives, this multi-state approach to

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233 Commission Communication, supra note 231, at 3; More Competition Sought, supra note 191.
235 See supra notes 191–226 and accompanying text.
236 Id. See also infra notes 274–293 and accompanying text.
238 See infra notes 260–273 and accompanying text.
239 See, e.g., Directive 88/295, supra note 92, at art. 17; COM(88) 354 final, supra note 145, at art. 32; COM(88) 377 final, supra note 198, at art. 28; COM(88) 378 final, supra note 199, at art. 8.
240 COM(87) 134 final, supra note 175, at arts. 2–4. See infra notes 242–259 and accompanying text.
241 See Commission Communication, supra note 231, at 15.
242 EEC Treaty, supra note 9, at art. 189.
implementation has resulted in a disjointed body of law. This is particularly true of member state rules governing enforcement of public procurement law.

Domestic rules governing public procurement disputes and remedies vary greatly from member state to member state. The Commission has noted, for example, that the time given to appeal and within which the statute of limitations runs vary among the member states. Moreover, some member states allow dispute settlements while others do not, and access to damage awards is not equal to all members of the Community. Because of the differences in treatment resulting from disparate member state laws, contractors and suppliers have "little confidence in their rights of redress ...." The Commission believes that these contractors and suppliers are, therefore, discouraged from entering the market.

In order to ensure member state compliance with the public procurement directives, the Commission has, at times, intervened in the contract award process—always with a good deal of success. These interventions, however, have been "informal and ad hoc ...." In order to formalize intervention, the Commission has proposed a Council directive which would regulate such actions as well as allow other procedures by which Community public procurement law may be enforced. Centralizing the enforcement authority would likely avoid many of the problems experienced by the present system. The Commission has noted in the past, however, that its lack of resources has limited its ability to act upon all the complaints it has received. "The resulting delays and backlogs benefit the infringing states, impede systematic action, lead to political and economic disequilibria of infringement proceedings, and frustrate the confidence of industry as well as that of the man in the street." In light of the significant percentage of the EEC's economy devoted to public works and supply

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243 See, e.g., Commission Communication, supra note 231, at 8.


245 Id.

246 Memo on the Application of Public Procurement Law, supra note 84, at 1–2.

247 Id.

248 Commission Communication, supra note 231, at 25.

249 Id.

250 Id. at 26.

251 Id.

252 See supra notes 175–190 and accompanying text.


254 Id.
contracts, it seems possible that even a formalized and expanded enforcement process might be overtaxed by the sheer number of anticipated complaints.

In addition to formalizing procedures of intervention, the Commission has also noted the need to reform existing penalties. At present, the penalties that the Commission imposes upon contracting authorities guilty of public procurement law violations are often late and largely ineffective. The Commission believes that their receipt of the authority to suspend the contract process when wrongdoing is uncovered will amend this situation. Moreover, the Commission is considering other preventative and remedial measures as well as the possibility of new sanctions.

C. Transparency in Public Contract Awards

By introducing more transparency into public contract awards, the Commission seeks to foster confidence in the award system, facilitate monitoring and enforcement, and encourage compliance with Community procedures. The original public procurement directives issued by the Council require notice publication of open and restricted contracts only. That degree of transparency, however, has proved insufficient to ensure the Community objectives listed above. The Commission soon realized that it had to take more drastic steps toward ensuring transparency in public contract awards.

The Commission has concentrated its efforts to increase transparency in three areas: pre-contract information, special tender information, and award results. Typically, a pre-contract award notice would be published annually and would contain certain information regarding the nature and value of all public contracts over the minimum threshold value which a contracting authority envisages awarding in the coming year. A special tender contract notice would require a contracting authority to notify the Community of the use of a

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255 See supra note 1 and accompanying text.
256 See Memo on the Application of Public Procurement Law, supra note 84, at 2.
257 Id.
258 Id.
260 See generally id. at 24, 39; Commission Communication, supra note 231, at 5.
262 See Commission Communication, supra note 231, at 5, 23.
263 Id.; More Competition Sought, supra note 191.
264 See Commission Communication, supra note 231, at 5, 23; Weiss, supra note 75, at 328; Tendering for Public Contracts, supra note 1.
265 Pre-contract notices required by the proposed directive on public works contracts would be published "as soon as possible after the decision approving the planning of the works contracts . . . ." COM(88) 354 final, supra note 145, at art. 14.
266 Id.; Directive 88/295, supra note 92, at art. 9; COM(88) 377 final, supra note 198, at art. 14; COM(88) 378 final, supra note 199, at art. 6.
noncompetitive procedure and indicate the nature and value of the contract to be so awarded.267 This notice would discourage the misuse of special procedures which, at present, may be carried out in secret.268 Furthermore, a report indicating the contracting authority's reasons for using the special award procedure would often be required.269 Finally, a notice containing the results of the award and the provisions of the winning bid would allow better Community monitoring of contract awards.270

Directive 88/295, COM(88) 354 final, COM(88) 377 final, and COM(88) 378 final all contain provisions which require pre-contract, special tender, and award notices.271 Certain provisions within this Community legislation also require greater transparency regarding labor obligations.272 Finally, the Council and Commission have developed new provisions which would improve the quality of the statistical information compiled by the Commission.273

D. Contracts Exempted from the Public Procurement Directives

At present, contracts awarded by the water, energy, and transport services, as well as public supply contracts offered by the telecommunications service are excluded from the operation of Community public procurement law.274 In addition, concession, military, and most service contracts are excluded as well.275 As noted in section IV(D) of this Comment, the inclusion of many of these contracts into the existing legal structure poses some problem.276 Nonetheless, the exclusion of these contracts has been costly and prevents Community wide competition in the public procurement market.277

267 Directive 88/295, supra note 92, at art. 7; COM(88) 377 final, supra note 198, at art. 15; COM(88) 378 final, supra note 199, at art. 6.

268 See supra notes 91–92 and accompanying text.

269 See, e.g., COM(88) 354 final, supra note 145, at art. 10.


271 See supra notes 264–270.

272 COM(88) 354 final, supra note 145, at art. 27. See also Public Works Contract Memo, supra note 155, at 14.

273 See, e.g., Directive 88/295, supra note 92, at arts. 7–8, 17; COM(88) 354 final, supra note 145, at arts. 10, 12, 29, 31–32; COM(88) 377 final, supra note 198, at arts. 4, 22, 27–28; COM(88) 378 final, supra note 199, at arts. 3, 7–8. With regard to statistical information, the Commission has experienced some difficulty getting adequate and timely reports from the member states. See Commission Communication, supra note 231, at 3. See also 1985 White Paper, supra note 227, at 24.

274 Directive 71/305, supra note 15, at arts. 3(4)–(5); Directive 77/62, supra note 15, at art. 2(b); Directive 88/295, supra note 92, at art. 3.

275 See Commission Communication, supra note 231, at 12–13, 26. Service contracts awarded in conjunction with works contracts are subject to the public works directive. Id. at 26. See generally 1985 White Paper, supra note 227, at 24.

276 See supra notes 191–226 and accompanying text.

277 1985 White Paper, supra note 227, at 24; Public Procurement in Four Sectors, supra note 190. "[O]nly
In response to a Council statement requesting the Commission to draft measures which would open up telecommunication supply contracts to Community competition, the Commission recommended certain limited procedures which the Council adopted in 1984. Realizing that a fully liberalized market would require further legislation, the Commission has proposed a directive which would bring most telecommunication public contracts within the scope of Community public procurement law. Likewise, the Commission has proposed a companion directive that would work the same changes upon the public procurement market in the water, energy, and transport sectors.

Many member states argue that the existing minimum value thresholds for public works and supply contracts are too low, thus forcing contracting authorities to award arguably small contracts in conformity with the public procurement directives. The Commission disagrees, however, claiming that the thresholds are too high and allow many contracts, which would otherwise be subject to the directives, to escape their reach. Indeed, in 1982, 44 percent of public contracts offered by central governments fell below the minimum value thresholds. Moreover, one third of the entities covered by the provisions of Directive 80/767 did not make a purchase over the minimum value threshold. Despite these statistics, Directive 88/295 has left the minimum value threshold for supply contracts unaltered. Further, the directive has lowered the minimum value threshold for contracts subject to Directive 80/767 by only 10,000 ECU. Indeed, the proposed directive in COM(88) 354 final would increase the minimum value threshold for public works contracts from 1,000,000 ECU to 5,000,000 ECU. It is interesting to note that the Commission has advocated this increase after taking into account the "perverse effects

... about 20 percent ... of all public markets are covered by rules intended to ensure the free movement of goods by requiring the publication of notices of public contracts ... and by ensuring compliance with objective procedural rules and criteria for awarding contracts." More Competition Sought, supra note 191.

Council Statement Concerning the Bodies Responsible in Member States for Providing Telecommunication Services, 20 O.J. EUR. COMM. (No. C 11) 3 (1977).


COM(88) 378 final, supra note 199. See supra notes 191–226 and accompanying text.

COM(88) 377 final, supra note 198. See supra notes 191–226 and accompanying text.


Id. at 12–13. Moreover, high minimum value thresholds keep small and medium sized entities (SME) from participating in public procurement. Id. at 15, 22; Tendering for Public Contracts, supra note 1.

Commission Communication, supra note 231, at 12.

Id. at 13.


Id.

COM(88) 354 final, supra note 145, at art. 6.
of too high a threshold” as well as the exclusionary effects a high threshold has on small and medium sized enterprises.289

The Commission proposal in COM(88) 354 final, articles 2, 4, 18, and 19, would subject public works contracts offered to or by a concessionaire to the Community rules governing notice publication.290 On the other hand, Commission proposals in COM(88) 377 final and COM(88) 378 final would exempt all water, energy, transport, and telecommunication contracts awarded by a concessionaire if these subcontracts are awarded to entities with which the concessionaire is associated or affiliated.291

Service contracts, except those associated with a public works contract, enjoy continued exempt status in Community public procurement legislation.292 Likewise, military works and supply contracts which are necessary to member state security may be awarded without regard to Community public procurement law.293

VI. CONCLUSION

In light of the newly adopted Council directive governing the award of public supply contracts, it seems likely that the remaining Commission proposals will be adopted by the Council. They are not extreme nor do they require extensive revision of existing law. It is possible, however, that none of these new enactments will have an immediate effect upon member state practice in the area of public supply and works contracts. While the Community’s strategies to open up public procurement will certainly help complete the law governing this area, a free public contract market will occur only when contractors and suppliers feel confident in the law, and are ready to avail themselves of interstate public contracts. Indeed, only a consistent and sustained application of the new amendments “will increase the credibility of the Community’s efforts to break down the psychological reluctance of traders, industrialists, and more particularly small and medium-size enterprises to bid across frontiers for public [supply and] work[s] contracts.”294 The task seems Herculean as 1992 draws ever nearer.

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289 Public Works Contract Memo, supra note 155, at 8. See supra note 283.
290 COM(88) 354 final, supra note 145, at arts. 2, 4, 18–19.
291 COM(88) 377 final, supra note 198, at arts. 1, 3; COM(88) 378 final, supra note 199, at art. 3.
293 Directive 88/295, supra note 92, at arts. 3–4; COM(88) 377 final, supra note 198, at art. 6; COM(88) 378 final, supra note 199, at art. 3. See also EEC Treaty, supra note 9, at art. 223(b) (“Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war materials . . . .”)
294 Tendering for Public Contracts, supra note 1.