

Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Text with EEA relevance)

TITLE I

DEFINITIONS, SCOPE AND GENERAL PRINCIPLES

Article 1

Definitions

For the purposes of this Directive, the following definitions shall apply:

1. ‘Common Procurement Vocabulary (CPV)’ means the reference nomenclature applicable to contracts awarded by contracting authorities/entities, as adopted by Regulation (EC) No 2195/2002;
2. ‘Contracts’ means contracts for pecuniary interest concluded in writing as referred to in Article 1(2)(a) of Directive 2004/17/EC and Article 1(2)(a) of Directive 2004/18/EC;
3. ‘Works contracts’ means contracts having as their object either the execution, or both the design and execution, of works related to one of the activities mentioned in Division 45 of the CPV, or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority/entity. A ‘work’ means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or technical function;
4. ‘Supply contracts’ means contracts other than works contracts having as their object the purchase, lease, rental or hire-purchase, with or without the option to buy, of products.

A contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations shall be considered to be a ‘supply contract’;

5. ‘Service contracts’ means contracts other than works or supply contracts having as their object the provision of services.

A contract having as its object both products and services shall be considered to be a ‘service contract’ if the value of the services in question exceeds that of the products covered by the contract.

A contract having as its object services and including activities mentioned in Division 45 of the CPV that are only incidental to the principal object of the contract shall be considered to be a service contract;

6. ‘Military equipment’ means equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material;

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7. 'Sensitive equipment', 'sensitive works' and 'sensitive services' means equipment, works and services for security purposes, involving, requiring and/or containing classified information;
8. 'Classified information' means any information or material, regardless of the form, nature or mode of transmission thereof, to which a certain level of security classification or protection has been attributed, and which, in the interests of national security and in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, requires protection against any misappropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise;
9. 'Government' means the State, regional or local government of a Member State or third country;
10. 'Crisis' means any situation in a Member State or third country in which a harmful event has occurred which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people, or has a substantial impact on property values, or requires measures in order to supply the population with necessities; a crisis shall also be deemed to have arisen if the occurrence of such a harmful event is deemed to be impending; armed conflicts and wars shall be regarded as crises for the purposes of this Directive;
11. 'Framework agreement' means an agreement between one or more contracting authorities/entities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged;
12. 'Electronic auction' means a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

Consequently, certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, may not be the object of electronic auctions;
13. 'Contractor', 'supplier' and 'service provider' means any natural or legal person or public entity or consortium of such persons and/or bodies which offers on the market to execute works, supply products and provide services, respectively;
14. 'Economic operator' means a contractor, supplier or service provider. It is used merely in the interests of simplification;
15. 'Candidate' means an economic operator which has sought an invitation to take part in a restricted or negotiated procedure or a competitive dialogue;
16. 'Tenderer' means an economic operator which has submitted a tender under a restricted or negotiated procedure or a competitive dialogue;
17. 'Contracting authorities/entities' means contracting authorities as referred to in Article 1(9) of Directive 2004/18/EC and contracting entities as referred to in Article 2 of Directive 2004/17/EC;
18. 'Central purchasing body' means a contracting authority/entity as referred to in Article 1(9) of Directive 2004/18/EC and Article 2(1)(a) of Directive 2004/17/EC, or a European public body, which:

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- acquires supplies and/or services intended for contracting authorities/entities, or,
 - awards contracts or concludes framework agreements for works, supplies or services intended for contracting authorities/entities,
19. ‘Restricted procedures’ means procedures in which any economic operator may ask to participate and whereby only those economic operators invited by the contracting authority/entity may submit a tender;
20. ‘Negotiated procedures’ means procedures in which the contracting authority/entity invites the economic operators of its choice and negotiates the terms of the contract with one or more of these;
21. ‘Competitive dialogue’ means a procedure in which any economic operator may ask to participate and whereby the contracting authority/entity conducts a dialogue with the candidates admitted to that procedure with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.
- For the purposes of recourse to the procedure referred to in the first subparagraph, a contract is considered to be ‘particularly complex’ where the contracting authority/entity is not objectively able:
- to define the technical means in accordance with Article 18(3)(b), (c) or (d), capable of satisfying its needs or objectives, and/or,
 - to specify the legal and/or financial make-up of a project,
22. ‘Subcontract’ means a contract for pecuniary interest concluded in writing between a successful tenderer for a contract and one or more economic operators for the purposes of carrying out that contract and having as its object works, supplies of products or the performance of services;
23. ‘Related undertaking’ means any undertaking over which the successful tenderer can exert a dominant influence, whether directly or indirectly, or any undertaking which can exert a dominant influence on the successful tenderer or which, as the successful tenderer, is subject to the dominant influence of another undertaking as a result of ownership, financial participation or the rules which govern it. A dominant influence on the part of the undertaking is presumed when, directly or indirectly in relation to another undertaking, it:
- holds a majority of the undertaking’s subscribed capital,
 - controls a majority of the votes attached to the shares issued by the undertaking, or,
 - is entitled to appoint more than half of the undertaking’s administrative, management or supervisory bodies,
24. ‘Written’ or ‘in writing’ means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means;
25. ‘Electronic means’ means any means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
26. ‘Life cycle’ means all the possible successive stages of a product, i.e. research and development, industrial development, production, repair, modernisation, modification, maintenance, logistics, training, testing, withdrawal and disposal;

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27. ‘Research and development’ means all activities comprising fundamental research, applied research and experimental development, where the latter may include the realisation of technological demonstrators, i.e., devices that demonstrate the performance of a new concept or a new technology in a relevant or representative environment;
28. ‘Civil purchases’ means contracts not subject to Article 2 covering the procurement of non-military products, works or services for logistical purposes and concluded in accordance with the conditions specified in Article 17.

Article 2

Scope

Subject to Articles 30, 45, 46, 55 and 296 of the Treaty, this Directive shall apply to contracts awarded in the fields of defence and security for:

- (a) the supply of military equipment, including any parts, components and/or subassemblies thereof;
- (b) the supply of sensitive equipment, including any parts, components and/or subassemblies thereof;
- (c) works, supplies and services directly related to the equipment referred to in points (a) and (b) for any and all elements of its life cycle;
- (d) works and services for specifically military purposes or sensitive works and sensitive services.

Article 3

Mixed contracts

1 A contract having as its object works, supplies or services falling within the scope of this Directive and partly within the scope of Directive 2004/17/EC or Directive 2004/18/EC shall be awarded in accordance with this Directive, provided that the award of a single contract is justified for objective reasons.

2 The award of a contract having as its object works, supplies or services falling partly within the scope of this Directive, with the other part not being subject to either this Directive, or to Directive 2004/17/EC or Directive 2004/18/EC, shall not be subject to this Directive, provided that the award of a single contract is justified for objective reasons.

3 The decision to award a single contract may not, however, be taken for the purpose of excluding contracts from the application of this Directive or of Directive 2004/17/EC or Directive 2004/18/EC.

Article 4

Procurement principles

Contracting authorities/entities shall treat economic operators equally and in a non-discriminatory manner and shall act in a transparent way.