

The Impact of EU accession on Water Services Corporation

A report prepared by

EUROPA Research & Consultancy Services Ltd

for

Water Services Corporation

PART III
Conclusions
(EU Public Procurement Rules)

May 2000

The Impact of EU Accession on Water Services Corporation

A report prepared by

EUROPA Research & Consultancy Services Ltd,

for the Water Services Corporation.

PART III / Conclusions / EU Public Procurement Rules

Manuscript completed in May 2000.

© Joint copyright:

EUROPA Research & Consultancy Services Limited and
WATER SERVICES CORPORATION.

This report has been prepared for and for the sole use of Water Services Corporation. It should be retained as private and confidential to the said corporation. The report is covered by the copyright laws of Malta. Breach of copyright exposes persons in violation to the penalties envisaged by the Copyright Act. No part of this report, whether in whole or in part, may be published without prior authorisation in writing of *EUROPA* Research & Consultancy Services Limited and Water Services Corporation. Copies are hereby authorised for the internal use of the Water Services Corporation.

EUROPA Research & Consultancy Services Ltd,
36, Archbishop Street, Valletta VLT 08, MALTA.
Tel: 226 331; Fax: 247 170.

Contact:

Dr Joanna Drake LLD, Dip.Adv.Eur.Stud(*Bruges*),
Dr Mariosa Vella Cardona LLD, M'Jur (Eur. Law)

WATER SERVICES CORPORATION

Water Services Corporation

Luqa.

Contact: Mr Antoine Riolo, Chief Executive

Contents

	Page
Introduction	
Terms of reference	5
The first phase	5
Submission of interim reports: Parts I to V	6
Concluding reports	
How this report is divided	
Phase 2: Meetings and follow-up to the report	
Note on the report	
Instructions on how to read the report	
Working team	
Directive 93/38	
What are supply, works or services contracts?	
Contracts excluded from the purview of the Directive	
Contracts which fall within the purview of the Directive	
Thresholds	
How is the amount of the contract calculated?	
Rules governing the award of a contract	
Technical specifications	
Procedures for the award of contracts	
Qualification, selection and award	
WSC Position	
WSC's present position	
Reform & Implementation	
Proposals for reform	
Negotiating Position	
Proposals for negotiating position to be adopted	
Council Directive 92/13/EEC	
WSC Position	
WSC's present position	
Reform & Implementation	
Proposals for reform	
Negotiating Position	
Proposals for negotiating position to be adopted	

Introduction

Terms of reference

This volume is part of a wider report on the impact of EU accession on the Water Services Corporation originally commissioned in April 1st 1999. The terms of reference are the following:

1. The need to update to the WSC report submitted in July 1996 and prepared by Richard Morris & Associates of Scotland entitled "European Union Water Directives Study".
2. The need for a study of the impact of EU membership on WSC through an assessment of the adoption by Malta of the *acquis communautaire*.
3. Proposals for reform in view of the adjustments rendered necessary by membership.
4. Proposals for a negotiating position to be adopted by WSC in view of accession negotiations.
5. Proposal of an implementation strategy, including a time frame to be followed by the Corporation between now and accession.
6. An implementation programme as a follow-up to the study.

The above constitute the terms of reference of this report.

The first phase

In an initial phase leading to the above, Europa Research & Consultancy Services was given the task to prepare and submit a research report covering the following parts, namely:

1. The need to update to the report submitted in July 1996 by Richard Morris & Associates of Scotland entitled "European Union Water Directives Study".
2. The need for a study of the impact of EU membership on WSC through an assessment of the adoption by Malta of the *acquis communautaire*. This section, which shall form the core of the report, shall include the following sections:
 - (a) Ramifications of the EU **Environment policy** covered in point 1);
 - (b) **EU incentives** how to access them, including

community programmes and funding, both before and after accession:

(c) EU **Public Procurement**

(d) EU rules on **Health & Safety at work**

(e) **Competition** policy issues.

3. Proposals for reform in view of the adjustments rendered necessary by membership.

4. Proposals for a negotiating position to be adopted by WSC in view of accession negotiations.

Submission of interim reports: Parts I to V

Throughout the year 1999, five interim reports were submitted to WSC covering points 1 and 2(a) to 2(e) above.

These reports were duly studied by the WSC in close consultation with Europa Research & Consultancy Services. Subsequently, WSC submitted its views and positions on the points raised in the said five reports.

Concluding reports

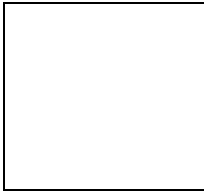
Taking into accounts WSC's submissions on each of the five interim reports, Europa Research & Consultancy is now submitting its final report on each of these reports. For clarity, the concluding report is again divided into five parts on the same lines of division as the interim reports. In this case, however, the concluding report will focus on points 3 and 4 above, namely, proposals for reform in view of the adjustments rendered necessary by membership accompanied with a proposals for a negotiating position and an implementation strategy to be adopted by WSC in view of accession negotiations.

How this report is divided

This volume constitutes the PART III of the concluding report and is being submitted in May 2000. It covers the area of the EU Public Procurement Rules. A further four reports, concluding Parts I, II, IV and V are also being submitted.

This volume is divided into the following sections:

1. A brief summary of the key legislation and main points arising out of the interim report – Part III (EU Position);
2. A brief summary of WSC's position on the EU legislation (WSC position);
3. Proposals for reform and implementation (Reform & Implementation) (for the purposes of implementation, the official working



date of 1st January 2003 shall be adopted) and

4. Proposals for WSC's negotiating position (WSC Negotiating Position).

*Phase 2:
Meetings and
follow-up to
the report*

The submission of all five concluding reports shall be followed as necessary by information and debriefing meetings with the WSC officials in order to ensure that maximum utility is made out of the report leading to an effective follow-up strategy.

*Note on the
report*

This report does not attempt to constitute an academic study. Quite the contrary, it tries to tackle the issues in a practical manner diluting their complexities and presenting them in an intelligible and easy-to-read manner. To this end, technical references and footnotes have been kept to a minimum.

*Instructions
on how to
read the
report*

The report relies heavily on the use of margin notes to indicate the contents of each section or paragraph accordingly. This is done to enable easier reference and reading. All margins notes are listed in the content list and on the left-hand side of every paragraph. Reading through the margin notes one can quickly get an idea of the issues that are tackled in the report and cross-refer to different sections.

Working team

The team working on the project was led by Dr Joanna Drake and included Dr Mariosa Vella Cardona. Team members hold academic post-graduate training on EU affairs and an active involvement in lecturing and/or research contributions on the subject.

EU Public Procurement Rules

Introduction As explained in the introduction, this document follows up on Part III of the WSC report which had focused in detail on EU rules on public procurement.

We recall that 'Public procurement' means the purchasing of supplies, works and services by a state or state-governed bodies. The overriding EU objective in this sphere is of opening up procurement to EU-wide competition by means of transparency in contract award procedures and the ending of national market monopolies.

The first report (Part III) had focused on the two main EU public procurement laws, as follows:

- **Directive 93/38** as recently amended by Directive 98/4 which regulates transport, energy, telecommunications and **water** (utilities) contracts, and:
- **Directive 92/13** which relates to the co-ordination of the laws, regulations and administrative provisions in the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications.

In the case of each of the above two directives, this document is divided in the following sections:

- A brief summary of the key legislation and main points arising out of the interim report – Part III (**EU Position**)
- A brief summary of WSC's position on the EU legislation (**WSC position**)
- Proposals for reform and implementation (**Reform & Implementation**) (for the purposes of implementation, the official working date of 1st January 2003 shall be adopted) and
- Proposals for WSC's negotiating position (**WSC Negotiating Position**)

Directive 93/38

EU Position

<i>Directive 93/38</i>	The salient features of this (main) directive are the following:
<i>What are supply, works or services contracts?</i>	<p>The contracts covered by the directive are the following:</p> <ol style="list-style-type: none"> 1. the purchase, lease, rental or hire-purchase, with or without options to buy, of products; 2. the execution, or both the execution and design or the realisation, by whatever means, of building or civil engineering activities referred to in Annex XI of the Directive. 3. in the case of service contracts, any object other than those referred to in (a) or (b) above <u>but excluding</u>: <ul style="list-style-type: none"> • contracts for the acquisition or rental, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights thereon. However, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, are subject to this Directive; • contracts for voice telephony, telex, radiotelephony, paging and satellite services; • contracts for arbitration and conciliation services; • contracts for the issue, sale, purchase or transfer of securities or other financial instruments; • employment contracts; • research and development service contracts other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting entity.
<i>Contracts excluded from the purview of the Directive</i>	<ul style="list-style-type: none"> • The Directive does not apply to contracts which the contracting entities listed in Annex I award for the purchase of water. Annex I provides a list of entities which have been set-up in different Member States. These entities are all involved in the production, transport or distribution of drinking water. Neither does it apply to contracts which the

contracting entities (listed in Annexes II to V) award for the supply of energy or of fuels for the production of energy.

- The Directive also does not apply to service contracts which a contracting entity awards to an affiliated undertaking, that is an undertaking which is strongly linked to the contracting entity (80% of the average turnover of this undertaking comes from services which it gives to the contracting entity).

Contracts which fall within the purview of the Directive

The Directive specifically applies to contracts or design contests awarded by entities which are concerned with the production, transport or distribution of drinking water (such as the Water Services Corporation) when such contracts are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water intended for the supply of drinking water represents more than 20% of the total volume of water made available by these projects or irrigation or drainage installations. Similarly, the Directive also applies to contracts awarded by the above-mentioned entities, when such contracts are connected with the disposal or treatment of sewage.

Thresholds

It has already been said that the Directive only applies when the contracts reach a certain threshold. The thresholds are the following:

- In the case of contracts awarded by contracting entities operating in the fields of water, as is the case with the Water Services Corporation, the directive is applicable when the estimated value net of VAT of such contracts, is not less than the equivalent in Euro of SDR 400,000 (i.e. Eur 412,044) in relation to the procurement of supplies and of priority services within Annex XVIA, with the exclusion of research and development services (Annex XVIA cat.8) and certain telecommunications services (Annex IA cat.5, under CPC i.e. Common Products Classification numbers 7524, 7525 and 7526, that is programme transmission services, interconnection services and integrated telecommunications services).
- For contracts for the procurement of all other services, the threshold is ECU 400,000.
- For works contracts awarded by a contracting entity operating in the fields of water, the threshold is the equivalent in ECU of 5,000,000 SDR.

How is the amount of the

Details on how the amount of the threshold is calculated are provided in the main text of this report.

*contract
calculated?*

*Rules
governing
the award of
a contract*

The fundamental rule underlying this Directive is that there has to be **no discrimination** between different suppliers, contractors or service providers in the award of contracts.

In addition, there are a series of rules with which WSC, as a contracting entity, to which the Directive applies, has to abide in the award of contracts. These are the following:

*Technical
specifications*

Technical specifications must be included in the general documents or the contract documents.

*Procedures
for the award
of contracts*

- A call for competition has to be made by means of a notice drawn up in accordance with Annex XII A, B or C.
- When a call for competition is made by means of a periodic indicative notice, a series of details have to be included (as listed in the report).
- Notices referred to above are to be published in the Official Journal of the European Communities and cannot be published in another way before it has been sent to the Community Office for such publication.
- After a call for competition has been made, the contracting entity may choose an award procedure which is either open, restricted or negotiated (subject to the cases mentioned above where a restricted or negotiated procedure has to be adopted).
- In certain cases, a contracting entity may proceed to use a procedure without a prior call for competition.

*Qualification,
selection and
award*

- If a particular contracting entity so wishes, it may establish and operate a system of qualification of suppliers, contractors or service providers.
- Applicants whose qualification is refused are to be informed of such decision and the reasons for refusal.

WSC Position

*WSC's
present
position*

The points raised by WSC in reaction to this directive may be summarised as follows:

- (a) The need to take note of a Circular by the Contracts

Department which requires WSC to include a special clause indicating the number and details of employees registered with ETC. Clearly, this requirement may well be retained for the purposes of contractors which are Maltese companies or registered in Malta, but may not present an obstacle to foreign (EU) companies tendering for WSC contracts provided that the threshold determining the applicability of the directive is reached.

- (b) The requirement for the inclusion of technical specifications is currently being carried out by WSC. This does not seem to present a problem since the EU directive itself envisages the possibility of technical specification requirements.
- (c) WSC raises a concern that in some limited cases (e.g. pushfit fitting) it adopts specifications based on design characteristics rather than on performance requirements due to security requirements.
- (d) Finally, the WSC points out that certain administrative modifications may be required in connection with the publication of tenders.

Reform & Implementation

Proposals for reform

The comments that may be made on the four WSC raised above are the following:

- (a) **Department of Contracts Circular:** Clearly, this requirement may well be retained for the purposes of contractors which are Maltese companies or registered in Malta, but may not present an obstacle to foreign (EU) companies tendering for WSC contracts provided that the threshold determining the applicability of the directive is reached.
- (b) **Standardisation:** The fact that WSC normally follows BS/EN specifications does not present any problem unless the specific area or product is covered by a specific EU standard regulation which differs from the British standard (highly unlikely). The same applies, in principle to ISO and EN (ISO). For completeness sake, WSC would have to ensure – before issuing tenders – that the product / works required are not already covered by specific EU standardisation directives. In any such event, recourse may be made to the Malta Standardisation Authority for assistance since it is up to this authority to ensure that the necessary standards

are gradually introduced in Malta.

(c) Design characteristics vs performance requirements:

This does not appear to pose any problem with the EU directive provided that the fundamental rule underlying this Directive - that there has to be no discrimination between different suppliers, contractors or service providers in the award of contracts – is adhered to.

(d) Administrative burden: This requirement is likely to increase certain administrative burdens in relations to the issuing of tender documents. However, there appears to be sufficient time for a gradual phasing in of these additional administrative requirements between now and accession.

Negotiating Position

Proposals for negotiating position to be adopted

It is submitted that there do not appear to be any insurmountable difficulties for WSC to be able to adhere to this directive and that therefore no requests for special arrangements or transitional periods should be made to the government.

Council Directive 92/13/EEC

*Council
Directive
92/13/EEC*

The main features of this Directive are the following:

- Member States must ensure that a system of review is made available to suppliers and contractors.
- When the European Commission itself is of the opinion that a clear and manifest infringement of the Community procurement rules has taken place, it can bring the alleged infringement to the attention of the competent authorities of the Member State.
- Member States must set up an attestation system whereby contracting entities may have their contract award procedures and practices examined by an independent body of persons who ensure that those procedures and practices are in conformity with Community law.

WSC Position

*WSC's
present
position*

No particular comments from WSC on this directive, largely because it applies to Member States and not specifically to WSC itself.

Reform & Implementation

*Proposals for
reform*

Not applicable.

Negotiating Position

*Proposals for
negotiating
position to be
adopted*

No special requests for WSC.