ANNEX 3

Other Entities (Utilities)

Goods
Threshold: SDR 400,000

Services
Threshold: SDR 400,000

Construction Services
Threshold: SDR 5,000,000

1. All procuring entities whose procurement is covered by the EEA utilities directive which are contracting authorities (i.e. those covered under Annex 1 and Annex 2) or public undertakings[1] and which have as one of their activities any of those referred to below or any combination thereof:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply of drinking water to such networks;

(b) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity or the supply of electricity to such networks;

(c) the provision of airport or other terminal facilities to carriers by air;

(d) the provision of maritime or inland port or other terminal facilities to carriers by sea or inland waterway;

(e) the provision or operation of networks[2] providing a service to the public in the field of transport by urban railway, automated systems, tramway, trolley bus, bus or cable.

2. An indicative list of Other Entities (Utilities) is attached.

[1] According to the EEA utilities directive, a public undertaking is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the majority of the undertaking's subscribed capital, or
- control the majority of the votes attaching to shares issued by the undertaking, or
- can appoint more than half of the undertaking's administrative, management or supervisory body.

[2] As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

Notes to Annex 3

1. Procurement for the pursuit of an activity listed above shall not be subject to this Agreement when the activity is directly exposed to competition on markets to which access is not restricted.

2. This Agreement does not cover procurement by entities included in this Annex:

(a) for the purchase of water and for the supply of energy or of fuels for the production of energy;

(b) for purposes other than the pursuit of their activities as described in this Annex or for the pursuit of such activities in a non-EEA country;

(c) for purposes of re-sale or hire to third parties provided that the procuring entity enjoys no special or exclusive right to sell or hire the subject of such contracts and that other entities are free to sell or hire it under the same conditions as the procuring entity.

3. This Agreement does not cover procurement:

(a) by a procuring entity from an affiliated undertaking[3]; or

(b) by a joint venture formed exclusively by a number of procuring entities for the purpose of carrying out a relevant activity within the meaning of paragraphs (a) to (e) of this Annex, from an undertaking which is affiliated with one of these procuring entities,

provided that at least 80 per cent of the average turnover of the affiliated undertaking with respect to goods, services or construction services for the preceding three years derives respectively from the provision of such services or goods to undertakings with which it is affiliated.

When, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it will be sufficient for that undertaking to show that the turnover referred to in this paragraph is credible, in particular by means of business projections.

4. This Agreement does not cover procurement:

(a) by a joint venture, formed exclusively by a number of procuring entities for the purpose of carrying out activities within the meaning of paragraphs (a) to (e) of this Annex, from one of these procuring entities; or

(b) by a procuring entity from such a joint venture of which it forms part, provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the procuring entities, which form it, will be part thereof for at least the same period.

[3] "affiliated undertaking" means any undertaking the annual accounts of which are consolidated with those of the procuring entity in accordance with the requirements of Council Directive 83/349/EEC on consolidated accounts, or in case of entities not subject to that Directive, any undertaking over which the procuring entity may exercise, directly or indirectly, a dominant influence, or which may exercise a dominant influence over the procuring entity, or which, in common with the procuring entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.