

POSITION PAPER

On the Current EU Public Procurement Framework

Brussels, 05/12/2024

Key messages

Public procurement is crucial for driving the green transition, but the current EU framework faces challenges such as reduced competition, an over-reliance on price and the growth of direct awards. FIEC supports simplifying rules but cautions against unnecessary changes, urging a careful review. Key recommendations include promoting fair competition by addressing third country bidders and low bids and limiting in-house procurement. FIEC also calls for clear strategic procurement guidelines in line with EU green objectives, balanced subcontracting rules, transparent selection criteria and effective price adjustment mechanisms to ensure fair procurement practices.

Public procurement will play a key role in the green transition as it specifies the requirements under which construction companies compete for **public** works contracts.

The current EU public procurement framework, consisting mainly of Directive 2014/24/EU (public procurement) and Directive 2014/25/EU (utilities procurement) has been in place since 2014. Several problems observed in the European public procurement market include the decline in competition in public procurement over the last decade, the share of direct awards and single bidder procedures and the over-reliance on price as an award criterion.¹ Addressing these issues is necessary to improve the functioning of the European public procurement market.

At a political level,² there have been calls to revise the current EU public procurement framework.³ According to the mission letter of Commissioner Séjourné, this revision should aim at cutting red tape and allow European products to be given preference in public procurement in strategic

¹ European Court of Auditors' (ECA) Special Report No. 28/2023

² For example, *Letta report on the future of the single market*.

³ *Europe's Choice: Political Guidelines for the next European Commission 2024-2029*, pp. 11

sectors.⁴ However, in the past such revisions have also been an opportunity to amend various parts of the current framework.

FIEC supports the wish to simplify the rules and reducing administrative burdens. However, FIEC considers that **the Commission should carefully consider whether a revision of the framework is really needed or whether there is an application or enforcement problem that needs to be addressed**. Nevertheless, FIEC would like to make the following recommendations in the event of a revision of the Directives:

A Directive is a better option than a Regulation

FIEC considers that the choice of legal instrument should not change. **FIEC strongly disagrees with the possibility of transforming the EU procurement framework into a Regulation**, which has been proposed by some in order to limit the discretion for national implementation and the risk of fragmentation.⁵

Public procurement procedures in Europe are based on **fundamental principles and** an EU framework that leaves some room for specific national implementation rules. This is particularly important for the construction industry given the specific characteristics of the sector, which may vary from country to country.

Ensuring a level-playing field in the public procurement market

The activities of State-owned construction enterprises (SOEs) from third countries in and around the EU has become a significant problem over the past decade.⁶ Recent examples of public works contracts awarded to SOE-led consortia in different European countries, often at what appear to be abnormally low prices, show the need for a comprehensive EU strategy to promote a level playing field and fair competition. FIEC believes that public procurement can play an important role in restoring a level playing field in Europe.

Some EU Member States, such as Romania,⁷ exclude companies from countries which have neither signed the World Trade Organisation's Government Procurement Agreement (GPA) nor a bilateral or EU-level agreement on mutual market access from participating in public tenders, while others continue to award large public contracts to companies from such third countries.

⁴ Ursula von der Leyen's mission letter to Séjourné, Executive Vice-President for Prosperity and Industrial Strategy, states "You [Séjourné] will revise the Public Procurement Directives to help ensure security of supply for certain vital technologies, products and services, while simplifying the rules and reducing administrative burden. It should enable preference for European products in public procurement for certain strategic sectors and technologies."

⁵ For example, *Letta report on the future of the single market*.

⁶ FIEC map on SOEs in Europe, see [here](#).

⁷ Government Emergency Ordinance No. 25/2021



Afonso Brito
Policy Officer Economic & Legal Affairs

FIEC - European Construction Industry Federation
Avenue des Arts 20, BE-1000 Brussels - +32 2 514 55 35 - info@fiecc.eu

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FIEC considers that **there should be a convergence on the inclusion/exclusion of third country bidders in public tenders, especially where projects are (co-)financed by European funds**, which is to say European taxpayers' money.

The Commission's Communication on Guidance on the participation of third country bidders and goods in the EU procurement market, clarifies that third country economic operators from countries which have neither signed the World Trade Organisation's Government Procurement Agreement (GPA) nor a bilateral or EU-level agreement on mutual market access may be excluded from public tenders. **Contracting authorities should make greater use of this possibility**, especially when it comes to State-owned enterprises from countries where significant market distortions are known to exist.

In addition, **FIEC also calls for stricter provisions regarding abnormally low tenders**. In particular, contracting authorities should be obliged to reject a tender (instead of "may only"), where the evidence supplied does not satisfactorily account for the low level of price.⁸ In addition, they shall not award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations in the fields of environmental, social and labour law.⁹

Restrict the possibilities of in-house procurement

The instrument of in-house procurement means the provision of works or services that are the subject of public contracts without applying the procurement procedures regulated by the legislation on public contracts (national transposition of Directive 2014/24/EU). What should have been an exceptional instrument has become a common mechanism, used extensively and unjustifiably, circumventing the basic principles of public procurement in both works and services contracts of different types.

In certain Member States, such as Spain,¹⁰ there has been an upward trend in the number of in-house contracts and their economic value. There are many cases where projects are awarded to bodies whose objectives do not correspond to the purpose of the contract. On other occasions, private companies (with experience and resources) are sidelined when the contracting authority chooses to use in-house means despite a lack of sufficient resources.

Another shortcoming noted is the recurrent lack of transparency and sufficient publicity of in-house contracts, which is essential for the necessary control of their legality and appropriateness. Finally, there is a recurrent abuse of urgency as a theoretical motivation for the repeated use of

⁸ Directive 2014/24/EU, Article 69 (3).

⁹ Directive 2014/24/EU, Article 56 (1) and Article 18 (2).

¹⁰ Data available for 2021-2022 shows that the number of in-house contracts increased annually by 77%; in terms of economic value, the volume of investment increased by almost 350% (*Oficina Independiente de Regulación y Supervisión de la Contratación*)



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Policy Officer Economic & Legal Affairs

FIEC - European Construction Industry Federation
Avenue des Arts 20, BE-1000 Brussels - +32 2 514 55 35 - info@fiec.eu

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internal procedures, especially at the end of each financial year, which does not reflect a problem of urgency but rather a lack of management and planning.

Therefore, FIEC considers that **the scheme for the use of in-house procurement must be restricted, by limiting the situations where this can be used and ensuring an effective informative system for transparency** (in digital, public and accessible format).

Strategic procurement

The European Climate Law aims to make Europe climate neutral by 2050 and to reduce greenhouse gas emissions by 55% from 1990 levels by 2030. While EU public procurement directives allow contracts to be awarded on the basis of quality, environmental, social or life-cycle criteria, most public contracts in the EU are still awarded on the basis of price alone. Aligning procurement with “strategic” objectives (social, environmental, resilience, etc.) has been suggested as one solution to the problem of lack of competition in public tenders. There is a strong political will to use public procurement to promote social and environmental agendas and a chapter on Green Public Procurement has been inserted in the new Construction Products Regulation.

The introduction of social/environmental criteria is not easy to manage and can lead to several problems in practice, as it is often difficult to define the subject matter of the contract clearly and objectively. It may also become a barrier for SMEs if not defined adequately. In addition, there is a wide variety of social/environmental criteria used by different contracting authorities for similar contracts, which distorts competition. It is therefore necessary to overcome fragmentation in the EU and to develop guidelines for the EU-wide implementation of Strategic Procurement.

In addition, FIEC calls for **an overview and analysis of methods for the calculation of life-cycle costs to be used for the assessment of life cycle costs in tenders falling within the scope of the Public Procurement Directives**. This would also contribute to the objective of moving away from price-only decisions in procurement procedures, which FIEC generally supports. Examples at the national level¹¹ and EU level¹² already exist.

As such, **FIEC considers that the use of “strategic” procurement**, mainly in relation to some types of ESG (environmental, social and governance) criteria, **must be carefully assessed. It is essential to keep the direct link of the award criteria/conditions for the performance of contracts with the purpose of the contract**. In addition, there should be clear guidance on how to define social/environmental criteria.

¹¹ For example, the Netherlands has successfully developed a system for measuring and evaluating CO2 emissions and environmental impact. In Germany, a CO2 shadow-pricing system is proposed to update procurement legislation.

¹² At EU level, Article 68(3) of Directive 2014/24/EU authorises the Commission to establish a common methodology for calculating life-cycle costs through Union legislation.



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Policy Officer Economic & Legal Affairs

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Avoid overregulation of subcontracting

Subcontracting will be a hot topic over the next few years, with several organisations calling for restrictions/limitations on this practice. FIEC understands the motives of this discussion, but advises not to support further restrictions on subcontracting, mainly because they may further reduce the options of small and medium-sized enterprises (SMEs) to participate in procurement projects and in the construction of certain types of works, which by their very nature are a combination of several specialised activities.

FIEC recalls that restrictions on subcontracting are already allowed under the existing legal framework and already exist at national level in several countries.¹³ **It is therefore important to ensure that there be no overregulation in this area. In addition, any rules adopted at EU level should not be more restrictive than those already in place in several Member States.**

Furthermore, in many Member States Small and medium sized enterprises (SMEs) are involved in larger projects mainly through subcontracting. The need to increase SME participation in public procurement is rightly recognised at the political level.¹⁴ Therefore, any measure that could potentially hinder the participation of SMEs in public procurement or prevent them from participation in construction projects should be carefully considered.

Lastly, FIEC notes that the construction sector in Europe is facing a labour and skills shortage. Some countries, such as Germany, have banned the use of temporary workers in the construction industry, forcing companies to resort to subcontracting. It is therefore **important that construction companies retain some flexibility in the use of subcontractors.** This is important as public procurement restrictions could eventually be extended to private contracting entities.

Selection criteria

With regard to the selection criteria, and in particular the means of demonstrating the technical capacity of economic operators, the reference period should be extended to allow economic operators to provide a list of works carried out over more than the last five years. **FIEC advocates for the past ten years**, without prejudice to the possibility for the Member State to consider a longer reference period for relevant works, as currently provided for in Annex XII, Part II(a)(i).

¹³ For example, in Spain, subcontracting is limited to three sub-layers as general rule for private and public contracts (Ley 32/2006)

¹⁴ For example, *Council Conclusion on ECA Special Report 28/2003*.



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The grounds for exclusion should be proportionate and focussed on the essence of the procurement procedures

With regard to the power of national contracting authorities to exclude an economic operator guilty of serious professional misconduct, particularly in the social and environmental fields or in cross-cutting areas, there are exclusion decisions that are considered disproportionate to the infringement. **FIEC calls for proportionality and believes that the grounds for exclusion should not focus solely on the substance of the procurement process itself.** In other words, they should not be aimed at achieving other social, environmental or transversal objectives as this would be disproportionate.¹⁵

Therefore, the wording of Article 57(4)(c) of Directive 2014/24/EU should be more precise in order to ensure legal certainty and to avoid disproportionate grounds for exclusion such as those mentioned above.

Professional misconduct

There is a need for greater proportionality and rationality in relation to professional misconduct in practice.

Under the Directives, contracting authorities may exclude or be obliged to exclude an economic operator from a public procurement procedure if they can prove by appropriate means that the economic operator has been guilty of grave professional misconduct.¹⁶ FIEC warns that interpretation of these rules has often proved problematic. A court ruling would provide a clearer basis for decisions.

Ensuring adequate price adjustment mechanisms in public contracts

European contractors have been faced with significant supply chain disruptions in addition to price increases for energy or for certain construction materials. As a result, many are no longer able to participate in public tenders and construction works have slowed down while some companies even faced bankruptcy.

To add to this problem, in several Member States contracts do not sufficiently take into account price increases in the case of firm, non-revisable price contracts, therefore damaging the competitiveness of the companies and the rhythm of execution of contracts, and clients continue to enforce completion deadlines in the absence of a clause, in particular a review clause, allowing automatic extension of the deadlines.

¹⁵ In Spain, for example, certain breaches of equality legislation (Organic Law 3/2007 for the effective equality of women and men) or of whistleblower protection law (Law 2/2023), have been established as grounds for exclusion

¹⁶ Directive 2014/24/EU, Article 57(4)(c)



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At the very least, and without prejudice to the legal frameworks which exist at national level in several countries and which (according to the sector) function well, Member States should be obliged to apply price revision mechanisms that adequately take due account of situations of price escalation over the contract term, and the specificities, complexity and the duration of each construction project, thus keeping a fair system of risk allocation.

Variants

Under the current rules, contracting authorities may authorise or require tenderers to submit variants.¹⁷ The regulation of use of variants could be reformed to become more efficient, among others because it fosters the implementation of new techniques or innovative solutions.

Contracting authorities do not normally make any reference to variants in the tender notice. Therefore, FIEC considers that **variants should always be allowed, unless otherwise specified by the contracting authority in the tender notice**. In countries such as Germany, this is the case for procedures below the EU threshold,¹⁸ but not for those above it.¹⁹ Variants can encourage the use of new techniques and innovative products, and it is therefore important to take advantage of the opportunity to submit them.

Lastly, unforeseen or unforeseeable findings, such as those of a geological and archaeological nature, should be explicitly mentioned as a cause for variants during the construction phase.

Miscellaneous

In addition to the issues mentioned above, FIEC has some other general observations to make. **FIEC supports the promotion of conflict resolution through mediation, conciliation or arbitration.**

The following recommendations don't require changes to the current framework. Although the principle of neutrality is enshrined in the Public Procurement Directives, some contracting authorities continue to impose the use of a particular BIM (Building Information Modelling) software on tenderers. Measures should be taken to prevent this practice.

Public funding for construction is likely to decrease in the future and alternative sources of funding will be needed for certain types of projects. The revision should therefore include appropriate provisions to encourage the award of such contracts, ensuring an appropriate allocation of risk between the public and private parties and the economic and financial equilibrium of the contract.

¹⁷ Directive 2014/24/EU, Article 45.

¹⁸ "Variants must be evaluated, unless the public entity has not admitted variants in the notification" for procedures below the EU thresholds (§ 16d Abs. 3 VOB/A)

¹⁹ "The public entity can admit variants. If the public entity does not make an indication, variants are not admitted" for procedures above the EU thresholds (§ 8 Abs. 2 VOB/A-EU)



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