

FIEC is the European Construction Industry Federation, representing via its 29 National Member Federations in 26 countries (23 EU & EFTA and Turkey) construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as "global players", carrying out all forms of building and civil engineering activities.  
Recognised "Sectoral Social Partner" (employers)



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## FIEC position paper

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# FIEC welcomes the 2017 public procurement package but recalls some problems and good practices

## ■ General comments

FIEC broadly welcomes the package of public procurement measures, presented by the European Commission in October 2017, and which is expected to reinforce and help the implementation of the 2014 public procurement directives<sup>1</sup>.

It is composed of:

- A general Communication "Making public procurement work in and for Europe",
- An ex-ante assessment mechanism for the procurement of large infrastructure projects,
- Guidance on professionalisation of public buyers,
- A public consultation on draft guidance on public procurement of innovation.

And a further public consultation on "socially responsible public procurement" has been undertaken shortly afterwards in order to update the guide "Buying Social".

In particular, FIEC supports the measures which have been proposed in order to improve the professionalization of public buyers.

However, FIEC is more sceptical about the strong promotion of what is now called "strategic procurement" (i.e. including innovative, green and social / societal criteria). These latter criteria are not very clearly defined and sometimes diverge significantly from the traditional principle of purchasing for the best value for money.

## ■ Professionalisation of public buyers

The main problems with public procurement lie in the poor enforcement of the rules at national level (without even referring to the incorrect implementation which can be subject to infringement procedures!) and a lack of training amongst contracting authorities over how to apply the rules.

FIEC shares the view of the Commission that there is a lack of professionalism in the field of public procurement. Therefore, we welcome the specific focus of the package on increasing the professionalisation of public buyers. Priority should indeed be on ensuring that the existing rules are fully, correctly and consistently implemented and applied across the EU.

<sup>1</sup> Directives 2014/23/EU, 2014/24/EU and 2014/25/EU

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As public procurement concerns both the public and the private sector, it seems advisable that professionalisation should be organised in such a way that experts from the industry are involved in the training for public procurers. This already happens in practice in some instances and we would like to see more of these initiatives.

## ■ **Reduced competition / high tender costs / too complex procedures**

As the Commission points out in its Communication, the number of offers per tender has fallen and companies have difficulties accessing procurement markets!

This phenomenon is confirmed by a number of FIEC Member Federations who stress that public procurement procedures have become overly complex, lengthy and costly for most construction companies, which in their vast majority are SMEs (of less than 20 workers).

The length of award procedures after the tenders have been submitted is sometimes extremely long (several months at least). Thus, tenderers have major difficulties in proposing realistic prices and guarantee them over such long period of time. According to the limited time tenderers have to prepare their bid, their prices end up being highly speculative.

This is why FIEC questions the logic of over-prescriptive strategic procurement (see also below). On the contrary, in order to increase competition, the overall aim should rather be simplification of public procurement.

## ■ **Innovation**

FIEC pointed out in its contribution<sup>2</sup> dated 21/12/2017 that the main obstacle to innovation, in spite of options provided by the directives (e.g. variants), is the risk-aversion of public buyers.

Indeed, As regards the tools presented in the draft guidance for public authorities aimed at encouraging them to organise support to both innovation procurement and use innovation-friendly procurement tools, there are already all in the 2014 public procurement directives. That is, without even using the new complex procedure for an innovation partnership or so, any procurement can already lead to the purchase of high quality and innovative works as soon as specifications are defined in terms of performance (rather than detailed technical specifications).

The problem is just that, due to risk-aversion, public authorities do not use these tools, but stick to traditional procurement ways, to the lowest price, etc.

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<sup>2</sup> To the European Commission's public consultation on draft guidance on public procurement of innovation

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## ■ Social criteria

FIEC pointed out in its contribution<sup>3</sup> dated 01/03/2018 that EU guidance on social criteria in public procurement should be limited to key concepts with some good practices illustrating these theoretical concepts.

However, FIEC also expressed doubts about elaborating such a guide at EU level, knowing that Member States are already developing guidance at their national level, according to their own social policies.

Moreover, we are not favourable to the award of the contract upon social criteria which could, in fact, affect fair competition and be an element of discrimination, in particular against SMEs. Social criteria are complex to establish and evaluate, in particular in a context of lack of professionalism of public buyers, as we mentioned it above. In any case, award criteria should always respect the direct link with the subject matter of the contract.

In contrast, a social execution clause is more adapted as it is executed similarly by everyone.

While strategic procurement is legitimate, it should be taken into account that complex conditions and additional specifications and award criteria also contribute to a decrease in participation in public procurement.

Asking for this kind of additional criteria also implies higher costs for public buyers while they usually tend to go for the cheapest offer in practice.

## ■ In-house and public-public cooperation

The extensive codification of exemptions for in-house procurement and public-public cooperation via the 2014 public procurement directives and sometimes even over-implementation (i.e. gold-plating) or wrong implementation (i.e. wider exemptions than what is actually foreseen in the directives) in some Member States, has significantly narrowed public procurement opportunities for private economic operators and is a major obstacle to competition, while it was one of the main priorities of the 2014 public procurement directives.

Private contractors are regularly excluded from competing in contracts where they could deliver more effective, affordable and efficient solutions.

## ■ Digitalisation

In general terms, most Member States are lagging behind concerning the implementation of electronic procurement rules (by October 2018 at the latest)!

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<sup>3</sup> To the European Commission's public consultation on "socially responsible public procurement"

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### **BIM:**

The 2014 public procurement directives encourage the recourse to BIM (Building Information Modelling). It is clearly mentioned that the type of BIM software requested should remain open or made available to the winning bidder. In the practice however, it is observed that public procurers do impose a specific BIM software to the bidder. This is illegal.

### **European Single Procurement Document (ESPD):**

Many countries are still not ready with the proper implementation of the ESPD, so that more guidance would be needed – especially as the Commission is now already talking about the ESPD version 2<sup>4</sup>. In particular, the ESPD does not perfectly fit with the existing procedures.

### **■ Central Purchasing Bodies / joint procurement**

While centralised procurement can contribute to more professionalism – compared to fragmented procurement from numerous small local contracting authorities – if it is linked to appropriate education and advanced training of the persons in charge, bundling of procurement and cooperation between public procurers can also generate the negative effect of excluding SMEs from the market.

This is a dangerous collateral damage considering that one of the priorities of the 2014 public procurement rules was to increase the participation of SMEs in public procurement.

In particular, Central Purchasing Bodies or joint procurement should not exclude the option of awarding contracts in several different lots.

### **■ Most Economically Advantageous Tender (MEAT):**

While the MEAT is said to have been reinforced in the 2014 public procurement directives, as long as the "price only" will be left as possible award criterion, contracting authorities will tend to choose this solution in order to avoid any questioning at a later stage. This results in bidders dropping their prices down to unsustainable levels. In the end, cheap prices also lead to cheap solutions, which is the opposite to the spirit of the 2014 public procurement directives.

### **■ Abnormally Low Tenders (ALTs):**

Back in 2011, the European Commission proposed a set of cumulative conditions, according to which a tender was deemed to be abnormally low and contracting authorities shall require justifications. This proposal represented a real improvement called for by the construction industry and to which FIEC proposed further improvements.

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<sup>4</sup> Support and guidance from the European Experts Group on Electronic Procurement (EXEP) is useful and necessary but obviously insufficient.

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Much to our regret, these proposals did not go through the legislative process and the idea of having an effective mechanism for ALT's identification was abandoned. FIEC considers that it is a missed opportunity considering the very subjective margin of manoeuvre left to contracting authorities and numerous abuses in this field.

### ■ **Fair contract conditions:**

The aim should be fair contract conditions, which build a spirit of partnership and collaboration in order to achieve the common goal. That is, achieving high quality works for a fair price – meaning socially, economically and environmentally sustainable.

### ■ **Ex-ante assessment mechanism**

As regards the ex-ante assessment mechanism, it is composed of a helpdesk, a voluntary notification mechanism – the result of which is non-binding, as well as an information database and a platform for peer-to-peer discussions. This scheme corresponds to FIEC's response to the relevant public consultation.