

## **Green Paper on the modernisation of EU public procurement policy -**

### **Towards a more effective European Procurement Market**

answered by the European Council of Engineers Chambers (ECEC) representing approx. 300.000 European Chartered Engineers

#### **Purchasing Activities**

**Question 1:** Do you think that the scope of the Public Procurement Directives should be limited to purchasing activities? Should any such limitation simply codify the criterion of the immediate economic benefit developed by the court or should it provide additional/alternative conditions and concepts?

The scope of the Public Procurement Directives should not be limited to purchasing activities but should include all public contracts. **Every** activity that is funded / financed in whatever legal construction by a public authority must be covered by the scope of the directive. Also if only the utilization and maintenance of works are paid/funded by a public authority in any way (leasing /payback etc) the public procurement regime has to be applicable.

Experience has shown that otherwise procuring authorities develop a lot of legal effort in order to find ways to circumvent the procurement regime.

#### **Public Contracts**

**Question 2:** Do you consider the current structure of the material scope, with its division into works, supplies and services contracts appropriate? If not, which alternative structure would you propose?

We think that it is necessary to keep the division into works, supplies and services. There are so many differences in these categories that it is not appropriate to abolish the division. There should be a special chapter on “intellectual services”

There is a danger that such a change would lead to an increase of pure price competition in cases where this is completely inappropriate - this would be extremely problematic for the procurement of intellectual services as in those cases a pure price competition can never find the best possible procurement outcome (best value for money).

#### **Thresholds**

**Question 6:** Would you advocate that the thresholds for the application of the EU Directives should be raised, despite the fact that this would entail at international level the consequences described above?

Yes, in the opinion of the ECEC it would make the situation easier especially for small procuring entities. We think that there is no need for different treatment of the sectors, there should be one overall regime and the thresholds could be defined somewhere in the middle of the current classic/sectoral thresholds.

#### **Public utilities**

**Question 10:** Do you think there is still a need for EU rules on public procurement in respect of these sectors? Please explain the reasons for your answer. 10.1 If yes: Should certain

*sectors that are currently covered be excluded or, conversely, should other sectors also be subject to the provisions? Please which sectors should be covered and give the reasons for your answers*

No, we do not think that there is still a need for special regulations in respect to these sectors. On the contrary - in practice the different treatment of branches / procuring authorities is disturbing and not comprehensible (eg. railway building company in sector / highway building company not, the same about water / wastewater). See also Question 6.

### **Improving the Toolbox for Contracting Authorities**

**Question 14:** Do you think that the current level of detail of the EU public procurement rules is appropriate?

This question will be answered in connection with the following thematic questions. Overall we think that it is appropriate, nevertheless in some aspects more detail would be good (e.g. more detailed rules for negotiated procedure), others could be less detailed (e.g. selection criteria – more flexibility for the procuring authority would be good).

### **General Procedures**

**Question 15:** Do you think that the procedures as set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes? If not, how should the procedures be improved in order to alleviate administrative burdens/reduce transaction cost and duration of the procedures, while at the same time guaranteeing that contracting authorities obtain best value for money

ECEC is not of the opinion that all the procedures set out in the Directive facilitate the achievement of the best possible procurement outcomes. For the procurement of intellectual services the negotiated procedure with prior publication is most appropriate. In view to transparency it would be important to establish an obligation to publish the decision making process / the results for the award of the contract (like the minutes of an award jury).

All procedures that are only based on price are not appropriate for intellectual services. Even if there is a high percentage of the weight on quality criteria there are many cases in which the set quality requirements are easily reachable for everyone which means that in the end the price is the only decisive criterion.

It is in the nature of intellectual services that contract specifications cannot be established precisely in advance. So in order to get the best outcome for contracting authorities it is necessary to apply quality orientated procurement procedures only. To ensure cost-efficiency as well as the best technical solution for a project it is necessary to prohibit the lowest-price criteria in procurement procedures for intellectual services and to clarify in the Directive that intellectual services can only be contracted after quality orientated procurement procedures. As mentioned above we therefore think that the negotiated procedure – with the amendment mentioned above - is the most appropriate procedure and would definitely reduce cost and duration of the procedure and at the same time guarantee best value for money.

**Question 16:** Can you think of other types of procedures which are not available under the current Directives and which could, in your view, increase the cost-effectiveness of public procurement procedures?

Modified negotiated procedure – see Question 15

**Question 17:** Do you think that the procedures and tools provided by the Directive to address specific needs and to facilitate private participation in public investment through public-private partnership (e.g. dynamic purchasing system, competitive dialogue, electronic auctions, design contests) should be maintained in their current form, modified (if so, how) or abolished?

ECEC has no experience from dynamic purchasing and electronic auctions which are not applicable to our sector.

We have found the procedure of framework agreements [Art. 32] useful however for covering the needs of contracting authorities, especially where they are concluded with a single economic operator or several economic operators and contracts are awarded by application of the terms laid down in the framework agreement; where contracts are awarded by reopening competition, the framework agreement reduces to a tool for having selected economic operators on standby and is therefore less effective. All together it does not seem to be a well fitting tool for the procurement of intellectual services.

The competitive dialogue procedure is not considered useful in our sector since it constitutes an inefficient means of defining the project: the project definition is worked on in parallel by all selected candidates, with considerable input of highly qualified staff, while a conventional multi-disciplinary engineering firm could just as well investigate and compare the alternative solutions, even for particularly complex projects. We feel that the same conclusion applies, *mutatis mutandis*, to other intellectual services, e.g. lawyers, financial advisers.

Even if remuneration is foreseen, the experience to date is that the required (technical, financial, legal) input is so significant that it is essentially borne by the candidates, constituting a high transaction cost.

Finally, the issue of cherry-picking of the ideas of the candidates by the contracting authorities is still a major concern; after all, the purpose of the exercise is precisely “to identify the means best suited to satisfy their needs” [Art. 29, par. 3].

Regarding design contests, ECEC understands that they continue to be useful for award of architectural design services in showcase projects of high aesthetic value.

**Question 18:** On the basis of your experience with the use of the accelerated procedure in 2009 and 2010, would you advocate a generalisation of this possibility of shortening the deadlines under certain circumstances? Would this be possible in your view without jeopardizing the quality of the offers?

No, as the deadlines are tight already, shortening them would indeed jeopardise the quality of the offers and the development of competition, as especially SME would find it more difficult to allocate staff for project preparation at even shorter notice.

## More negotiation

**Question 19:** Would you be in favour of allowing more negotiation in public procurement procedures and/or generalising the use of negotiated procedure with prior publication?

As already mentioned we think that the negotiated procedure is the most appropriate and quality orientated procedure for the procurement of intellectual services that would reduce cost and duration of the procedure and at the same time guarantee best value for money (see also Question 15).

It is also very attractive for the procuring authority (reduction of candidates), therefore we definitely favour generalising the use of negotiated procedure with prior publication for intellectual services.

But: This cannot be a price-negotiation - only adjusted to the description of objectives and tasks.

**Question 20:** In the latter case, do you think that this possibility should be allowed for all types of contracts/all types of contracting authorities, or only under certain.

Negotiated procedure with prior publication should be the standard procedure for intellectual services. But it is not appropriate for all types of goods/services.

**Question 21:** Do you share the view that a generalised use of the negotiated procedure might entail certain risks of abuse/discrimination? In addition to the safeguard already provided for in the Directive for the negotiated procedure, would additional safeguards for transparency and non-discrimination be necessary in order to compensate for the higher level of discretion? If so, what could such additional safeguards be?

The prior publication guarantees transparency and non-discrimination. It is extremely important that a lot of bidders have access, also for the participation of small/young architectural/engineering offices. In view to transparency it would also be important to establish an obligation to publish the decision making process / the results for the award of the contract (like the minutes of a jury in the design contest).

## Selection and award

**Question 23:** Would you be in favour of a more flexible approach to the organisation and sequence of the examination of selection and award criteria as part of the procurement procedure? If so, do you think it should be possible to examine the award criteria before the selection criteria?

**Question 24:** Do you consider that it could be justified in exceptional cases to allow contracting authorities to take into account criteria pertaining to the tenderer himself in the award phase? If so, which cases, and which additional safeguards would in your view be needed to guarantee the fairness and objectivity of the award decision in such a system?

Yes. We are in favour of a more flexible approach to the organisation and sequence of the examination of selection and award criteria as part of the procurement procedure **for certain type of contracts** ( engineering projects.)

We think that it should be possible to examine the award criteria before the selection criteria for the above mentioned contracts.

As far as we point out the importance of the quality of contract decision, which is closely related to the qualification of key experts, providing services, we consider it could be justified in exceptional cases to allow contracting authorities to take into account criteria pertaining to the tenderer himself in the award phase. In our view, additional safeguard measure should be the appointment of an independent, well qualified Project manager, managing the investment process on behalf of the investor.

Motives:

Procurement needs to take into account the specific characteristics of services – the services, provided by chartered engineers are creative, intellectual services.

We expect to see the objectives of EU procurement policy in the future much more focused on supporting and promoting good quality engineers, providing quality engineering services.

This will require flexibility in rules and mandatory requirements to do this effectively.

Therefore we think, it would be useful to change the existing rules for providing engineering services (as intellectual services):

We consider the examination of award criteria as more important than examination of selection criteria. For that reason we think it should be possible and useful to examine the award criteria before the selection criteria. Such an approach will make impossible the introduction of discrimination requirements in the tender documentations.

Furthermore, in our opinion, the selection and awarding processes have to be with more emphasis on the quality of the services provided. Quality must be a guiding focus in awarding contracts.

With regards to above mentioned contracts, we propose on the award stage **to eliminate the criterion on the lowest price only**. Going for lowest price can risk seriously the quality of services. As award criterion to be applied only the criterion “Economical Most Advantageous Tender”. At the same time a greater weight is to be given to the quality of the technical proposal and the key expert’s qualification.

### **Taking past performance into account**

**Question 25:** Do you think the Directive should explicitly allow previous experience with one or several bidders to be taken into account? If yes, what safeguards would be needed to prevent discriminatory practices?

Previous experience is obviously taken into account by way of previously issued certificate of performance/references. In any other form it is very problematic. If it actually would be allowed, at least the following minimum safeguards would be necessary: An obligation to have a clear display of the assessment/quantitation of the previous experience, a clarification that only the own positive experiences of a public procurement authority could be accepted, not those of other authorities and a clarification, that this is not appropriate for smaller projects under a certain threshold because there is a danger to eliminate young offices with little experience from the market. All together previous experience with a bidder could only be accepted with a very minor weight.

## More legal certainty for awards below the thresholds of the Directive

**Question 29:** Do you think that in the case-law of the Court of Justice as explained in the Commission Interpretative Communication provides sufficient legal certainty for the award of contracts below the thresholds of the Directive? Or would you consider the additional guidance, for instance on the indications of a possible cross-border interest, or any other EU initiative, might be needed? On which point would you deem this relevant or necessary?

We think that some regulations for the implementation of the basic principles of the treaty that have to be applied for awards below the thresholds of the Directive would be. For example in cases of direct awards it would be necessary - in order to secure transparency - to establish some basics of transparency like the information of results for all participants who made a price offer.

## Better Access for SMEs and Start-ups

**Question 46:** Do you think that EU public procurement rules and policy are already sufficiently SME-friendly? Or, alternatively, do you think that certain rules of the Directive should be reviewed or additional measures be introduced to foster SME participation in public procurement? Please explain your choice.

No, in the opinion of the ECEC procurement rules are not sufficiently SME-friendly.

- Eligibility/Selection criteria

It is a huge practical problem that – although Article 44 of the Directive states that the requirements on economic and financial standing and technical and/or professional ability for a specific contract must be related and proportionate to the subject of the contract – selection criteria are in many cases inadequate and excessively high. Also the required references are very often not in proportion to the contract subject.

It is necessary that the procuring authority is able to find a reasonable relation between the total amount of the contract and the requirements. For this it is necessary that the responsible person within the procuring authority is well qualified (additional measures: training, awareness raising measures).

Another problem is, that the period in which required reference projects must have been realised in order to be accepted (Article 48, paragraph 2, subparagraph ii of Directive 2004/18/EC stipulates three years!) is often too short. A change in the directive expanding this foreseen 3-years timeframe for intellectual services is therefore extremely important. Even procuring authorities themselves have in many cases recognised that this timeframe is problematic and extremely unrealistic and have therefore started to use longer time-frames. The directive has to be amended accordingly.

- Financial guarantees

There is a very negative tendency to move the risks from the client to the provider of the architectural/engineering services. This is of course a problem for SMEs and Microenterprises.

Disproportional financial guarantees (bank guarantees to cover risks even when they are beyond the control of the architectural/engineering office, retention of resources in the form of participation guarantees should be prohibited.

- Cooperation to provide required capacities

Project-orientated cooperations of bidders should be possible – so no limitations to a certain number.

Enhancing the publication of prior information notices would be helpful in order to give more time and possibility to form such partnerships. Nevertheless this should not be combined with a reduction of deadlines following the publication of a prior information notice. As SMEs and especially Microenterprises have very little capacity to deal with the preparation of tender documents, close time limits are problematic.

- Administrative burdens

The possibilities to reduce administrative burdens for tenderers should be reviewed. We think that self-declaration is a good tool, additionally the use of databases by contracting authorities should be enforced.

**Question 47:** Would you be of the opinion that some of the measures set out in the Code of best Practices should be made compulsory for contracting authorities, such as subdivision into lots (subjects to certain caveats)?

**Question 48:** Do you think that rules relating to the choice of the bidder entail disproportionate administrative burdens for SMEs? If so, how could these rules be alleviated without jeopardizing guarantees for transparency, non-discrimination and high-quality implementation of contracts?

See Questions 46 and 49/50

**Question 49:** Would you be in favour of a solution which would require submission and verification only by short-listed candidates / the winning bidder?

Yes definitely, not all bidders but only the short-listed candidates (in 2-phase procedures) / the winners shall be required to verify their self declaration.

**Question 50:** Do you think that self-declarations are an appropriate way to alleviate administrative burdens with regard to evidence for selection criteria, or are they not reliable enough to replace certificates? On which issues could self-declaration be useful (particularly facts in the sphere of the undertaking itself) and on which not?

Self-declarations on all aspects of eligibility are a good solution. Ideally this can be combined with the use of databases with all the relevant information on the eligibility / ability / capacity of bidders, but the winner / the short listed candidates (in 2-phase procedures) have to provide certificates

**Question 51:** Do you agree that excessively strict turnover requirements for proving financial capacity are problematic for SMEs? Should EU legislation set a maximum ratio to ensure the proportionality of selection criteria (for instance: maximum turnover required may not exceed a certain multiple of the contract value)? Would you propose other instruments to ensure that selection criteria are proportionate to the value and the subject-matter of the contract?

Yes. It is a huge practical problem that – although Article 44 of the Directive states that the requirements on economic and financial standing and technical and/or professional ability for a specific contract must be related and proportionate to the subject of the contract – selection criteria are in many cases inadequate and excessively high. Also the required references are very often not in proportion to the contract subject.

It is necessary that the procuring authority is able to find a reasonable relation between the total amount of the contract and the requirements. For this it is necessary that the responsible person within the procuring authority is well qualified (additional measures: training, awareness raising measures)

### **“How to buy” in order to achieve the Europe 2020 objectives**

**Question 62:** Do you consider that the rules on technical specifications make sufficient allowance for the introduction of considerations related to other policy objectives?

Currently, due to the sustainability criteria, there is enough room for policy objectives that promote the EU's strategic objectives for 2020.

**Question 63:** Do you share the view that the possibility of defining technical specifications in terms of performance or functional requirements might enable contracting authorities to achieve their policy needs better than defining them in terms of strict detailed technical achievements? If so, would you advocate making performance or functional requirements mandatory under certain conditions?

No, not always. It depends on the policy framework. Performance or functional requirements can challenge parties to come with sustainable and/or innovative solutions for certain policy objectives. Particularly when these are included in the award criteria and costs do not play a crucial role. We do not advocate to make the performance and functional requirements in certain circumstances mandatory. For each project the most appropriate solution (form of contract) could be different.

### **Requiring the most relevant selection criteria**

**Question 69:** What would you suggest as useful examples of technical competence or other selection criteria aimed at fostering the achievement of objectives such as protection of environment, promotion of social inclusion, improving accessibility for disabled people and enhancing innovation?

These objectives are very important, but their inclusion in the public procurement procedure (as a criteria) would mislead the result. It would give an opportunity for misconduct without a chance of control.

### **Using the most appropriate award criteria**

**Question 70:** The criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objective. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts / some specific sectors / in certain circumstances)?

**70.1.1** to eliminate the criterion of lowest price only

**70.1.2** to limit the use of the price criterion or the weight which contracting authorities can give to the price



**70.1.3** to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer? If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives?

Yes, we fully agree that for pursuing other policy objective the MEAT is best suited. Therefore the criterion of lowest price only should be eliminated for such cases.

Yes, this would be an important step in order to enforce quality instead of price competitions. Additionally it is also important that criteria are set up adequately. If they are configured in a way that all participants can fulfil them, this leads to a mere price competition even if the weight of the price is very low

Current public procurement legislation and policy remains too narrow and restrictive to fully achieve many key environmental sustainable development objectives.

ECEC is convinced that the EU should do more to encourage contracting authorities to choose services on the basis of sustainable development considerations.

The Chartered engineers and consultants are requested to support and contribute to achieving the headline targets of Europe 2020 Strategy. The Engineering services should be shifted towards the new eco-efficient technologies, should be provided with a culture for innovations.

In that respect we think that in order to take best account of such policy objectives, it would be useful to change the existing rules for intellectual services.

We propose:

- to eliminate the criterion of the lowest price only (on the award stage)
- to limit the weight which contracting authorities can give to the price (within the criterion of the most economically advantageous tender).

Motive:

This approach will ensure sustainable decisions, taken on the basis of quality, safety, environmental criteria and life-cycle costs. When using awarding of contracts based on lowest price, the innovations are neglected and the technical progress is limited.

## **Innovation**

**Question 91:** Do you think there is a need for further promote and stimulate innovation through public procurement? Which incentives/measures would support and speed up the take-up of innovation by public sector bodies?

Yes, the ECEC sees a need for further promotion and stimulation innovation through public procurement.

Measures would be to use quality and innovation orientated procurement procedures (design contest, negotiated procedure with prior publication) and to adjust award criteria accordingly to enhance development of innovative solutions.

**Question 92:** Do you think that the competitive dialogue allows sufficient protection of intellectual property rights and innovative solutions, such as to ensure that the tenderers are not deprived of the benefits from their innovative ideas?

No, the ECEC is of the opinion that the competitive dialogue offers no adequate protection of intellectual property rights. In reality the contracting authorities are in a bind between the obligation to protect the confidential information and on the other hand the need to disclose some information in order to identify solutions.

**Question 93:** Do you think that other procedures would better meet the requirement of strengthening innovation by protecting original solutions? If so, which kind of procedures would be the most appropriate?

See Question 91

**Question 94:** In your view, is the approach of pre-commercial procurement, which involves contracting authorities procuring R&D services for the development of products that are not yet available on the market, suited to stimulating innovation? Is there a need for further best practice sharing and/or benchmarking of R&D procurement practices used across Member States to facilitate the wider usage of pre-commercial procurement? Might there be any other ways not covered explicitly in the current legal framework in which contracting authorities could request the development of products or services not yet available on the market? Do you see any specific ways that contracting authorities could encourage SMEs and start-ups to participate to pre-commercial procurement?

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Yes, we feel that the approach of pre-commercial procurement is suited to stimulate innovation. There should be also a platform for exchanging views and information on innovation and also for best practice sharing and facilitating the wider use of pre-commercial procurement.

We are not aware of the other ways not covered by the current legal framework in which contracting authorities could request the development of products or services not yet available on the market.

**Question 95:** Are other measures needed to foster the innovation capacity of SMEs? If so, what kind of specific measures would you suggest?

Yes, many SMEs and especially Microenterprises are not financially strong enough to foster the innovation capacity. Specific measures are e.g. special SME funds, specific affordable insurance.

**Question 96:** What kind of performance measures would you suggest to monitor progress and impact of innovative public procurement? What data would be required for this performance measures and how it can be collected without creating an additional burden on contracting authorities and /or economic operators?

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It depends on the project which performance measures are appropriate to monitor the innovation of public procurement. In order to get a proper measurement process it is important to select a variable that is quantifiable and reflects the innovation of the project.

**Question 113:** Are there any other issues which you think should be addressed in a future reform of the EU public procurement Directives? Which issues are these, what are - in your view - the problems to be addressed and what could possible solutions to these problems look like?

Public purchasers, as their (often low) quality is concerned (training, expertise availability – esp. technical and engineering). Obligation to tender relevant (missing) expert services to guarantee and support quality of PP for public interests.

**Question 114:** Please indicate a ranking of the importance of the various issues raised in this Green Paper and other issues that you consider important. If you had to choose three priority issues to be tackled first, which would you choose? Please explain your choice.

- Obligatory use of quality orientated procurement procedures for intellectual services: Most economically advantageous tender instead of price competition to guarantee the best possible outcome of a procedure (also in view to policy aims and innovation) /Obligatory use of negotiated procedure with prior publication for intellectual services with suggested amendments (Question 15) - to guarantee the best possible outcome of a procurement procedure (also in view to policy aims and innovation) – Best value for money
- Proportionality of eligibility/selection criteria to ensure better access for SMEs and Microenterprises
- Quality of staff of procuring authorities