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Evaluation of Directive 2014/24/EU on public procurement based on the experience of the ECEC member organisations, representing over 300.000 Chartered Engineering Consultants which provide planning/ designing services and construction supervision services

- ***New sector for intellectual (including engineering) services***

This Directive defines a service contract exclusively as opposed to a construction contract. This definition is clearly deficient. By modifying this definition, it is possible to introduce the singularity of service contracts with intellectual services. Engineering services are intellectual services which rely mainly on activities of the mind, require a high-level qualification, can generate intellectual property rights, and are carried out in the interest of the client and the public. They play an important role in finding sustainable solutions of current societal challenges and are pivotal in achieving the objectives of the Green Deal and other important political goals like quality of life and infrastructure, climate impact resilience, public health, and safety, etc. For intellectual services only a functional service description, defining the required services as a task with performance and functional requirements is possible and not a full constructive description.

Currently, despite of completely different requirements, intellectual services are treated in the same way as standardised services. This does not correspond to the nature of these services thus seriously jeopardises the quality of the results of the procedure.

Due to the specific nature of intellectual services, the complexity of interactions, and the interdependencies among participants, a dedicated section/ special chapter for intellectual services is required in the Public Procurement Directive.

- ***Quality competition for intellectual engineering services***

The procurement of planning / designing services must focus on competitive and quality performance and not on the "lowest price". Sustainable solutions can only be selected based on their content, not their price. High quality planning / designing guarantees not only sustainable, high quality and safe solutions but are a basis to save costs during the life cycle.

Quality instead of prize competition must become obligatory for intellectual services such as engineering services. Only this can ensure the best as well as most economical solutions and guarantee public health and safety. In lowest price competitions companies that do not invest in education and continuous professional development for CEOs and staff dominate.

The currently permitted maximum weight of 90% for the price criterion formally allows the consideration of quality criteria when selecting the most economically advantageous tender, but in practice, qualitative aspects rarely play a significant role. A proposed amendment would increase the maximum weight for qualitative criteria to ensure greater competitiveness based on quality rather than solely on price. Some EU Member States have already implemented similar measures. For

example, in Spain's Public Sector Contracts Law (Ley de Contratos del Sector Público, <https://www.boe.es/buscar/act.php?id=BOE-A-2017-12902>), Article 145(4) stipulates that quality criteria must account for at least 51% of the evaluation score.

This issue is particularly significant in design and supervision services, which represent a small fraction of total construction costs but have a major impact on overall project expenditures. A 10% reduction in service costs results in total savings amounting to only 0.5%, as services constitute about 5% of total construction costs. However, such "savings" often lead to higher final construction costs due to deficiencies in project documentation, extended completion timelines, and additional unforeseen works.

Additionally, life-cycle costs and user safety should be considered, as higher-quality services in the early phases contribute to more efficient public spending and serve the public interest. The exact percentage for the weighting of qualitative criteria should be determined at the EU level, ensuring that price does not account for more than 50% of the overall score, thereby guaranteeing that quality is genuinely considered.

In practice, contracting authorities tend to rely on the simplest evaluation criteria, such as the number of completed contracts or the specific experience of experts. While these are valid criteria, they do not sufficiently differentiate between bidders, especially when set at a threshold that many economic operators can meet.

Introducing scoring for the methodology of work and/or proposed solution concepts, at least for projects exceeding a certain financial threshold, could significantly assist contracting authorities in selecting high-quality bidders.

- ***Negotiated procedure***

In the engineering sector, clients are confronted with highly complex technical services that are based on rapid technological developments. There is no possibility of a sufficiently precise technical specification in advance and there can be a huge information asymmetry between service provider and the client.

The negotiated procedure should therefore be implemented as the standard procedure for the awarding of engineering services

- ***No more excessive capacity requirements***

SMEs play an important role in ensuring economic growth and innovation. Their participation in procurement procedures is therefore important for the economy and for society. Particularly for micro-enterprises participation in procurement procedures is often difficult due to high capacity / reference requirements that are extremely difficult to fulfil by SMEs and micro enterprises. Such requirements are often a burden for potential service providers with an SME structure which considerably reduces the intellectual competition and thus hinders perfect sustainable solutions.

For intellectual services, SME-friendly procurement must be enhanced in the Directive and clearly reinforced in the recitals. Capacity requirements and requirements of reference must be kept low so they can be fulfilled by SMEs and start-ups.

Reference requirements must be modified from five/three years to ten years. Turnover requirements must be proportional to the expected duration of the contract. The estimated value of the contract to be considered in determining the minimum annual turnover requirement must be the annual value maximum, not the total estimated value of the contract for its entire duration.

- ***Abnormally low tenders***

The Directive does not prescribe thresholds below which a submitted tender would be considered abnormally low. However, it does not prohibit defining a mechanism that would require contracting authorities to request an explanation. Many EU Member States have already implemented such mechanisms in their national public procurement laws (Belgium, Bulgaria, Greece, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia). The laws in these countries require the contracting authority to request an explanation if a tender, depending on the country, falls below a certain percentage of the estimated value, if it is lower by a certain percentage than the average of the received tenders, if it is lower than the next lowest tender, or in case of some combination thereof, considering the number of submitted tenders. A common procedure could be established at EU level, obliging contracting authorities – based on studies of independent bodies about scope and remuneration of engineering services - to systematically assess whether a tender constitutes an abnormally low offer. As abnormally low offers can cause a lot of problems, there should be possibilities to allow the Evaluation Committee to eliminate the abnormally low and high offers.

- ***Methods for calculating the estimated value of procurement for planning services***

To estimate the value of procurement, the directive determines the consideration of all costs associated with an order. The aggregation of dissimilar services (in relation to the specialist area) leads to the risk of quickly exceeding the threshold values leading to an award procedure that is not appropriate to the size of the project. Very small companies, which are often young and innovative offices, are often excluded due to this matter. To avoid inadequate procedures and access barriers when calculating the contract value, only similar planning services should be added together.

The Directive should also include the need for contracting authorities to ensure that the base tender budget is in line with market prices and is the result of a detailed prior study of costs. This principle is found in the search for competition in the award processes.

Contracting authorities must first have a clear project assessment plan and base their decisions on up-to-date and relevant market information, which includes considering current market prices for the goods, services or work being procured. This implies that it is essential that price estimates are made carefully and are based on market data reflecting the current economic situation and conditions. In some countries these procedures are based on standards.

- ***Right to apply for a review of tender and competition documents***

Applying for a review of tender and competition documents is very difficult for bidders because they are usually dependent on continued cooperation with the client. Often the business relationship is an asymmetric one, the client being a much larger entity than the SME/Micro-Enterprise. Additionally, the procedures are usually quite lengthy and potential bidders who might be excluded due to the description of the requirement are not able to take part in the procurement procedure.

The review of problematic tender and competition documents is very important in order to prevent problematic procurement procedures and the connected risks for clients.

Implementing the right of professional institutions to apply for review of tender and competition documents before the court would lead to a fundamental improvement in the quality of public procurement in general.

- ***Payment for (intellectual) engineering services***

For services provided during construction, contracting authorities often tie payments to the contractor's progress - meaning that the percentage of work completed by the contractor each month determines the percentage of payment released for engineering services. This practice contradicts public procurement principles, as it results in an undefined scope of procurement, makes payment conditions beyond the service provider's control, and most concerningly, creates financial dependency on the contractor's performance.

The only fair and appropriate method of payment for such services is based on a predetermined unit price per month. It is therefore proposed to prohibit payment structures for engineering services that are linked to conditions beyond the actual scope of service performance (e.g., linking supervision service payments to the contractor's progress).

- ***Exclusion of economic operators***

Currently the directive defines mandatory and discretionary grounds for exclusion, leaving Member States the choice of which discretionary grounds to adopt as mandatory.

If certain discretionary grounds - particularly professional misconduct—were made mandatory (as is the case in some EU Member States, such as Italy, Spain, and Romania), contracting authorities would have greater flexibility to exclude bidders with a history of poor contract performance, often due to excessively low pricing. Such exclusions would incentivize realistic market pricing, ensuring high-quality service delivery, protecting the public interest, and promoting the rational use of public funds.

- ***Modifications***

There can be a need to modify the work projects due to the deficiencies detected during the execution of the same, which makes it necessary to reform the legal regime of the modifications not foreseen in the bidding documents, in the sense of increasing the limits.

- ***Conditions of execution of the contract***

Contracting authorities may lay down special conditions relating to the performance of the contract, provided that they are linked to the subject-matter of the contract. Such conditions may include economic or innovation-related considerations, environmental, social, or employment-related considerations.

Especially due to the experiences during the last years it would be very important for the construction sector to include the paragraph "*They may also include the requirement for economic operators to provide for compensation for the risks of price increases resulting from price variations (hedging) that may substantially affect in the performance of a contract.*" (was included in the first draft of the 2014 directive and then unfortunately removed from the final draft).

- ***Subcontracting***

The current possibility that Member States may provide that, *at the request of the subcontractor and where the nature of the contract so permits, the contracting authority shall transfer directly to the subcontractor any sums due to it for services rendered, supplies delivered or works carried out for the economic operator to whom the public contract has been awarded (the main contractor) and that such provisions may include appropriate mechanisms enabling the main contractor to object to undue payments and that these provisions relating to this mode of payment shall be set out in the procurement documents* should be eliminated, since it is understood that it violates the company's power of self-organization and even the principle of freedom of enterprise.

- ***Revision of prices***

Price review in the current Directive on public procurement is contained in a generic and general way, leaving a wide freedom to each Member State in the transposition of the Directive. This generic solution makes it possible for the legislature, when transposing the directive, not to be obliged to incorporate the mandatory nature of the price review. It is therefore proposed to establish that price revisions must be provided for in the initial procurement documents for all public sector contracts and must be applied without any grace period or with a minimum time lag of three months from the date of formalization of bids and that the materials covered by the contract, energy and labour must be subject to revision. Additionally, an extraordinary price revision regime which, in unforeseeable situations, such as epidemics, disasters or wars, for example, guarantees the public interest in the execution of public works contracts and compensates contractors for the alteration of the economics of the contracts caused by the extraordinary increase in their costs, unforeseeable at the date of the tender, shall be implemented.

The Directive should require that public contracts include price revision clauses that are clearly, precisely, and unambiguously stated from the outset in the bidding documents.

- ***No framework agreements for intellectual services***

Framework agreements can be used for construction, supply, and services. The framework agreement is characterised by the fact that one or more contractors as framework agreement partners have a performance obligation in the event of a call-off from the framework agreement. However, there is no obligation to call off from the framework agreement, which is why this represents a unilateral obligation on the part of the framework agreement partners. Particularly for the provision of services, such as consulting and planning / designing services, a framework agreement partner without contract security would have to maintain qualified personnel for the event of a call-off from the framework agreement. Highly key personnel are an important assessment factor in the award criteria for service contracts. This means that in framework agreements, companies are required to nominate qualified personnel and to keep them available free of charge for the event of a call-off from the framework agreement. Furthermore, the services for a subsequent planning project cannot be reliably calculated because essential information (construction costs, type, and size of the construction project in particular for the upcoming extensions and conversions and for refurbishment measures) is missing. Framework agreements therefore tie up key personnel who could productively in other projects and force contractors to submit offers that cannot be reliably calculated.

(Especially) Intellectual services should therefore not be awarded by means of a framework agreement.

- ***Calculation of deadlines***

The start of the bidding period begins on the day the notice is sent, regardless of weekends / non-working days. De facto restrictions of competition arise in particular during (in particular long-term) public holidays because potential interested parties may not be aware of the notice until the next working day.

Therefore, working days instead of calendar days should be used to calculate the tender deadlines (minimum durations for deadlines). This would ensure that interested companies have sufficient time to participate in the tendering procedure, even in case of several Sundays / public holidays in the bidding period.

- ***Adequate thresholds***

The current EU thresholds no longer do justice to European and global political circumstances such as high inflation. The economic development can be boosted by the simplifications of procurement procedures associated with the increase in threshold values. In addition to safeguarding jobs and reducing administrative costs, raising the thresholds will also strengthen regional small and medium-sized enterprises.

Regarding the different types of thresholds intellectual engineering services - analogous to comparable legal services – could be allocated to the specific services and the related thresholds.

Another approach to tackle the issue is to define an appropriate special threshold corresponding with the EU threshold value for construction services, using a 15% value of it (in Euros 830,700,00) as the EU threshold value for services as there is an obvious imbalance in the EU thresholds for intellectual services and construction services. Currently, the very low threshold for service contracts means that even small construction projects require a major procurement procedure for engineering and architectural services. Construction services, on the other hand, can be tendered and awarded nationally. The threshold value for service contracts should at least be set in an appropriate ratio to the threshold value for construction contracts (15%)

Particularly in view of the complex, expensive and long EU-wide procurement process the threshold value needs to be increased in line with the EU priorities of more competitiveness and less bureaucracy.

- ***Tackling the problem of late payment***

In context with the evaluation of public procedure it is important to also tackle the problem of late payment. It would be advisable to take a cross-functional approach, and to consider both the regulations on payment deadlines and those on public procurement (which include provisions on payment terms for services/invoices, etc....). In terms of payment times, public-sector clients are in some countries still among the worst payers, despite the crucial importance of public-sector contracts.