# ECEC Position on the European Commission's Proposal for a Directive of the European Parliament and the Council on Public Procurement COM (2011) 896 final - main points

## In General:

It is necessary to acknowledge that intellectual services as engineering and architectural consultancy services fundamentally differ from the execution of works or the supply of products and therefore the procurement procedures for these services have to be different.

## Art. 1 Subject matter and scope

The ECEC is of the opinion that it is necessary to divide between the procurement of planning services and construction services. The approach in Art 1 (2) would lead to a expansion of the scope of the directive which is not really justified.

## Art. 4 Thresholds

In view to thresholds the ECEC would like to stress the importance of an economical approach that takes into account the total costs of a procurement procedure. There has to be a reasonable relation between costs and benefits of a procurement procedure.

## Art. 24 Choice of procedures

The negotiated procedure is – at least in the currently valid form – a necessary procedure for intellectual services as engineering services. Therefore it should be opened for all nonstandardized services. Intellectual services should be mentioned as an example for the standard use of the negotiated procedure.

Additionally we suggest adding after point (c ) another point "architectural and engineering services" -

The last paragraph of point 1. – "Member states may decide not to transpose into their law…"- should be deleted as far as it concerns the negotiated procedure.

The negotiated procedure has to be equated to the other standard procedures offered by the directive.

In view to Paragraph 1 Point (a) we suggest a division between planning and execution of works. The intermixture is negative for the client as it means a lack of competition as well as a lack of control and is therefore contradicting the aims of this directive.

**Art. 25 – Art 28**

The shortening of the deadlines in all procedures is problematic. Especially for SME the deadlines are already very narrow as they are now. The European Commission should therefore keep in mind that such short deadlines are completely contradicting the aims of opening the competition and better access to procurement procedures for SMEs. The short timeframes make the participation of SMEs in many cases completely impossible. For SMEs a general minimum of 4 weeks is absolutely necessary.

**Art. 27 Competitive procedure with negotiation**

The new form of the negotiated procedure which has now also certain aspects of the competitive dialogue is problematic. The negotiated procedure in the currently valid form is much better suitable for intellectual services, although certain additional information duties for the client in view to transparency could be added. The more „competitive approach“ might make sense in view to very big and complex procedures. But for those cases the competitive dialogue is available anyway. The principles of the “classic” negotiated procedure are clear: On the basis of the requirements that are announced at the beginning of the procedure offers are submitted, the contents are not changed until the end of the procedure. Requirements cannot be changed during the procedure. These basic principles have to be kept, only then the necessary demarcation from the competitive dialogue is possible.

Paragraph 3 therefore has to be changed:

The possibility to change the offers “in order to better correspond to the award criteria ..” should be deleted.

Paragraph 3 (b) leads to the fact that a negotiation about parts of the technical specifications other than those defining the minimum requirements shall be possible. This would mean that the client can change his parameters at all times, which would make a change of the offer necessary. This possibility has to be deleted.

### Art. 28 Abs. 8 Competitive Dialogue

There should be a duty for public clients to give prizes or payments to the participants of the dialogue („have to“ instead of „may“)

### Art. 29 Innovation Partnership

The procedure as a whole is negative for the service provider. Especially problematic is the possibility of the termination of the contract after every phase of the project. This should be bound to objective criteria.

Precarious in this procedure is not only the procurement itself but also the conclusion of the contract. The approach how to deal with the dissolved contract doesn't have solutions for all open questions/problems (possibility of a cheap purchase of ideas / cherry-picking).

The principles of procurement law should also apply to this procedure.

### Art. 44 Divisions of contracts into lots

In view to a better access for SMEs the division in lots is positive. The limitation in Paragraph 2 should be deleted as it is an impairment because the opportunity to get a contract is reduced.

### Art. 56 Selection criteria

The ECEC welcomes the wording of Art 56 point 1, paragraph 3, defining the limits of permitted conditions for participation („Contracting authorities shall limit …“).

### Art. 57 Self-declaration and other means of proof

The ECEC welcomes the possibility of self-declarations in order to reducing the effort of participation and the fact that tenderers cannot be required to re-submit certificates that have already be submitted to the same procuring authority within the past four years.

### Art. 59 European Procurement Passport

The approach to make crossborderparticipation easier is positive. But in the proposed form the ECEC doubts the effectiveness, also because the documentary has to be updated permanently anyway. Generally tenderers update their data once a year anyway (see a well working example in Austria https://www.ankoe.at/index.php?id=25&L=1

A digital certificate in IMI with automatic translation of important parts fed in by central bodies on national level could improve the situation.

**Art. 66 Contract award criteria**

Paragraph 1 – the approach to substitute the wording „lowest price“ with „lowest cost“ is positive but as the procuring authority is unfortunately completely free to base the award on cost or price it will have no effect.

The ECEC would like to stress that for intellectual services which are non-standardized services only decisions based on lowest cost / economically most advantageous tender can be appropriate. Therefore the ECEC asks the commission to go a step further in the wording of Art 66 and make the use of the lowest cost/ economically most advantageous tender approach mandatory for intellectual services and prohibit the use of lowest price as the sole criterion.

Paragraph 2 (b) – To see the quality/qualification of personnel as award criterion is already practiced by many procuring authorities, a legal adaptation is positive. But it is wrong to connect this quality/qualification to a certain sole person, whose further development is never foreseeable and controllable. Therefore such a requirement is in fact unrealistic. It has to be sufficient that a certain quality/ qualification is available in the personnel of the tenderers office/firm - not connected to a certain person.

If the wording is kept in this form it would be very important to regulate that the procuring authority is obligated to agree to an equivalent change of personnel.

**Article 69 – Abnormally low tenders**

The ECEC believes that the conditions set for initiating the abnormally low tenders procedure are quite broad and hence in effect neutralize the tool and making it considerably more difficult for contracting authorities to safeguard themselves from abnormally low tenders. Therefore the criterion in Art 69 (1) (a) should be deleted and or reduced to 25 %, the criterion in Art 69 (1) (b) shall be reduced to 10%.

The cumulative effect of the three criteria be changed to disjunctive and/or the addition of another criterion stating that the contracting authority may request explanations with regard to an abnormally low tender, when a tender’s price varies substantially from the estimated contract price.

**Annex XIV**

The ECEC welcomes the possibility to accept references that are older than three years. The three years are very often unrealistic, especially in view to big and complex projects.