

ECEC Position on the European Commission Proposal for a Public Procurement Act

The European Council of Engineers Chambers (ECEC) welcomes the European Commission's proposal for a new EU public procurement framework and its ambition to strengthen quality in public procurement. However, ECEC calls for significant improvements to ensure that the specific nature of engineering and other intellectual services is properly recognised.

*Intellectual services as those provided by **Chartered Engineers** play a central role in the planning and design of our built environment – from buildings to public spaces and infrastructure. They significantly contribute to the public interest. A high-quality built environment can only be the outcome of quality processes. Implementing the aims of the New European Bauhaus in the construction sector requires high-quality procurement procedures that enable excellent and innovative solutions for the built environment.*

1) Legal Framework

While the ECEC understands the intention of the European Commission to provide a stronger framework to implement efficient quality procurement in the EU, it sees a severe danger of reducing already existing quality requirements on national level as the current text leaves room for procuring authorities to define procedures, including possibilities that are not suitable for intellectual services. In addition, a uniform public procurement framework cannot address the different conditions in the Member States appropriately, so for some member states the current approach would lower their minimum requirements with the likely results that in practice procedures would tend to adapt to the lower requirements. The ECEC therefore appeals to the European Commission to avoid this effect especially for services that – as explained - in their nature require quality procurement procedures and to base the intended improvements on a strong new Public Procurement Directive instead of a Regulation.

2) Intellectual Services

While **implementing a mandatory minimum use of quality criteria** (Article 98) is generally an important step to improving the quality of procurement procedures all over Europe, the ECEC regards the currently fixed minimum ratio of 30% quality in general and 50% quality in the procurement of labour-intensive services as not adequate for intellectual services such as engineering services. This approach could lead to lowering the percentage ratios of quality criteria in countries with a higher level of mandatory quality criteria and thus risks compromising the quality of the built environment in Europe.

As expressed in the **Luxembourg Declaration**, the ECEC urges the European Commission and the European Parliament to take into consideration the distinctive nature of planning and design services, often referred to as intellectual or creative services, that lies in the inherent unpredictability of their outcomes. While it is possible to define needs and set economic, local, functional, and other parameters that frame a project, the actual solution emerges through the creative process itself.

Given this distinction, the newly defined **labour-intensive services** should be further subdivided into labour-intensive intellectual services and labour-intensive other/physical services. On this basis an adequate framework for the procurement of intellectual services should be provided. This should include the obligation to apply a higher quality ratio percentage as well as distinctions regarding adequate procurement procedures and the protection of intellectual engineering and design work during the tendering procedure.

3) Quality Procedure

It is important to stress that “Best quality for money” needs to be reflected throughout the procurement process, not only in the mathematical weighting of award criteria. If quality criteria are not adequately defined, they can result in a de facto pure price competition.

For engineering and other intellectual services, the main factors for a successful implementation of quality procurement are that procedures allow public buyers to assess the competence and ability of tenderers in relation to the specific assignment. Such assessment should not only relate to references, as they often have a discriminatory effect for smaller and younger offices. In addition, not all relevant

qualities can be measured through predetermined indicators, but they can be assessed through fair, transparent and professionally informed procedures.

Defining quality procedures and adequate quality criteria as well as calculating costs requires a high level of expertise and can provide a challenge for many procuring authorities especially for smaller entities. This is especially important because – as explained above – the procedural basis in the current draft leaves a lot of room for procuring authorities to define the procedures. The ECEC therefore welcomes Article 139 as it is extremely important to invest in building up such expertise and providing procuring authorities with guidelines and best practise approaches e.g. for adequate quality criteria in different fields.

In addition, the ECEC suggests the implementation of a quality control mechanism: Applying for a review of tender and competition documents is very difficult for service providers because they are usually dependent on continued positive cooperation with the client. At the same time the review of problematic tender and competition documents is very important to prevent problematic procurement procedures and the connected risks for clients. Implementing the right of representative (professional) interest organisations to apply for review of tenders would lead to a fundamental improvement in the quality of public procurement in general.

4) Division into lots

The ECEC welcomes that the draft very explicitly recognizes and enhances the importance of dividing public contracts into lots and thus providing better access for SMEs to public procurement. Smaller and specialized engineering firms need to have the opportunity to bid for individual specialist or partial services. The division of contracts into lots should therefore become the standard practice across Europe, thus the wording should convey an even stronger sense of obligation.

5) Simplification and wider access

Simplification is another important way to enhance SME and Microenterprise participation in Public Procurement. Simplifying procedures and lower barriers to entry for SMEs and MEs should be further enhanced in the draft, e.g. by clear quality procedures, by a better guarantee for proportionality of access requirements such as references and capacity checks and by reduced documentation requirements such as

accepting eligibility proof in existing national databases. If references are required, not only lead architects and engineers of a project should be able to use them but also team members that otherwise often are never able to acquire references.

Conclusion:

The ECEC calls for amendments of the draft to better recognise the specific nature of engineering and other intellectual services.

The ECEC calls for

- the reform to be based on a strong new Public Procurement Directive rather than a Regulation
- labour-intensive services to be further divided into intellectual and other services, with procurement procedures specifically adapted to intellectual services and higher quality requirements.
- procurement procedures to enable a meaningful assessment of professional competence and quality, while also protecting intellectual engineering and design work during tendering.
- better SME access to public procurement by making the division of contracts into lots standard practice, ensuring that access requirements are proportionate to the scope and nature of the contract, and reducing documentation requirements.
- sufficient expertise within contracting authorities and representative professional organisations to have the right to request a review of tender and competition documents, helping to prevent problematic procurement procedures before they create risks for public clients and projects.