30/9/2010

An EU initiative on concessions

FIEC contribution to the business consultation

FIEC is the European Construction Industry Federation, representing via its 34 national Member Federations in 29 countries (27 EU & EFTA, Croatia 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.

Through its national Member Federations, FIEC represents companies active in all types of construction activities; namely having experience in concessions (works, services and mixed).

Introduction – general comments:

- This contribution is a complement to the letter sent to Mrs. Szychowska, Head of Unit MARKT C2, on 21/6/2010 (**herewith attached**).
- FIEC considers that there is **no need for a rigid European framework on concessions**; the EU should rather leave it to each Member State to rule on the details.
- Both contractors and contracting authorities **need a stable legal framework** – rather than one which is frequently modified. Such a stable legal framework is necessary to ensure and improve the **capacity building** of both public and private partners.
- There is a need for **sound economic basis and reliable contracts** for good PPPs (whether concessions’ type or any other).

Additional comments:

1) Current legal framework:

Both works and service concessions are defined in directive 2004/18/EC on public procurement (articles 1(3) and 1(4)), but – except for article 3 – service concessions are not covered by this directive (see article 17).
The award of works concessions is subject to some basic rules (e.g. publication – see Title III).

According to the ECJ, Judgment 10/09/2009, C-206/08 “WAZV Gotha / Eurawasser”, although service concessions are excluded from the scope of the directives, they must comply with the principles of the EC Treaty, and namely respect competitive and transparent procurement procedures.
Hence, the award procedure keeps enough flexibility for such complex long-term contracts and the respect of the fundamental principles of the Treaty is sufficient to ensure a fair procedure.

Contractors did not report any specific loophole or problem concerning the flexibility of these few rules.

2) Definitions:

The current definitions of **works and service concessions** (articles 1(3) and (4) of directive 2004/18/EC) enable a distinction between two main types of long-term contracts:

- Where investment is made by the private party AND the private operator bears the demand risk (with payment by users). E.g. works and services concessions.

- Where investment is made by the private party BUT the private party does not bear the demand risk (with payment by taxpayers). E.g. traditional works contracts.

FIEC does not believe that more precise legal definitions are possible in the field of concessions. Concessions are very close to other types of contracts and business concepts are changing very quickly. For this reason, a general legal definition is sufficient. The details would be left to the interpretation of the Court.

In the same way, FIEC considers that it is impossible to give an "objective" definition of what is a **"significant" risk**, which is evaluated on a case by case by contractors. In the French jurisprudence, for instance, a risk simply corresponds to a possible loss.

3) Publicity:

Concerning the compulsory advertisement of services concessions at the European level, even if such an advertisement is not yet compulsory, concession contracts already concern companies of **all** sizes and active in various sector – amongst which, construction companies – mostly in utilities' sectors (water and energy supply, etc.), but also in health (maintenance, cleaning and equipment of hospitals) and social infrastructure (school, universities, court houses, prisons). To be added are more traditional infrastructure (highways, airports) and building maintenance in general.

Hence, so far, the absence of such compulsory advertisement at EU level has not been reported by contractors as being an issue.

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If however taken on board by the Commission, FIEC assumes that the compulsory publication of services concessions in the OJEU would ensure the openness of the market, that is, EU-wide competition. This is expected to widen the market structure and ensure fair prices for EU taxpayers (in the sense: best value for money).

Deleted: At the same time, competition will also increase the pressure on the various companies and operators, with a consequent negative impact on jobs and wages.

While in favour of widening the EU market structure and ensuring the best value for money to the EU taxpayers, FIEC would like to warn the EU Institutions from possible cases of unfair competition by third country state-owned "enterprises", which are able to propose very low prices – abnormally low prices! - on the EU public procurement market due to state aid which would be illegal under the EU rules.
Out of the various solutions which could be used to fight against such unfair practices[1], FIEC would like to highlight the following two:

- through the **application of EU state aid rules also to third country companies**, so far as they wish to work in the EU, or through rules / mechanisms, which ensure that no third country enterprise benefits from third country state aid to the detriment of EU companies;
- through the effective and checked **application of the EU social and environmental legislations:** for instance, these companies should be obliged to prove during the pre-qualification phase that they respect all EU social and environmental rules.

4) Thresholds:

Should services concessions be integrated in the public procurement directives and aligned to the rules governing works concessions, then FIEC wonders what the threshold for these services concessions should be.

This is a very complicated and sensitive issue as there are concessions contracts of **all sizes** in the field of services.

For instance, should a very high threshold be chosen, corresponding to high-value contracts of cross-border interests, then the Commission would not meet its objective to eliminate a "loophole" for the majority, but would rather address a very small minority of contracts...

[1] See: FIEC contribution to the public consultation on a future trade policy, dated 28/7/2010, on www.fiec.eu