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.

PART 1: Key issues for the Construction Industry presented in the EP-IMCO Hearing of 27th January 2010

I. The existing rules are adequate and sufficient.

1. General observations:

FIEC believes that European legislation on public procurement (Directives 2004/18/EC and 2004/17/EC) is adequate and sufficiently clear, **including as regards environmental and social aspects**.

The fundamental principles of the Treaty to be respected are: competition, transparency, non-discrimination, equal treatment, proportionality, mutual recognition, effective legal review, as well as the strict respect of the confidentiality of the tenders and any technical solution submitted by the contractors.

All actions in the field of public procurement must strictly comply with the provisions of the Treaty and the directives.
In this regard, FIEC would like to recall that:

a) "Soft law" is not law. This should be made clear by the Commission when publishing "explanatory notes", "Interpretative Communications", "guides", etc…
b) The various Directorates General of the Commission should coordinate their actions in this field, in order to ensure full coherence with the public procurement directives. Furthermore, the multiplication of non-legislative texts risks creating confusion rather than clarification.
c) For the time being, public procurement legislation needs stabilization. The frequent changes of national legislation in the process of implementing the EU directives create considerable uncertainty and additional work for contracting authorities and contractors. Furthermore, in many countries, there is not much experience with the "2004 directives", in particular with certain procedures, such as the competitive dialogue or electronic tendering).

2. Constructive input by the ECJ:

In general, we consider that the European Court of Justice has covered and clarified the provisions of the directives and a number of loopholes effectively.

For example and without dealing with all aspects of these decisions:

a) **Public-public cooperation:**

According to the ECJ, Judgment 9/6/2009, C-480/06 "Stadtwerke Hamburg", public authorities may decide in which legal form they perform non-commercial public tasks.

<u>FIEC position:</u>

First of all, as the ECJ earlier clarified, the public procurement rules apply as soon as private economic operators are included. In addition, in-house and inter-municipal cooperation must not create parallel markets which escape from the application of public procurement rules and exclude private economic operators.

b) **Institutionalised Public-Private Partnerships:**
According to the ECJ, Judgment 15/10/2009, C-196/08 "Acoset", no "second procurement" is needed if a competitive and transparent procedure has been used for choosing the private partner for a services contract.

FIEC position:
This clarification prevents unnecessary award procedures and saves costs.

c) **Service concessions:**
According to the ECJ, Judgment 10/9/2009, 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.

FIEC position:
The respect of the fundamental principles of the Treaty is sufficient, so that, in principle, no new legislation is required. However, it does not seem logical that works and services concessions are treated differently. So, if legislation were envisaged, the current rules for works concessions should be extended to service concessions.

In general, FIEC notices that the main problems encountered by construction contractors in the framework of public procurement lay either in the bad implementation of the directives at national level[1], or in bad practical application.

3. Towards the improvement of public procurement procedures?

If, despite existing sufficient legislation and clarifying court cases, a revision of the current legislation is envisaged – as could be the case at the end of the on-going evaluation process of the public procurement directives by 2012 or 2013 – then the European legislator should ensure that:

a) it complements the existing directives;
b) it ensures coherence with other EU law;
c) it avoids recourse to further "soft law";
d) it does not create new loopholes;
e) it focuses on the promotion of innovation in public procurement, to ensure sustainable public procurement.

II. How to better promote innovation in public procurement?

FIEC welcomes the various initiatives of the Commission in the field of innovation (e.g. Commission's "Guide on dealing with innovative solutions in public procurement"2). Promoting innovation in public procurement is indeed a key condition towards sustainable public procurement.

[1] See the resolution of the European Parliament of 20 June 2007 on specific problems in the transposition and implementation of public procurement legislation and its relation to the Lisbon Agenda, P6_TA(2007)0273

[2] SEC(2007)280 of 27/02/2007

In this regard, FIEC recalls that supporting innovation in public procurement is possible **ONLY IF**:

1. Not the price alone, but additional criteria are applied in order to establish the **Most Economically Advantageous Tender (MEAT criterion).** This approach should systematically be used to award the contract, rather than the lowest price criterion only. Only the former enables procurers to properly take into account the whole life-cycle cost of the building or infrastructure (from the design to the end of life of the asset), as well as those additional aspects, e.g. social or fair trade aspects, which the directives allow. This is a key condition for more sustainable public procurement, especially in the context of current economic crisis. By contrast, using the lowest price criterion can lead to the acceptance of abnormally low tenders, which do not guarantee the promotion of sustainability in public procurement!

2. The opportunity of presenting **alternative offers** (variants) is ensured to the contractors. A company should, by default, be free to present an alternative offer, and not only in cases in which this is specifically permitted by the client which is the case in the current directives.
   In order to safeguard fair, transparent and non-discriminatory competition, the contracting entity needs to specify which (technical) minimum requirements all tenders will have to comply with. In addition, the entity needs to clarify how tenders exceeding these requirements will be evaluated.

3. The **confidentiality** of tenders and technical solutions submitted by contractors must be strictly respected. This is of particular importance when contractors present alternative offers, as well as in the special case of the competitive dialogue procedure. It is unacceptable that contractors' ideas are cherry picked or stolen. In a market economy, no contractor can afford to invest in financial and personal resources if the result is made available to competitors, which did not have these expenses to pay. Such incorrect practice discriminates and financially disadvantages inventive contractors, as well as dissuading them from participating in future calls for tenders organised by the same client. This restricts both the client's choice and competition.

III. Third country state-owned "enterprises" on the EU public procurement market

FIEC, together with its Member Federations, have recently observed suspect cases where third country state-owned companies have been allowed to participate in European public procurement. . ...
In the present case, a third country state-owned "enterprise" has been awarded two out of 5 lots of a road construction project in an EU Member State. This case has led to many questions regarding the respect of EU procurement and competition rules.

1. Unfair competition / State aid:

As the owner of such "enterprises" is a state, it provides no normal commercial basis for the calculation of risks and prices.
Furthermore, in the present case, 100 million USD have been subsidised to the "enterprise" by the third country, which does not correspond to EU state aid rules.

It is unacceptable that such third country state-aid, which would not be allowed from an EU Member State, is admitted on the Internal Market, even receiving significant EIB funding.

2. **Risk of negative impact on social and environmental European standards:**
   Furthermore, we are convinced that the price offered for the same project can only be achieved by non-respect of EU social and environmental standards. Considering the efforts European contractors undertake and the costs involved in complying with EU rules on social and environmental aspects, it is simply not acceptable to admit such offers without any serious check, simply taking it for granted that all legal obligations will effectively be met.

   From FIEC's point of view, contracting entities within the EU must require, verify and safeguard that EU social and environmental rules are complied with!

3. **Abnormally low tenders:**
   As a consequence, the third country contractor has been able to make an offer with an extremely low price, which has also been accepted!
   In fact, the two offers corresponded to 26,7% and 28,9% of the estimated budget, whereas the next offers, from EU companies, corresponded to 42,2% and 45,7%, i.e. over 50% higher than the winning tender. It is also interesting to note that the other three lots of the same motorway project were awarded to EU companies for prices corresponding to respectively 50,9%, 40,6%, and 39,1% of the estimated budget, i.e. in the same range as the EU firms having lost against the non-EU contractor offer.

   This is of the responsibility of the contracting authority to reject such an offer.

4. **The EU Internal Market open without limits?**
   For many years, we have all been working on the opening of the Internal Market in the EU, with quite some success regarding public procurement of works and services. Cases such as the one reported above indicate that the current state of EU law is not adequate for protecting our Internal Market against third country competitors who increase their competitiveness by not respecting the EU rules on the level playing field in state aid matters, social standards or environmental requirements. EU legislation fails to protect the Internal Market against the risk of unfair competition, social dumping and disregard of European environmental standards.
   It is a political decision whether we want to adapt our legislation or whether we want to continue the way of exclusively trying to convince by giving a good example, without creating more tangible defence mechanisms for cases in which the good example alone proves to be inefficient.

FIEC believes that:

a) EU public procurement markets must not be open without limit for enterprises from countries which do not undertake serious efforts to open their own markets to EU companies. The principle of reciprocity or "symmetric access" has to be respected.
b) If no efforts are made, or do not lead to tangible results in an acceptable time, the EU should adapt the access of third country enterprises to the conditions which EU enterprises have themselves to respect.
c) Finally, in cases where important trading partners take advantage from the general openness of the EU, but show no real move towards reciprocity, the EU should introduce, without further delay, carefully targeted restrictions on access to parts of the EU procurement market, to encourage these partners to offer reciprocal market opening.

In any case, FIEC, together with the European International Contractors (EIC), call upon the Commission and the Parliament to analyse the various aspects and possible solutions in depth, and offer both the full collaboration and worldwide experience of the European construction industry.

PART 2: Further Key issues for the Construction Industry, not addressed in the EP-IMCO Hearing of 27th January 2010

IV. Current weaknesses of public procurement:

As mentioned in Part 1, the main problems encountered by contractors lay either in the bad implementation of the Directives at national level, or in bad practice sometimes applied on the ground.

The following issues have been reported by contractors:

1. **Too many projects are cancelled by the contracting authorities prior to the award of a contract,** in particular in the case of PPPs**:**

Causes:

a) Projects are not mature, are badly prepared or, in some cases, they are too complicated. In many cases all or several of these issues are encountered in a project.

Consequences:

b) waste of time and money,
c) high financial losses for both tenderers and clients,
d) risk of "cherry picking" of presented ideas for use in future projects.

Possible solutions:

e) Better education and preparation of the persons dealing with procurement in the contracting authorities**:**
The sufficient capacity and adequate competence of contracting authorities' staff are essential to ensure the overall efficiency of public procurement. It is obviously the role of each Member State or contracting authority to ensure that projects are correctly prepared and civil servants involved in public procurement are competent enough to deal with the types of procedures they use. This is a key condition to ensure the success and good quality of the projects.

f) In the case of cancelling tender procedures prior to the award, the contracting authority should be obliged to compensate all tenderers, at least for the cost incurred by the procedure so far.

g) Furthermore, a system of sanctions could be envisaged for contracting authorities who have to cancel a procedure due to poor preparation of the project.

2. **Abnormally low tenders (ALT):**

Causes:

a) In theory, setting the price of an offer is the responsibility of contractors, independently of the cost estimate made by the client.
b) In practice – and in particular against the backdrop of the economic downturn, where resources are scarce – clients tend to put pressure on contractors, trying to award contracts for the lowest possible price. In most cases, this is a very bad choice for several reasons:

- The quality might not correspond to the requirements, in particular in the long term.
- The winning contractor may have difficulties to honour its commitments.
- More seriously calculating contractors have missed a business opportunity.

c) This phenomenon is accentuated by the fact that contracting authorities tend to award contracts according to the lowest price criterion only, rather than the Most Economically Advantageous Tender (MEAT) criterion, which enables procurers to take into account other aspects of the offer – especially in the case of variants, innovation etc., where the sole criterion of the price is not sufficient.

Possible/ likely consequences:

d) decrease of the construction quality and increase of repair works;
e) less room for the application of environmental or social clauses);
f) unfair competition towards companies submitting offers of better quality;
g) increase of litigation related to the contract performance and quality;
h) increase of construction insurance premiums, i.e. increase of the cost of construction;
i) does not provide "best value for money", which should be a priority of contracting authorities, in particular during periods of economic downturn.

Solutions:

j) Contracts should be awarded on the basis of the MEAT criterion, rather than the lowest price.
k) The contracting authority should be obliged to systematically reject all identified abnormally low tenders for which no objectively plausible and verifiable explanation has been given by the tenderer and checked by the contracting authority. For this purpose, Article 55 of Directive 2004/18/EC should be amended, in order to ensure that the identification, evaluation and, if indicated, rejection/ exclusion of abnormally low tenders is carried out in a transparent and verifiable manner by the contracting authorities. Furthermore, offers evaluated as abnormally low tenders should be excluded ("shall" instead of "may").
l) In any case, the contracting entity should systematically require, verify and safeguard, during the actual execution of the works, that all applicable social and environmental legislation is respected.
m) As an incentive to take this task seriously, one could consider making the contracting authority liable for the possible adverse consequences of the acceptance of an abnormally low tender.
n) In general, it might be useful to develop guidance notes or training programmes for public procurers for preparing MEAT tenders and identifying / evaluating abnormally low tenders.

V. Specific case of environmental and social clauses:

As a general observation, FIEC stresses that public procurement directives already allow the inclusion of environmental and social considerations, if certain conditions are respected! There is therefore no need for further legislation for that specific purpose.
FIEC also recalls that: contractors need legal certainty in this field and that "soft law" is not law, but only the opinion of the Commission's services.
Furthermore, it is very important that initiatives undertaken in this field by the various Directorates General of the Commission are properly coordinated, in order to ensure not only the respect of EU law, but also the coherence of all these initiatives.

The main principles to be respected in this field are that environmental or social clauses:

1. be strictly linked to the subject matter of the contract;
2. be integrated **ONLY**:
   a) in the technical specifications (art. 23 - environmental and social[3] considerations) and/or
   b) exceptionally in the selection criteria (art. 50 – environmental management – EMAS) and/or
   c) in the award criteria (art. 53 1. (a) – environmental characteristics) and/or
   d) in the contract performance conditions (art. 26 - environmental and social considerations);
3. strictly respect effective competition, non-discrimination, equal treatment, mutual recognition and effective legal review (i.e. fundamental principles of the Treaty).
   <u>Example</u>: environmental and social clauses must not be written so as to exclude potential qualified tenderers from the procurement and unofficially designate one preferred tenderer!

… and have the following consequences:

4. additional competences required from the contracting authority!

Furthermore, the specific requirements of the construction sector have to be taken into account by contracting authorities while requesting specific or additional environmental and in particular social conditions: for example, a construction site is a potentially dangerous working place, even for skilled and experienced workers.

In addition, contractors tend to organise their personnel and equipment on a long-term basis, so that changing this organisation to a contract by contract basis would add many complications.

Another serious question concerns responsibility and liability in cases in which the contracting authority makes it mandatory for the contractor to use a certain group of persons which is neither part of the contractor's enterprise nor skilled in construction work. If then one of these persons is injured or causes damage, FIEC considers that the contractor must not be held liable.

<u>Examples:</u>

1. **Labour market insertion measures:**
   As regards specific **labour market insertion measures**, the performance condition can, for example, consist in providing vocational training for certain groups such as long-term or young unemployed people – according to national laws and systems; requiring the winning tenderer to recruit a certain percentage of the workers working on the delivery of the contract from groups such as those mentioned above. This percentage should be expressed in working hours and has to be the same for all bidders. If the idea is to have local people employed and if the awarding authority does not provide the persons to be employed, there is a danger of discrimination, because this condition would be easier to fulfil for local firms.

   Such requirements obviously only make sense if the considered project is large enough and sufficiently long in time as to justify hiring additional workers. Otherwise, they will cause the dismissal of workers in order to replace them by new ones from the desired target groups or provide an unjustified advantage to the most understaffed companies. In addition, the management on site of these additional workers should be adapted.

   Again, FIEC recalls that considering the specificities of the construction sector – specific skills in high demand, risks linked to on-site working conditions, lack of available skilled construction workers, etc. – hiring people from the above mentioned groups requires that they be skilled and have received health and safety training. On the contrary, hiring unskilled and untrained people on construction sites often leads to an increase the safety risks.

[3] Since access criteria for disabled people and « design for all users » are considered as being social clauses.

2. **Health and safety:**
   As regards specific **safe and healthy working conditions**, performance conditions requiring better health and safety measures than those required by existing collective agreements and national legislation are possible, but need to be clearly defined in the contract document, and should not discriminate against contractors who are in full compliance with EU and/or national health and safety legislation.

   Another problematic issue consists in requiring a specific "health and safety management system", such a requirement would effectively exclude all contractors unable to afford setting up such a system only for one single contract from the procurement process..

VI. Facilitate the access of SMEs in the public procurement market

According to an EU-Commission study [4] (p4), it was estimated that in 2001 the proportion of the value of public procurement above EU thresholds secured by SMEs was between 29% and 43%. The annual estimates made in this study of the values secured by SMEs since 2001 are all within the range estimated for 2001 but point to a slight overall increase. The equivalent figures for 2005 are 42% of value and 64% of contracts.
(p5) This, coupled with the relatively good performance of medium-sized companies, suggests that the EU is, in general, succeeding in ensuring reasonable access of SMEs to public procurement in above EU-threshold contracts.

FIEC therefore considers that the current public procurement rules already provide a good framework for contracting authorities. It is their responsibility to ensure that their procurement procedures, in practice, allow the access of SMEs.

This can, for example, be done by:

1. encouraging small enterprises to bid for contracts;
2. facilitating the cooperation of enterprises as consortia;
3. dividing contracts into lots where suitable;
4. encouraging subcontracting of larger contracts;
5. applying well balanced contracts for securing unbalanced risk;
6. applying suitable qualification criteria;
7. abstaining from unnecessarily high levels of proof and financial guarantees;
8. advertising not only the large, but also small public procurement opportunities on centralised national websites.

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[4] Evaluation of SME Access to Public Procurement Markets in the EU, Executive summaryof the Final Report, by GHK and Technopolis, 20/11/2007, commissioned by the European Commission, DG ENTR/E/4