

Public procurement – Amendments to IMCO draft report
Listing of relevant amendments
Assessment according to FIEC position¹

1) Distinct rules for central / sub-central authorities (art. 2, 24, 26)

There is no amendment **under art. 2** which proposes to delete the distinction between “central government authorities”, “sub-central contracting authorities”, “regional authorities” and “local authorities”, as requested by FIEC.

Neither have the FIEC requests been taken into account regarding the need to treat all contracting authorities in the same way, that is, with the same rules, **under art. 24 par. 2 (b)** and **under art. 26 par. 4**. In the latter, the provision has even been reinforced by IMCO Chair Harbour (**AM 711**).

POSITIVE	NEUTRAL / TBC	NEGATIVE
X	X	AM 711, Harbour

2) Relation between public authorities (art. 11)

a) In-house (par. 1 to 3)

Only MEP Hedh proposes to entirely delete art. 11, as requested by FIEC (AM 455).

Rapporteur Tarabella proposes to completely delete the criterion of the percentage of activity for the controlling contracting authority (AM 458).

Quite a number of amendments propose to lower this percentage, between 50% and 85% (AMs 459, 460, 461, 464, 466, 472).

On the contrary, other MEPs propose to safeguard 100% or “all” the activities for the controlling contracting authority (AMs 468, 469, 471).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 455, Hedh AM 468, Baldassarre & Comi AM 469, Busoi AM 471, Manner	AM 458, Tarabella	AM 459, Rühle; AM 460, Weisgerber; AM 461, Weiler; AM 464, Harbour; AM 466, Simon; AM 472, Mander

b) Horizontal cooperation (par. 4)

Both Rapporteur Tarabella and IMCO Chair Harbour, as well as other MEPs, propose to delete the minimum percentage of activity of 10% which can be realised on the market, in line with FIEC views (AMs 554, 455, 553, 556, 557). Two other amendments go in the same direction (AMs 560, 561).

¹ FIEC position «consolidated» on public procurement, dated 25/6/2012, available on:
<http://www.fiec.eu/Content/Default.asp?PageID=20>

On the contrary, MEPs Rühle and Weiler propose to increase this percentage to 15-20% (AMs 558, 559).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 553, van de Camp AM 554, Tarabella AM 555, Harbour AM 556, Weisgerber & co AM 557, Simon AM 560, Busoi AM 561, Manner	X	AM 558, Rühle AM 559, Weiler

3) Confidentiality (art. 18)

MEPs Engel and Juvin propose to reinforce confidentiality, in the way requested by FIEC (AMs 606, 608, 610).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 606 / 610, Engel AM 608, Juvin	X	X

4) Minimum time limits (art. 25 to 28)

Most MEPs propose to re-establish the current time limits in the various procedures, or at least, to extend those proposed in the draft Directive, as they are considered to be too short (AMs 689, 690, 700, 701, 702, 707, 725).

On the contrary a few MEPs even propose shorter deadlines (AMs 686, 692, 699).

Other MEPs propose to leave it open with “sufficient” time for specific procedures such as the competitive procedure with negotiation (AMs 723, 724).

Also, several MEPs propose to delete the provision which impose shorter deadlines **for electronic procedures**, as requested by FIEC (AMs 696, 697, 698, 714).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 689, 701, 707, 709, 710, Harkin AM 690, 702, 725, 756 Creutzmann AM 700, Essayah	AM 723, Rühle AM 724, Weisberger & co.	AM 686, 699, Weisgerber & co. AM 692, Harbour
AM 696, Weisgerber AM 697, de Jong AM 698, 714 Essayah		

5) Competitive procedure with negotiation (art. 27)

There is no interesting AM regarding FIEC requests to ensure a **compensation for unsuccessful tenderers** or to reinforce **confidentiality** regarding this specific procedure.

MEP Creutzmann supports the FIEC request that the price be part of the elements which do not change during the negotiation, if there is no modification of other elements (AM 744).

Rapporteur Tarabella also supports the FIEC position that negotiation should not be based on the price only (AM 754).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 744, Creutzmann AM 754, Tarabella	X	X

6) Competitive dialogue (art. 28)

Regarding this specific procedure, FIEC requests on **confidentiality** and **price** aspects have clearly been supported by a series of AMs (AMs 762, 766, 770, 771, 772, 773, 774).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 762, 766, 772, Engel AM 770, Rühle AM 771, 774, Creutzmann AM 773, Harkin	X	X

7) Electronic auctions (art. 33)

A series of MEPs from all political groups, including the Rapporteur, support FIEC views in proposing that electronic auctions only apply to standardised goods and services, that is, not to construction works (AMs 853 to 860).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 853, Rühle AM 854, Weiler AM 855 Pietikäinen AM 856, de Jong AM 857, Tarabella AM 858 Schwab/Engel/Creutzmann AM 859, Repo AM 860, Baldassarre/Comi	X	X

8) Technical specifications / production process (art. 40)

Two MEPs support the FIEC request to reinforce the **link with the subject-matter of the contract**, as well as the **proportionality principle** (AMs 895, 899, 902).

On the contrary, several MEPs propose to introduce further possible criteria at this stage of the process, which do not always seem to make sense (AMs 898, 900, 906, 910).

MEP Juvin introduces a reference to the European production of the purchase (AM 925).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 895, 899, Rühle AM 902, Creutzmann	AM 925, Juvin	AM 898, Gebhardt AM 900, Tarabella AM 906, Pietikäinen AM 910, de Jong

9) Variants (art. 43)

A series of AMs supports the FIEC position that variants shall be authorised by default, contrary to what the current rules provides (in particular AMs 975, 987 and 982).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 975, 987, Rühle AM 978, de Jong AM 979, 983, 988, Rochefort AM 980, Creutzmann AM 982, Engel / Schwab	AM 976, Engel / Schwab	X

10) Division of contracts into lots (art. 44)

The closest AM to the FIEC proposal on lots is introduced by MEP Rühle, who advises that Member States shall provide for provisions on the subdivision of contracts into lots at their national level (AM 990).

A number of AMs support the alternative option that contracting authorities should justify in any case why they divide or not the contract into lots (AMs 991, 999, 1000, 1002).

One AM leave contracting authorities free to assess the need according to the situation (AM 1001).

The Rapporteur and MEP Schwab prefer to leave any possibility open (AMs 992, 993).

Several MEPs want to reinforce the mandatory division of contracts into lots (AMs 995, 996, 997, 998).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 990, Rühle	AM 991, Engel / Juvin AM 999, Baldassarre / Comi AM 1000, Creutzmann AM 1002, Prendergast	AM 995, Harbour AM 996, de Jong AM 997, Verheyen AM 998, Pietikäinen

	AM 1001, Manner AM 992, Schwab AM 993, Tarabella	
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11) Flexibility between selection and award phase in open procedure (art. 54 par. 3)

In line with FIEC requests, Rapporteur Tarabella and MEP Rochefort propose to delete this paragraph which allows examining tenders before verifying the fulfilment of the selection criteria (AMs 1037, 1038).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 1037, Tarabella AM 1038, Rochefort	X	X

12) Exclusion grounds – qualitative selection phase (art. 55)

MEPs Creutzmann and Schwab support the FIEC positions regarding art. 55 par. 3 (b) and (c), namely on **insolvency** and **grave professional misconduct** (AMs 1056, 1058).

However, there is no supportive AM regarding FIEC position on art. 55 par. 3 (d) on **past deficiencies**.

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 1056, Creutzmann AM 1058, Schwab / Creutzmann	X	X

13) European Procurement Passport (art. 59) and certification (art. 63)

Many amendments propose to reinforce the **European Procurement Passport** by making it more detailed and stricter.

On the contrary, MEP Handzlik proposes to completely delete the concerned provision in order to avoid additional administrative burden through this new instrument (AM 1099).

There is no specifically interesting AM introduced regarding **certification**.

POSITIVE	NEUTRAL / TBC	NEGATIVE
X	AM 1099, Handzlik	X

14) Direct performance by the tenderer (art. 62 par. 2)

MEP Comi supports the FIEC proposal on direct performance (AM 1117 => deletion of the provision).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 1117, Comi	X	X

15) Contract award phase (art. 54 and art. 66)

Regarding art. 54 par. 2, only MEP Creutzmann supports the FIEC position that contracting authorities SHALL NOT award a contract to a tender who do not comply with EU rules (AM 1036).

Regarding the **award criteria** (art. 66, par. 1), numerous MEPs, including Rapporteur Tarabella, support the **Most Economically Advantageous Tender** only (AMs 1123, 1124, 1125, 1127).

Some MEPs introduce a variant regarding **standardised products** which could still be awarded according to the lowest price/cost (AMs 1126, 1143, 1152, 1159).

Regarding the sub-criteria under the MEAT, no MEP supports the FIEC proposal regarding the **replacement of staff** (art. 66 par. 2b), but one AM propose to completely delete this paragraph (AM 1179). On the contrary, several MEPs worsen this paragraph in making it stricter (AMs 1180, 1181, 1183, 1184). Some MEPs propose a slightly different option (AM 1182).

Regarding the **production process** (art. 66 par. 2d), several MEPs support the FIEC position to completely deleted this paragraph (AMs 1186, 1187, 1188).

Rapporteur Tarabella tries to define more precisely what the “process of production” is (AM 1190).

However, numerous MEPs worsen this production aspect in making more detailed and stricter proposals...

Same thing occurs with **social aspects** (ex: AM 1192)

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 1036, Creutzmann	X	X
X	AM 1123, Engel/Juvin/Schwab/etc AM 1124, Weisberger & co. AM 1125, Gebhardt AM 1127, Tarabella AM 1126, Rochefort AM 1143, Creutzmann AM 1152, Engel/Juvin/Schwab/etc AM 1159, Handzlik & co.	X
AM 1179, Schwab & co.	AM 1182, Handzlik & co.	AM 1180, Rühle AM 1181, Pietikäinen AM 1183, Hedh AM 1184, Creutzmann
AM 1186, Schwab AM 1187, Harbour AM 1188, Creutzmann	AM 1190, Tarabella	AM 1192, Gebhardt

16) Life-Cycle Costing (art. 67)

Numerous MEPs propose AMs to this provision, without that a clear and unique orientation comes out. For instance, some of them propose to introduce more details, while others propose to delete the idea of having a common methodology across the EU in the coming years.

17) Abnormally Low Tenders (art. 69)

Regarding criteria for defining what an ALT is (art. 69 par. 1), there are numerous AMs proposed by MEPs (AMs 1245 to 1272).

In general:

- a) MEPs propose to reduce criterion (a) from 50% to 25%-40% (most of them support 30%);
- b) MEPs generally support criterion (b) at height of 20%;
- c) Many MEPs propose to decrease the number of minimum tenders required from 5 to 3.

One AM supports the FIEC position that contracting authorities SHALL request explanations for whatever other reasons why the tender appears to be abnormally low (AM 1273).

Some MEPs propose interesting additional options to reject ALTs, such as taking into account the proportion between the price/cost charged and the actual costs to be covered (AM 1191) and automatically rejecting tenders which are below a certain price limit (AMs 1293, 1294).

However, no MEP supports the FIEC position regarding the consideration of illegal State aid in ALTs and the need to also reject those tenders comprising illegal State aid.

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 1273, Weiler	AM 1291, Pietikäinen AM 1293, Comi AM 1294, Baldassarre	Nothing regarding illegal State aid!

18) Contract performance conditions (art. 70)

Some MEPs support FIEC views that contractual issues should not be addressed in the framework of the public procurement directive at all (AM 1304) or that, at least, price fluctuations should not be borne by contractors (AM 1305).

On the contrary, other MEPs want to make this provision even more burdensome (in particular AM 1308).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 1304, Schwab AM 1305, Rühle AM 1306, Weisberger	X	AM 1308, Gebhardt

19) Subcontracting (art. 71)

Several MEPs support the FIEC position that **direct payment to subcontractors** should not be ruled at EU level in the public procurement directive (AMs 1318, 1319, 1328, 1329, 1330, 1331, 1333, 1334, 1335). Some others reinforce this provision (AMs 1333, 1334, 1335).

On the contrary, a series of AMs have been introduced in order to reinforce this provision, and namely to **limit the number of possible subcontractors** – in general to a maximum of 3 successive subcontractors (AMs 1325, 1332, 1348).

Moreover, several AMs introduce (mandatory) **chain liability** (AMs 1342, 1343, 1345, 1346).

MEP Harbour however tries to propose a compromise AM which safeguards the principle of contractual freedom (AM 1347).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 1318, Verheyen AM 1319, Manner AM 1328, Engel / Schwab AM 1329, Harbour AM 1330, Rühle AM 1331, Simon	X	AM 1333, Gebhardt AM 1334, Comi AM 1335, Baldassarre
X	X	AM 1325, Cofferati AM 1332, Tarabella AM 1348, Gebhardt
X	AM 1347, Harbour	AM 1342, 1346, Tarabella AM 1343, Gebhardt AM 1345, Cofferati / Baldassarre

20) Modification of contracts during their term (art. 72)

There is no MEP who supports FIEC position on art. 72 par. 2(b) regarding the **definition of what a “substantial modification”** is.

Only one MEP proposes to delete art. 72 par. 4 on **contract price evolution**, as requested by FIEC (AM 1360). The other ones generally propose to extend the proposed percentage from 5% to 10/15/20%.

No MEP supports FIEC position on art. 72 par. 6 (deletion of **50% criterion**).

POSITIVE	NEUTRAL / TBC	NEGATIVE
AM 1360, Rühle	X	X

Additional amendments of interest:

❖ Market access / reciprocity principle:

Parallel proposals from Rapporteur Tarabella and MEP Harbour!

a) Principle:

Tarabella: recitals 8 (a) and (b) new => AMs 191 and 192

Harbour: recitals 9 (a) and (b) new => AMs 193 and 194

b) Definition of “non-covered supplies or services” which can be excluded from EU public procurement:

Tarabella: art. 2 par. 1 point 23 (a) new => AM 375

Harbour: art. 2 par. 1 point 23 (b) new => AM 376

c) Treatment of “non-covered suppliers or services”:

Harbour: Title I, Chapter 2a new => AM 648

Tarabella: Title I, Chapter 2a new => AM 649

The 2 MEPs propose a procedure which is inspired from the one under article 6 in the Commission’s draft Regulation on “market access / reciprocity” (COM(2012)124), but somewhat modified.

They both keep the notification principle to the Commission, as well as the decision power of the Commission regarding the exclusion, however, with different deadlines and consequences: 2 + 2 months for Harbour with supposed disapproval by the Commission if it does not respond in time; **15 + 15 days for Tarabella with supposed approval by the Commission if it does not respond in time.**

Hence, **the approach chosen by Tarabella is (much) nearer to the FIEC position!**

“While waiting for the adoption of the draft Regulation on reciprocity (or by default!)”, several MEPs propose alternative options in this field, also inspired from the Commission’s draft Regulation on “market access / reciprocity” and from existing provisions, with more or less modifications.

They link their alternative proposals with article 69 on ALTs: AM 1298, Cofferati; AM 1299 and 1302, Engel / Juvin; AM 1300 and 1303, Vergnaud.

❖ Treatment of ALTs originating from third countries:

Here again, Rapporteur Tarabella and MEP Harbour propose specific provisions on ALTs originating from third countries under article 69, which are very much inspired from the EC draft Regulation.

Harbour => AM 1296 (art. 69 par. 6 a new)

Tarabella => AM 1301 (art. 69 a new) => which also introduces an automatic exclusion if the price / cost is below a certain percentage!

❖ **Title IV on Governance:**

Numerous AMs go against the concept of “**public oversight**” (art. 84) because of the subsidiarity principle.

The AMs proposed generally weaken the provisions of art. 87 and 88 regarding the **assistance towards contracting authorities and the administrative cooperation**, which is not very good news.

❖ **Draft opinion INTA:**

The INTA draft opinion, prepared by rapporteur Gianluca Susta (IT-S&D) contains several AMs on Abnormally Low Tenders and on the “reciprocity / market” access aspect (AMs 16 to 23).

Regarding **ALTs**, again, the position supported by FIEC on ALTs benefitting from illegal State aid is missing.

Regarding “**market access / reciprocity**”, AM 23 on “Tenders comprising products originating in third countries” is inspired from the draft Regulation on “market access / reciprocity” proposed by the Commission (procedure under article 6), where contracting authorities have to notify to the Commission that they intend to exclude offers with non-covered goods/services and the Commission has the power to decide whether it approves or refuses such rejection.

❖ **Amendments to draft opinion JURI:**

These AMs are mostly focused on **Abnormally Low Tenders** and the **subcontracting / direct payment / chain liability** issues, with proposals for limiting the number of subcontractors, reinforcing the direct payment provision and introducing mandatory chain liability.

MEP Cofferati also proposes an AM (104) under art. 69 a new on “**Tenders comprising products originating in third countries**”, with exactly the same wording as MEP Susta in the draft opinion INTA.

❖ **Amendments to draft opinion ENVI:**

These AMs contain numerous additional and burdensome proposals regarding the **award criteria** (additional sub-criteria) and the **Life-Cycle Cost** concept.

Several AMs from **MEP Julie Girling (ECR-UK)** are however interesting:

AM 95 on art. 2 par. 1 point 22 => definition of “life cycle” where data need to be measurable and collated in a meaningful manner.

AM 173 on art. 67 par. 2 subpar. 1 point a => on the drawing up of an EU LCC methodology, where stakeholders, including the industry, have to be consulted.

AM 181 on art. 71 par. 2 => where the provision on direct payment has to be deleted, using the FIEC justification.