

**EC proposal of 20/12/2011 for a Directive on public procurement – COM(2011)896
(replacing “classical” directive 2004/18/EC)
FIEC POSITION - CONSOLIDATED**

FIEC is the European Construction Industry Federation, representing via its 33 national Member Federations in 29 countries (27 EU & EFTA, Croatia and Turkey) construction enterprises of all sizes, i.e. craftsmen, small and medium-sized enterprises as well as “global players”, carrying out all forms of building and civil engineering activities.

This document presents FIEC's consolidated position and concrete amendments on some targeted issues contained in the Commission proposal COM(2011)896 on directive 2004/18 (“classical”).

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1 Relation between public authorities (art. 11):

Commission's proposal: Article 11 codifies the jurisprudence of the European Court of Justice regarding situations of in-house procurement and inter-municipal cooperation, though it is not limited to a mere codification. In-house and inter-municipal cooperation fall out of the scope of the proposed directive.

FIEC's position: FIEC disagrees with this proposal.

AMENDMENT:

Proposal for a Directive

Article 11 paragraph 1

<i>Text proposed by the Commission</i>	<i>Amendment</i>
Article 11 Relations between public authorities (...)	Entire deletion of this article

Justification:

In-house and inter-municipal cooperation are an exception to the internal market and public procurement principles. Being exceptions, they need to remain limited. Moreover, these specific cases depend on evolving Court law and national practices which cannot be codified in one single legislative text. A better option in this regard would be to update the guidance provided by the European Commission (see EC Staff Working Document on public-public cooperation – SEC(2011)1169 dated 4/10/2011).

AMENDMENT:**Proposal for a Directive****Recital 14**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
(14) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted divergently between Member States and even between contracting authorities. It is therefore necessary to clarify in what cases contracts concluded between contracting authorities are not subject to the application of public procurement rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. The sole fact that both parties to an agreement are themselves contracting authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to decide how to organise the way they carry out their public service tasks. Contracts awarded to controlled entities or cooperation for the joint execution of the public service tasks of the participating contracting authorities should therefore be exempted from the application of the rules if the conditions set out in this directive are fulfilled. This directive should aim to ensure that any exempted public-public cooperation does not cause a distortion of competition in relation to private economic operators. Neither should the participation of a contracting authority as a tenderer in a procedure for the award of a public contract cause any distortion of competition.	Deleted.

*Justification:**Same justification as above.*

2 Confidentiality (art. 18):

Commission's proposal: A very slight change of wording is introduced in this article, from “*such information includes, in particular...*” (directive 2004/18/EC) to “*including, but not limited to...*” (proposed directive).

FIEC's position: There is no real improvement in the new wording proposed. Both the current wording and the proposed new wording are insufficient to safeguard the confidentiality of contractor's offers. A stronger wording is needed.

AMENDMENT:

Proposal for a Directive

Article 18 paragraph 1

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 48 and 53 of this Directive, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to , technical or trade secrets and the confidential aspects of tenders .	1. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 48 and 53 of this Directive, the contracting authority shall not disclose information forwarded to it by economic operators, such as technical or trade secrets. The contracting authorities shall bear full responsibility for any disclosure.

Justification:

Although contractors' tenders are in most cases not protected by Intellectual Property Rights, they contain a real intellectual added-value which needs to be protected.

Indeed, the respect of the confidentiality of the offers is extremely important, namely in terms of promoting innovation through public procurement, and the “cherry-picking” of innovative solutions is a major issue for contractors, in particular with regard to procedures where negotiations intervene.

Paragraph 1 leaves too much room for manoeuvre, a grey zone of uncertainty, for contracting authorities, with a high level risk of “cherry-picking”. All the aspects of an economic operator's offer are confidential and contracting authorities should be held responsible for “cherry-picking”.

In addition, requesting economic operators to designate every single confidential aspect of their tender represents an unnecessary administrative burden, both for economic operators who have to clearly specify this in their tenders and for contracting authorities who have to check what is confidential or not.

AMENDMENT:

Proposal for a Directive

Article 18 paragraph 2

<i>Text proposed by the Commission</i>	<i>Amendment</i>
2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.	2. In the context of a particular procurement process, contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

Justification:

It should be made clear that this provision applies in the context of a particular procurement process.

3 Competitive procedure with negotiation (art. 27):

Commission's proposal: This is basically the new name given to the “negotiated procedure with prior publication”. The list of cases where this procedure can be used has been simplified in art. 24.1 of the proposal.

FIEC's position: The principle of negotiation should not be broadened but remain used under strict conditions for specific cases only, as currently under art. 30 of Directive 2004/18, because of higher transaction costs, a tendency to negotiate on the price only and major confidentiality problems.

To the extent that the Member States decide to transpose into their national law negotiated procedures, they shall provide that contracting authorities shall conduct the negotiations in an efficient manner and compensate unsuccessful tenderers for time and additional work over and above the initial tender submitted.

AMENDMENT:

Proposal for a Directive

Article 24 paragraph 1 (a) new

<i>Text proposed by the Commission</i>	<i>Amendment</i>
	1.(a). To the extent that the Member States decide to transpose into their national law negotiated procedures, they shall provide that contracting authorities shall conduct the negotiations in an efficient manner and compensate unsuccessful tenderers for time and additional work necessary over and above the initial tender submitted.

Justification:

Time and cost necessary for participating in negotiated procedures following the submission of the initial tender are difficult/ impossible to estimate correctly. Consequently, the perspective of receiving some compensation for additional efforts is likely to attract contractors who would otherwise prefer to abstain from participation. This is likely to be beneficial for both competition and the quality of the works.

(Note: Adopting this amendment would require deletion of Article 28 paragraph 8)

AMENDMENT:

Proposal for a Directive

Article 27 paragraph 1

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. (...) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent; the minimum time limit for the receipt of tenders shall be 30 days from the date on which the invitation is sent. Article 26 (3) to (6) shall apply.	1. (...) The minimum time limit for receipt of requests to participate shall be 37 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent; the minimum time limit for the receipt of tenders shall be 37 days from the date on which the invitation is sent. Article 26 (3) to (6) shall apply.

Justification:

The amendment here above proposed for article 27 reintroduce the current deadlines, because the good preparation of a tender procedure takes time and so does the preparation of a tender by contractors.

AMENDMENT:**Proposal for a Directive****Article 27 paragraph 3 (d) new**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
	3. (...) (d) the price, if there is no modification of other elements of the tender.

Justification:

The price should not be an element for negotiation, as long as there is no modification of other elements of the tender.

AMENDMENT:**Proposal for a Directive****Article 27 paragraph 4**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
4. (...) Contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific solutions or other confidential information.	4. (...) Contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the negotiations without its explicit agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific solutions or other confidential information. The contracting authorities shall bear full responsibility for any disclosure.

Justification:

The agreement of the candidate cannot be presumed. It has to be explicitly expressed.

4 Competitive dialogue (art. 28):

FIEC's position: This procedure receives diverging feedbacks from country to country. It is often used and works well in some countries, while abuses linked to this procedure are criticized in other countries. In general, it is reported that this procedure leads to higher transaction costs, a tendency to negotiate on the price only and confidentiality problems. The same safeguards as for the competitive procedure with negotiation are needed for appropriate deadlines, confidentiality and fairness of negotiation.

AMENDMENT:

Proposal for a Directive

Article 28 paragraph 1

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. (...) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent. (...)	1. (...) The minimum time limit for receipt of requests to participate shall be 37 days from the date on which the contract notice is sent. (...)

Justification:

The amendment here above proposed for article 28 reintroduce the current deadlines because the good preparation of a tender procedure takes time and so does the preparation of a tender by contractors.

AMENDMENT:

Proposal for a Directive

Article 28 paragraph 3

<i>Text proposed by the Commission</i>	<i>Amendment</i>
3. (...) Contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific solutions or other specific confidential information.	3. (...) Contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the negotiations without its explicit agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific solutions or other confidential information. The contracting authorities shall bear full responsibility for any disclosure.

Justification:

The agreement of the candidate cannot be presumed. It has to be explicitly expressed.

AMENDMENT:**Proposal for a Directive****Article 28 paragraph 7**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
7. Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document. Where necessary, in order to finalise financial commitments or other terms of the contract, the contracting authority may negotiate the final terms of the contract with the tenderer identified as having submitted the most economically advantageous tender in accordance with Article 66(1)(a) provided such negotiations do not have the effect of modifying essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document and does not risk distorting competition or causing discrimination.	7. Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document. At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.

Justification:

The proposed new wording is dangerous as it introduces the possibility for the contracting authorities to put a pressure on the price towards the tenderer identified as having submitted the most economically advantageous tender, which is not acceptable. The existing wording of directive 2004/18/EC (art. 29 par. 7) is therefore more appropriate.

AMENDMENT:**Proposal for a Directive****Article 28 paragraph 8**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
8. The contracting authorities may specify prizes or payments to the participants in the dialogue.	8. The contracting authorities shall specify prizes or payments to the participants in the dialogue.

Justification:

Time and cost necessary for participating in negotiated procedures following the submission of the initial tender are difficult/ impossible to estimate correctly. Consequently, the perspective of receiving some compensation for additional efforts is likely to attract contractors who would otherwise prefer to abstain from participation. This is likely to be beneficial for both competition and the quality of the works.

5 Electronic Auctions (art. 33):

Commission's proposal: Compared to the existing Directive, these tools have been improved and clarified with a view to facilitating e-procurement. The use of electronic communications and transaction processing by public purchasers can deliver significant savings and improved procurement outcomes while reducing waste and error.

FIEC's position: FIEC considers that construction contracts, which may cover design, execution or both, usually concern individual made-to-measure solutions which require, contrary to off-the-shelves products a certain inter-action between contractor and contracting authority, in order to provide the envisaged quality and success. This cannot be ensured through electronic auctions, of which the main aim is achieving the lowest possible price/ cost in a repetitive procedure.

AMENDMENT:

Proposal for a Directive

Article 33 paragraph 1:

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. Contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented. For this purpose, contracting authorities shall use a repetitive electronic process (electronic auction), which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.	1. Except for works and service contracts, contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented. For this purpose, contracting authorities shall use a repetitive electronic process (electronic auction), which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

Justification:

According to Recital 14 of Directive 2004/18/EC, this procedure is totally inappropriate for all construction contracts, especially because of the complexity of the works to be carried out. Also, this procedure does not allow taking into account possible variants. Moreover, it favours the award of contracts to the lowest cost (i.e. price), rather than to the Most Economically Advantageous Tender. Finally, it obliges contractors to propose very high prices at the beginning of the procedure, in order to be able to lower their price afterwards, which does not correspond to the general principle of best value for money.

6 Variants (art. 43):

Commission's proposal: The possibility to present variants is not anymore reserved to awards where the MEAT criterion is used. However, it is still up to the contracting authority to allow tenderers to submit variants.

FIEC's position: FIEC has been requesting for many years that contracting authorities should systematically accept variants. There should rather be a specific indication in the contract documents if variants are not allowed.

AMENDMENT:

Proposal for a Directive Article 43

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. Contracting authorities may authorise tenderers to submit variants. They shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest whether or not they authorise variants. Variants shall not be authorised without such indication. 2. Contracting authorities authorising variants shall state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation. They shall also ensure that the chosen award criteria can be usefully applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants. 3. Only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration. In procedures for awarding public supply or service contracts, contracting authorities that have authorised variants shall not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.	1. Contracting authorities shall authorise tenderers to submit variants. If they do not authorise variants, they shall indicate this in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest. Variants shall not be rejected without such indication. 2. Contracting authorities shall state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation. They shall also ensure that the chosen award criteria can be usefully applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants. 3. Only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration. In procedures for awarding public supply or service contracts, contracting authorities shall not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

Justification:

In order to promote innovation from enterprises, and in particular SMEs, in public procurement, as wished for by the European Commission, variants should systematically be accepted by public procurers.

7 Division of contracts into lots (art. 44):

Commission's proposal: The contracting authority may split the contract into lots.

However, for contracts of not less than €500,000 – which means that all public works contracts above the EU thresholds are concerned – the “apply or explain” principle applies. That is, when the contracting authority does not split the contract into lots, it shall provide a specific explanation of its reasons.

FIEC's position: Due to diverging practices in the various Member States – to split or to not split – there are several different approaches amongst FIEC Member Federations on this issue.

One approach advocates that the division of contracts into lots should be encouraged, claiming that this, amongst others, facilitates the participation of SMEs in public procurement.

The other approach advocates that the directive should be neutral and favour neither the division of contracts into lots nor a single contract, a decision which has to be taken on a case-by-case basis taking into consideration the complexity of the project and the qualification/ capacities of the contracting authority. In any case, division into lots leads at least to higher coordination needs.

In this situation, FIEC considers that this issue is perhaps best left for Member States to decide at their national level.

AMENDMENT:

Proposal for a Directive

Article 44 paragraph 1

<i>Text proposed by the Directive</i>	<i>Amendment</i>
1. Public contracts may be subdivided into homogenous or heterogeneous lots. For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5, where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons. Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders are limited to one or more lots only.	1. Member States may provide for provisions on the subdivision of contracts into lots at their national level.

Justification:

See "FIEC's position" here above.

8 Flexibility between selection and award phases in open procedure (art. 54, paragr. 3):

Commission's proposal: For open procedures, the possibility for contracting authorities to examine tenders before verifying the fulfilment of the selection criteria has been introduced; that is, a greater flexibility between the selection and award phases.

FIEC's position: FIEC disagrees with this proposal for more flexibility. Justification see below.

AMENDMENT:

Proposal for a Directive

Article 54 paragraph 3

<i>Text proposed by the Commission</i>	<i>Amendment</i>
3. In open procedures, contracting authorities may decide to examine tenders before verifying the fulfilment of the selection criteria, provided that the relevant provisions of this section are observed, including the rule that the contract shall not be awarded to a tenderer that should have been excluded pursuant to Article 55 or that does not meet the selection criteria set out by the contracting authority, in accordance with subsection 1 of this section.	Deleted.

Justification:

In order to avoid abuses, confusion and misinterpretation, the selection and award phases should remain clearly distinct and follow the current order. verifying fulfilment of selection criteria first.

Putting the selection phase before the award phase obliges contracting authorities to properly verify the fulfilment of the qualitative selection criteria by tenderers.

Doing it the other way round would increase the danger that selection criteria are not seriously checked, because the offer is considered "too good to exclude".

9 Abnormally Low Tenders (art. 69):

Commission's proposal: Three cumulative conditions, according to which a tender is deemed to be abnormally low and contracting authorities shall require justifications, have been introduced.

The proposal also introduces an obligation to reject a tender, but only when it is abnormally low because of non-compliance with social, labour or environmental law.

FIEC's position: These changes represent an improvement compared to the current provision, but they remain insufficient considering the challenges and expectations in this field.

AMENDMENT:

Proposal for a Directive

Article 69 paragraph 1

<i>Text proposed by the Directive</i>	<i>Amendment</i>
1. Contracting authorities shall require economic operators to explain the price or costs charged, where all of the following conditions are fulfilled: (a) the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders (b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender; (c) at least five tenders have been submitted.	1. Contracting authorities shall require economic operators to explain the price or costs charged, where: (a) the price or cost charged is more than 20 % lower than the average price or costs of the remaining tenders; or (b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender.

Justification:

It is positive that the Commission proposes clear conditions for identifying an abnormally low tender. However, the proposed cumulative set of conditions will never be fulfilled in the practice of public works contracts, because its field of application is much too narrow.

The proposal to lower, in (a), the percentage deviation from the average takes into consideration that even lower figures are being used in some countries and that thresholds in EU-directives invariably lead to adaptation in the Member States, even if this means worsening the situation (current example: late payment directive and its draft implementation into German law)

The proposal to delete (c) is based on the fact that the existence of abnormally low tenders does not depend on a minimum number of tenders submitted.

Any tender appearing abnormally low should have to be justified by the tenderer.

AMENDMENT:

Proposal for a Directive

Article 69 paragraph 2

<i>Text proposed by the Directive</i>	<i>Amendment</i>
2. Where tenders appear to be abnormally low for other reasons, contracting authorities may also request such explanations.	2. Despite what is stated in paragraph 1, where tenders appear to be abnormally low for other reasons, contracting authorities shall also request such explanations.

Justification:

As soon as a tender appears to be abnormally low, and whatever the reason is, contracting authorities shall be obliged to request explanations. This is a matter of coherency and efficiency.

AMENDMENT:**Proposal for a Directive****Article 69 paragraph 5**

<i>Text proposed by the Directive</i>	<i>Amendment</i>
5. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.	5. Where a contracting authority suspects a tender to be abnormally low because the tenderer has obtained State aid, the tender shall be rejected on that ground alone after consultation with the tenderer, where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty, i.e. respecting the principles laid down in EU competition law. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.

AMENDMENT:**Proposal for a Directive****Article 69 paragraph 5a new**

<i>Text proposed by the Directive</i>	<i>Amendment</i>
	5a Where a tenderer whose tender the contracting authority intends to accept is a state-owned or state-supervised and –managed enterprise, it is deemed to receive or have received state aid. In this case, the contracting authority can accept the tender only after consultation with the tenderer where the tenderer is able to prove, within a sufficient time limit fixed by the contracting authority, that no aid had been granted or that the aid in question was granted legally, i.e. respecting the principles laid down in EU competition law. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission thereof.

Justification regarding the 2 amendments above:

According to recent developments within the European construction sector, the State aid issue is very much linked to the arrival on the EU public procurement market of third country state-owned or state-aided contractors. In order to ensure a level-playing field for all companies – both EU and non-EU companies – they should all strictly respect the EU rules in the field of State aid. If this is not the case such State aid would be illegal and give an unfair competitive advantage to the company benefitting from this illegal State aid. The negative effect of state aid on fair competition is not smaller only because such state aid is being given by third countries. The argument, the EU cannot extend its rules to third countries is correct, but irrelevant in this situation, in which the aim simply is to have EU rules respected inside the EU.

This aspect has not been taken into account in the proposed directive at all. Hence, the identification and rejection of ALTs based on illegal State aid from third countries needs to be reinforced.

In general, the question is whether it would not be more efficient to address all aspects of ALT in the public procurement directives to which the present Regulation could then simply refer.

10 Subcontracting (art. 71):

Commission's proposal: Article 71 paragraph 2 introduces a possibility for Member States to establish at their national level direct payment to subcontractors.

FIEC's position: FIEC disagrees with this proposal.

Contractual issues depend above all on Court Law, national legislations and the provisions of the Remedies Directive. For this reason, there is in principle no need to address contractual issues in the framework of the public procurement directives.

AMENDMENT:

Proposal for a Directive

Article 71 paragraph 2

<i>Text proposed by the Commission</i>	<i>Amendment</i>
2. Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.	Deleted.

Justification:

Article 71 interferes with the contractual structure and is outside the scope of public procurement rules. In particular article 71 paragraph 2 causes problems.

Indeed, it could lead to a situation where the contracting authority pays a subcontractor who has not yet fulfilled his contractual obligations. In this case, the general contractor has no more incentive means towards its subcontractor to finish the work. If the subcontractor has failed to meet the relevant contractual obligations, the main contractor should retain the right to hold back a proportionate fee, in the same way as the contracting authority can do this if the main contractor fails to meet the obligations set out by the contracting authority.

Finally, public procurement should not become the container for any legislative suggestion not belonging to the scope of public procurement. Should additional issues be introduced regarding the execution of the contract, FIEC will provide further arguments in this regard.

11 Simplification objective: distinct rules for central and sub-central authorities (art. 2, 24, 26):

Commission's proposal: In the definitions under **article 2**, there is a new distinction made between "central" and "sub-central" contracting authorities – basically, "regional" and "local" – with the objective of applying different rules to these various levels in certain cases (publication alleviation for "sub-central" authorities, **art. 24 par. 2b**; flexibility regarding the set up of time limits, **art. 26 par. 4**).

FIEC's position: FIEC disagrees with these proposals.

Amendment

Proposal for a Directive

Article 2, paragraphs 2, 3, 4 and 5

<i>Text proposed by the Commission</i>	<i>Amendment</i>
(2) 'central government authorities' means the contracting authorities listed in Annex I and, insofar as corrections or amendments have been made at national level, their successor entities; (3) 'sub-central contracting authorities' means all contracting authorities which are not central government authorities ; (4) 'regional authorities' include all authorities of the administrative units falling under NUTS 1 and 2, as referred to by Regulation (EC) No. 1059/2003 of the European Parliament and of the Council; (5) 'local authorities' include all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation (EC) No. 1059/2003;	Deleted

Justification:

The current definitions of directive 2004/18/EC are appropriate and do not need a revision (see art. 1 par. 9). Moreover, there is no reason for applying a special treatment for regional and local authorities. In order to keep them simple, the rules should be the same for all contracting authorities.

Amendment
Proposal for a Directive
Article 24 paragraph 2

<i>Text proposed by the Commission</i>	<i>Amendment</i>
2. The call for competition may be made by one of the following means: (a) a contract notice pursuant to Article 47, (b) where the contract is awarded by restricted or competitive procedure with negotiation by a sub-central contracting authority, by means of a prior information notice pursuant to Article 46(2). In the case referred to in point (b), economic operators having expressed their interest following the publication of the prior information notice shall subsequently be invited to confirm their interest in writing by means of an 'invitation to confirm interest' in conformity with Article 52.	2. The call for competition is made by means of a contract notice pursuant to Article 47.

Justification:

There is no reason why a different treatment should be applied for "sub-central" contracting authorities.

Amendment
Proposal for a Directive
Article 26 paragraph 4

<i>Text proposed by the Commission</i>	<i>Amendment</i>
4. Sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected candidates, provided that all candidates have the same time to prepare and submit their tenders. Where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting authority shall fix a time limit which shall be at least 10 days from the date of the invitation to tender.	Deleted.

Justification:

There is no reason why a different treatment should be applied for "sub-central" contracting authorities.

12 Minimum time limits (art. 25 to 28):

Commission's proposals: In the various procedures, **minimum time limits have been shortened** compared to the current minimum time limits applied.

FIEC's position: The good preparation of a tender procedure takes time and so does the preparation of a tender by contractors. This is particularly true for SMEs which have, in general, less human, technical and financial capacities. Consequently, the shortening of minimum time limits would decrease their access to public procurement.

For the above mentioned reasons, the minimum time limits indicated in art. 25 to 28 should be revised, so as to correspond to the current minimum time limits indicated in directive 2004/18/EC.

Amendment Proposal for a Directive Article 25 paragraph 4

<i>Text proposed by the Commission</i>	<i>Amendment</i>
4. The contracting authority may reduce by five days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 where it accepts that tenders may be submitted by electronic means in accordance with Article 19(3), (4) and (5).	Deleted

Justification:

There is no reason why contractors should have less time to prepare their tender when they can submit it by electronic means. If not all tenderers are able to submit their tender by electronic means, then those obliged to send it by traditional means (post) would be disadvantaged compared to the others.

Amendment Proposal for a Directive Article 26 paragraph 5

<i>Text proposed by the Commission</i>	<i>Amendment</i>
5. The time limit for receipt of tenders provided for in paragraph 2 may be reduced by five days where the contracting authority accepts that tenders may be submitted by electronic means in conformity with Article 19(3), (4) and (5).	Deleted

Justification:

There is no reason why contractors should have less time to prepare their tender when they can submit it by electronic means. If not all tenderers are able to submit their tender by electronic means, then those obliged to send it by traditional means (post) would be disadvantaged compared to the others.

13 Technical specifications / production process (art. 40):

Commission's proposal: The existing reference to the process of production has been promoted by the Commission in the sense that it is now directly included under article 40 paragraph 1 – and not solely in the annexes as it is the case in the current directive – and broadened to “*any other stage of its life cycle*” (with “life cycle” being defined under Article 2 point 22).

FIEC's position: FIEC has major concerns that this provision looses the necessary link with the subject-matter of the contract.

Moreover, the concept of process of production is not clear at all in the proposed directive but remains only vaguely referred to in Recital 41.

Amendment

Proposal for a Directive

Article 40 paragraph 1

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply. These characteristics may also refer to the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2. (...)	1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply, provided that they are linked with the subject-matter of the contract. The characteristics required should be proportionate to the value and objectives of the contract. These characteristics may refer to the specific process of production or provision of the requested works, supplies or services. (...)

Justification:

Contractors cannot be required to prove things on which they do not have any access, competency or responsibility up to the whole supply chain. For these reasons, technical specifications must remain strictly linked with the subject-matter of the contract and the requirements must be proportionate to the value and objectives of the contracts.

Amendment

Proposal for a Directive

Article 2 point (22)

<i>Text proposed by the Commission</i>	<i>Amendment</i>
(22) ‘life cycle’ means all consecutive and/or interlinked stages, including production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation.	(22) ‘life cycle’ means all consecutive and/or interlinked stages, including design , production, transport, use and maintenance, throughout the existence of a product or a work or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation.

Justification:

FIEC warns that this definition is very broad and the main principle of ensuring a link with the subject-matter of the contract might easily be broken. The proof issue is also problematic in this sense.

Moreover, including the transport element in the life-cycle can be problematic as it introduces a consideration of local production, which might not be compatible with the principle of open competition within the Internal Market.

14 Exclusion grounds - qualitative selection phase (art. 55):

Commission's proposal: Under **art. 55 par. 3(b)**, the directive foresees the possibility to exclude an economic operator who has entered into an arrangement with creditors.

FIEC's position: FIEC disagrees with this proposal.

Amendment

Proposal for a Directive

Article 55 paragraph 3 (b)

<i>Text proposed by the Commission</i>	<i>Amendment</i>
3 (b) where the economic operator is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it has entered into an arrangement with creditors , where it has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;	3 (b) where the economic operator is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

Justification:

The situation where an economic operator has entered into an arrangement with creditors must not be considered as a ground for exclusion.

Commission's proposal: Under **art. 55 par. 3(c)**, the directive foresees the possibility to exclude an economic operator who would be guilty of "**grave professional misconduct**".

FIEC's position: FIEC disagrees with this proposal.

Amendment

Proposal for a Directive

Article 55 paragraph 3 (c)

<i>Text proposed by the Commission</i>	<i>Amendment</i>
3 (c) where the contracting authority can demonstrate by any means that the economic operator is guilty of other grave professional misconduct;	Deleted.

Justification:

The concept of "grave professional misconduct" is not defined objectively in the directive, while any decision to exclude an economic operator from a procurement procedure should be based on objective and measurable criteria to which the discretion's power of the contracting authority should be limited.

Commission's proposal: Under **art. 55 par. 3(d)**, a new exclusion ground **according to previous deficient performances** of the tenderer has been introduced.

FIEC's position: FIEC disagrees with this proposal.

Amendment

Proposal for a Directive

Article 55 paragraph 3 (d)

<i>Text proposed by the Commission</i>	<i>Amendment</i>
3 (d) where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under a prior contract or contracts of a similar nature with the same contracting authority. In order to apply the ground for exclusion referred to in point (d) of the first subparagraph, contracting authorities shall provide a method for the assessment of contractual performance that is based on objective and measurable criteria and applied in a systematic, consistent and transparent way. Any performance assessment shall be communicated to the contractor in question, which shall be given the opportunity to object to the findings and to obtain judicial protection.	Deleted.

Justification:

Such exclusion ground would be unfair, as it is too strong and problematic in terms of proof. Past performance deficiencies should be assessed on case by case.

15 European Procurement Passport (art. 59) and certification (art. 63):

Commission's proposal: The introduction of the European Procurement Passport should serve as a "super (electronic) certificate" which will include basic information such as the identification of the economic operator, the absence of conviction and bankruptcy and the inscription into a national professional or trade register. **It would not deal with the exact technical or professional capacity of the company.** The exact content of this passport can be decided by delegated acts.

FIEC's position: FIEC supports the creation of such a passport **as long as it serves the mutual recognition of national certificates**. Indeed, it is more efficient to ensure the mutual recognition of the certificates which exist in most Member States, rather than to introduce a new "passport".

FIEC is particularly critic regarding the possibility for the Commission to further rule on the content of such passport through delegated acts. Such possibility might enter in conflict with existing national certificates and pre-qualification systems in the future. Also, FIEC expresses some doubts about whether the implementation of such an EU-wide passport is realistic in the practice or not.

Commission's proposal: As in the existing directive, the proposed directive promotes the harmonisation of the various national systems in the field of **certification** / registration (for pre-qualification purposes).

According to **art. 63 par. 4**, the certification is recognised as a "presumption of suitability" for the "qualitative selection phase".

According to **art. 63 par. 7**, the existing national systems must not be mandatory for participating in a public contract, but the mutual recognition of the various national systems is ensured.

FIEC's position: FIEC supports these provisions. Moreover, **FIEC recalls that the construction sector is against creating an EU-wide pre-qualification system**. Alternatively, the mutual recognition of national certificates should be encouraged.

According to **art. 63 par. 5**, "With regard to the payment of social security contributions and taxes, an additional certificate **may be required** of any registered economic operator whenever a contract is to be awarded."

FIEC's position: This provision might contradict the overall objective of simplification of the directive in Member States where a well-established and well-working pre-qualification system, already including these elements, is implemented. Should tenderers systematically provide a complementary certificate in case this is finally required by the contracting authority, would the efficiency of those national pre-qualification systems seriously be decreased.

On the other hand, while self-declaration / certification / registration should be promoted for the qualitative selection phase, this should not exclude that, at the award phase, the contracting authority verifies that the company to which the contract will be awarded has paid the necessary social security contributions and taxes.

The wording "**may be required**" should hence be safeguarded.

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

Commission's proposal: Art. 62 par. 2 provides that "contracting authorities may require that certain critical tasks be performed directly by the tenderer itself".

FIEC's position: FIEC does not support this proposal.

Amendment

Proposal for a Directive

Article 62 paragraph 2

<i>Text proposed by the Commission</i>	<i>Amendment</i>
2. In the case of works contracts, service contracts and siting and installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where a tender is submitted by a group of economic operators as referred to in Article 6, a participant in the group.	Deleted.

Justification:

It should be made clear that it must remain up to the contractor, who is responsible for the proper performance of the works, to decide to perform his tasks by himself or through third parties, and in this latter case, what parts of the tasks should be subcontracted. In any case, the option chosen by the contractor should not restrict its access to the market.

17 Contract award phase (art. 54 and art. 66 and following):

17.1 General principles (art. 54):

Commission's proposal: In its current drafting, **art. 54 par. 2** allows the contracting authority to award a contract to a tenderer submitting the best tender but not complying with obligations regarding social, labour or environmental law.

FIEC's position: This proposal is not acceptable.

Amendment

Proposal for a Directive

Article 54 paragraph 2

<i>Text proposed by the Commission</i>	<i>Amendment</i>
Contracting authorities may decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI.	Contracting authorities shall not award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI.

Justification:

If a tenderer violates basic and important social, labour or environmental legislation, he should not be awarded public contracts. Therefore, the article needs to be amended in order to prohibit the award of contracts in such circumstances.

17.2 The Most Economically Advantageous Tender (MEAT) and the lowest cost (art. 66 par. 1):

Commission's proposal: The MEAT criterion becomes the 1st one mentioned, but no clear ranking with the lowest cost is made in the proposal. Also, the "lowest price" criterion becomes the "lowest cost", which can be assessed according to the lowest price only or according to the LCC of the project.

FIEC's position: On one hand, FIEC advocates for the recourse to the MEAT criterion, in order to support quality, innovation, sustainability and avoid potential abnormally low tenders.

On the other hand, the proposal on the "lowest cost" can be confusing, in the sense that LCC can also be taken into account under the MEAT and that there need to be a common scientific methodology developed for LCC (see FIEC comments on LCC – Article 67).

17.3 Sub-criteria used under the MEAT (art. 66 par. 2):

Commission's proposal: Sub-criteria used in the framework of the MEAT must be linked to the subject-matter of the public contract in question. Additional sub-criteria can be included by contracting authorities, namely the "*organisation, qualification and experience of the staff*" (**art. 66 par. 2(b)**) and the production process (**art. 66 par. 2 (d)**).

FIEC's position: By using the MEAT criterion, the link with the subject-matter of the contract must be strictly respected. In this regard, FIEC considers that the sub-criteria proposed under **art. 66 par. 2 (b)** and **(d)** are vague and potentially dangerous. They need at least to be clarified and at best to be deleted.

Amendment

Proposal for a Directive

Article 66 paragraph 2 (b)

<i>Text proposed by the Commission</i>	<i>Amendment</i>
2 (b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent organisation and quality;	2 (b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the service contract or the design task of the works contract in question may be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced by another staff with equivalent skills ; the contracting authority shall duly justify any refusal of the replacement;

Justification:

First, "contracts involving the design of works" must be understood in a restrictive way. That is, this provision should only apply to the staff affected to the design aspect of works contracts involving the design of the works ("Design and Build" contracts).

Second, the proposed provision is commercially unreasonable. This would mean that if Mr. X is not available for any reason, he cannot be replaced on the project by Mr. Y without a burdensome and time-consuming verification and consent by the contracting authority. The successful bidder should be allowed to simply propose to replace the missing staff by another staff, provided that this person has equivalent skills, which ensure that the work can be carried out properly. If the contracting authority refuses the "equivalent person", it should duly justify its reasons.

Amendment

Proposal for a Directive

Article 66 paragraph 2 (d)

<i>Text proposed by the Directive</i>	<i>Amendment</i>
2 (d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.	Deleted.

Justification

These references to the “process of production” and to “any other stage of [the] life cycle” at the award stage are not clear at all. They also seem to be so broadly open concepts that the main principle of ensuring a link with the subject-matter of the contract would easily be broken.

*Far from clarifying these concepts, the proposed **recital 41** introduces even more confusion. It is not understandable for instance that health and safety rules be used as award criteria while all tenderers have to comply with them anyway. It is also unclear who “disadvantaged persons” or “members of vulnerable groups” are, which will lead to a number of divergent interpretations and Court cases. In any case, the use of social considerations must be understood in a restrictive way.*

17.4 Life-Cycle Costing (art. 67):

Commission’s proposal: Life-Cycle Costing (LCC) is promoted as an award criterion, both in the frame of the “Most Economically Advantageous Tender” and of the “lowest cost”, but it is not made mandatory. The proposal sets a framework for applying an LCC approach and announces that whenever a common methodology for the calculation of LCC will be adopted, then contracting authorities including LCC in the award criteria will be obliged to use this common methodology (**art. 67 par. 3**).

FIEC’s position: FIEC supports the voluntary recourse to the LCC approach in the framework of the MEAT award criterion. This could be further promoted by using an indicative methodology which is transparent, objective, standardised, measurable and considers potential specificities of the construction sector. Furthermore, work on LCC is also on-going at European level through CEN Technical Committee (TC) 350 “Sustainability of Construction Works”. Rather than reinvent the wheel, reference should be made, where appropriate, to such standards.

18 Contract performance (Chapter IV):

Commission's proposals: Several new provisions regarding contractual aspects, namely the modification and termination of a contract, have been introduced.

FIEC's position: Contractual issues depend above all on well-established Court Law, national legislations and the provisions of the Remedies Directive. These provisions go against the objective of simplification. In principle, contractual issues shall not be addressed in the framework of the public procurement directives.

18.1 Contract performance conditions (art. 70):

Commission's proposal: In addition to the social and environmental considerations, which can namely be taken into account at this stage, this article provides that the risks of price fluctuation – transferred to the economic operator! – may be taken into account.

FIEC's position: FIEC is disagrees with this latter proposal.

Amendment

Proposal for a Directive

Article 70

<i>Text proposed by the Commission</i>	<i>Amendment</i>
Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the call for competition or in the specifications. Those conditions may, in particular, concern social and environmental considerations. They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract.	Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are compatible with Community law, are directly linked with the subject-matter of the contract and are indicated in the call for competition or in the specifications. Those conditions may, in particular, concern social and environmental considerations.

Justification:

This latter sentence transfers the risk of price fluctuation to the economic operator and introduces a risk of speculation. Performance conditions should be reasonable. In this case, contracting authorities should better propose a price fluctuation clause.

18.2 Modification of contracts during their term (art. 72):

Commission's proposal: This article tries a definition of what a “substantial modification” is and proposes specific thresholds: 5% of the price of the initial contract (**art. 72 par. 4**) or 50% of the value of the original contract (**art. 72 par. 6c**).

FIEC's position: FIEC disagrees with these proposals. Some of them at least need clarifications.

Amendment**Proposal for a Directive****Article 72 paragraph 2(b)**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
(b) the modification changes the economic balance of the contract in favour of the contractor;	(b) the modification changes the economic balance of the contract in favour of the contractor in a way which was not foreseen in the terms of the initial contract;

Justification:

The definition of what a substantial modification is shall be complemented in order to be in line with the ECJ decision of 19/06/2008 (Aff. C 454/06 Presstext): the modification of the economic equilibrium of the contract in favour of the contractor is substantial only if it was not foreseen in the initial contract.

Amendment**Proposal for a Directive****Article 72 paragraph 4**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 4 and where it is below 5 % of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.	Deleted.

Justification:

In principle, the effects which contracts have should be dealt with at national level. More specifically here, the 5% threshold proposed under paragraph 4 is far too low. Such low threshold would lead in praxis in the construction sector to a high number of new award procedures which speak against the efficient and timely performance of public construction contracts.

Amendment**Proposal for a Directive****Article 72 paragraph 6**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
6. By way of derogation from paragraph 1, a substantial modification shall not require a new procurement procedure where the following cumulative conditions are fulfilled: (a) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee; (b) the modification does not alter the overall nature of the contract; (c) any increase in price is not higher than 50 % of the value of the original contract.	6. By way of derogation from paragraph 1, a substantial modification shall not require a new procurement procedure where the following cumulative conditions are fulfilled: (a) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee; (b) the modification does not alter the overall nature of the contract.

Justification:

In line with the wording used in art. 82 par. 6 of the draft directive on "utilities" (COM(2011)895), art. 72 par. 6(c) has to be deleted because there is no link between the cost of unforeseen circumstances and the amount of the initial contract.