



European Federation of Engineering Consultancy Associations



Representing
FIDIC in Europe

THE MODERNISATION OF EU PUBLIC PROCUREMENT POLICY

TOWARDS A MORE EFFICIENT

EUROPEAN PROCUREMENT MARKET

EFCA POSITION

European Federation of Engineering Consultancy Associations

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EVALUATION OF EU PUBLIC PROCUREMENT

LEGISLATION AND POLICIES

Preliminary remarks

The major tasks of designers (consulting engineers and architects) in the construction sector include the provision of assistance to the Contracting Authorities in the definition of their needs, respective technical/performance-based specifications and the selection of contractors and suppliers. Designers also supervise the project implementation and provide programme, design, construction and facility management services to the Contracting Authorities. **They therefore have a unique position in the supply chain as trusted adviser to the Contracting Authority.**

In this role, designers are key players in the implementation of Europe 2020 and the development of the competitiveness of the European construction sector. In line with the EU's strategy for smart, sustainable and inclusive growth, it is important for Europe to sustain and strengthen the competitiveness of its engineering consultancy industry.

Public procurement has significant economic leverage; designers can, and should, actively contribute in achieving these political targets through securing 'best value for money' in European public procurement.

The first part of this paper presents **general proposals for improving and modernising EU public procurement policy and law.**

The second part relates to the **particular position of intellectual or creative services such as consulting engineering services in public procurement and their key role for achieving the post 2010 Lisbon Agenda.**

Consulting engineering companies provide intellectual services. As such these services have an important 'creative' dimension as the outcome and results are difficult to define and cannot be known in detail prior to execution.

The impossibility of adequately defining the results of intellectual services prior to execution implies that the selection of a candidate cannot be made on the basis of an accurate description of the finished product. Consequently, the selection should be based on references, means of implementation and methods of work proposed.

Public procurement policies should take into account the specific character of intellectual services to ensure that all participants are tendering on an equal footing.

PART A GENERAL PROPOSALS TO ENHANCE THE ROME TREATY PRINCIPLES

A.1 TO MAXIMIZE COST-SAVING/VALUE FOR MONEY

A.1.1 The facts

Public tendering incurs high transaction costs and onerous procedural requirements, resulting in 'formal competition' merely to justify the award decision.

The crisis led to increased competition based solely on the lowest price – which is possible under European procurement legislation – which results in abnormally low prices. In construction, this means poor quality, postponed problems, and in general bad value for money:

- short-term savings often hamper innovation and creativity,
- life cycle costs are not considered,
- many relevant aspects or impacts of proposals are ignored.

The concerns above relate to any type of procurement, the economically most advantageous tender award mechanism ... and the new procurement approaches (PPP-like procedures) where these problems may be more associated with life-cycle cost considerations. Do they include general, independent and long term perspectives?

Major international contractors have built up engineering capacities (high-level senior staff) for PPP projects, and enter niche markets (concessions for the operation of airports, harbours, etc.) but these engineering capacities are usually not in the interest of the Contracting Authority. When contractors take the leadership in **PPP-like procedures**, consulting engineers may act as expert advisers either to the Contracting Authority or to the contractor. Engineering consultants are sometimes regarded just as a provider of commodity services (cf. outsourcing to China and India ...).

A.1.2 Suggested improvements

A set of common rules should apply to any type of procurement process involving – in the short, medium or long term – the use of public resources or public service monopoly rights (PPP-like procedures, PFI, concessions ...)

All procurement, and not only PPP approaches, should consider:

- direct and indirect cost of a proposal to the Contracting Authority,
- the long term performance (economic cost - including not only construction but also operation and maintenance costs, social cost, cultural cost, etc) of the offer: **EFCA supports the introduction of environmental factors in public procurement and advocates the integration of the LCC (life cycle costing) approach** complemented with environmental costs and social aspects.

The acceptance of a 'fit for purpose' approach should be based on a transparent and common understanding of the client's realistic clear performance requirements.

A.1.3 Proposals

1 - To adopt a minimum set of Community rules on PPP's

2 - To address in the directive possibilities for consideration of overall costs:

- a reference to LCC (clear concept and methodology) as best practice in public purchasing;

- allow for a sustainability analysis in the definition of scope, and sustainable development parameters in the selection and award criteria and contract performance clauses;
- Harmonized socio-economic assessment of project viability;
- Quality based selection principles with related criteria and procedure, and to consider the lowest price-based award as an exception.

3 - To consider a balance between the project cost and the amount of public resources involved to keep bid costs within reasonable limits when tendering (relevant transaction costs).

4 - To encourage public awarding authorities to use qualified assistance in their procurement, and provide for the possibility to use external expertise or to improve their internal procurement capacity in order to make an efficient and overall analysis of any proposal prior to the tendering stage.

Furthermore, abnormally low price offers should be rejected, except where a guarantee is given that such offers will not entail direct or indirect risks, in the short or long term, for the Contracting Authority and Society because of the low price. Therefore article 55 of Directive 2004/18 should provide for an evaluation of life cycle costing and long term impacts of public sector purchasing.

A.2 NON-DISCRIMINATION, OPENING OF THE MARKET

A.2.1 The facts

Productivity and innovation have been fostered in the construction sector through the establishment of **cross border networks or subsidiaries rather than through direct exports**. Many national barriers such as language, national regulation to practise some professions, national liability systems in construction and the recent increase of public in-house engineering in some countries limit the cross-border activities of intellectual service providers (consulting engineers, architects...).

Over the past decade trans-border provision of consulting engineering services was very limited. Firms primarily opt for setting up subsidiaries (use of local staff) to overcome recurring problems with regard to licenses (regulatory restrictions on professions) and focus on regional and local markets. Export/import and trans-border activity in the internal market mainly concerns foreign establishment i.e. subsidiaries or branch offices and use of local staff. Moreover, procurement of consulting services is based on trust and productive relationships between client and service provider; **such trust can be built easier with firms that are established in the country and especially with local staff** ("cultural affinity").

Through their networks and direct involvement in public tenders intellectual service providers (consulting engineers, architects...) foster the knowledge society. However, very few such developments are seen because **of the lack of protection of property rights**. One has observed public competition whereby the terms of reference were copied from offers in other unsuccessful public competitions!

In-house engineering of contractors has decreased as a result of European policies, in particular policies on conflict of interest. In-house engineering in the public sector decreased also as a consequence of European privatisation policies. However, in some sectors and countries, private sector firms still face in-house public competitors who engage in commercial operations. The recent crisis gave the opportunity for new developments of in-house engineering in many public or semi-public entities. Consequently:

- The market, open to competition for consulting engineering, varies considerably from one country to another (e.g. transportation infrastructure and systems).

- It may reduce competitiveness of the European economy.
- In-house public engineering departments often distort the competitive market since they have unfair and unclear advantages over private sector firms.

EFCA continues to advocate the public sector contracts out planning, engineering design and related professional services to the private sector. It is an important objective of European policies.

SMEs in the European market. Major companies are able to participate in public procurement because they have procurement specialists and even departments. However, the rules and practices remain challenging to SMEs, which are however crucial for the EU's economic growth and performance. Public procurement markets are quasi inaccessible to SMEs from another EU country in spite of the Services Directive.

A.2.2 Suggested improvements

To foster productivity and limit obstacles to cross-border activities in Europe – two major objectives of the single market - other legislative initiatives and policy instruments e.g. with regard to services, professional qualifications, competition and liability should be linked up more closely with the public procurement policies.

The following proposal refers to these policies: **they are a condition to improve the efficiency of the public procurement policy and cannot be separated from it.**

A.2.3 Proposals

1 - To keep distortions from direct and indirect state aid to a minimum in order to maintain and complete the single market.

- In-house services of public entities can compete in public procurement only if they can give evidence that they do not benefit from any direct or indirect advantage likely to distort competition.
- Academics and NGOs should not compete for consulting contracts (other than expert assessments) with private firms under public procurement rules.

2 - To remove cross border barriers

- To promote a European code of conducts agreed by the Commission in substitution of national ones
- To accept limitations on professional practice in a European country only in so far as they are defined in a European code of practice approved by the European Commission.

3 - To consider harmonization of liability to insurable levels for service (also applicable to other types of services, e.g. medical, accounting).

4 - To protect property rights in offers. Defining intellectual property rights is fundamental to safeguard the interests of intellectual service providers, participating in DB and PPP projects. Current legislation provides insufficient protection of confidentiality of proposed solutions.

In addition, European public procurement policy needs to address the relationship between SMEs and European competitiveness with **possible specific measures to facilitate SME access to public procurement.**

A.3 REGULATION, BUREAUCRACY VERSUS FLEXIBILITY

A.3.1 The facts

- The alignment of procurement rules and administrative processes, introduced by the national implementation of the Public Procurement Directive has sometimes led to **an**

excess of bureaucracy (e.g. submission of documentary evidence). It also often leads to a lack of negotiation between the awarding authorities and the competitors. One interesting issue to consider would be interviews, which are presently used extensively in US procurement processes. It can be useful but should not be used in a systematic way.

- **Strict observation of public procurement rules might delay the launch of some major construction projects**, including some national recovery plans developed in response to the crisis. Such delays have considerable negative effects on economic recovery. For example, sequential planning leads to major schedule overruns while coordination between simultaneous design and construction activities might reduce them.
- **Adjustment of project scope is not possible** during project execution¹. Long-term, large and complex projects require two consecutive awards (project inception first, then final design); this often results in insufficient contract flexibility and in some cases inefficient contract performance.
- There are **barriers to the uptake of collaborative** schemes, such as alliance contracting, since construction contracts cannot be awarded before full definition of construction scope. This results in reduced efficiency and quality of project delivery.

A.3.2 Suggested improvements

A flexible approach should be taken in modernising EU public procurement law in order to facilitate contract adjustments with the aim of improving efficiency in service contracts and balancing competitiveness and transparency, thereby ensuring that bid costs are maintained at a manageable level. EFCA recognises the value of disseminating best practices at EU level.

A.3.3 Proposals

1 - To introduce some flexibility during the tendering process and allow negotiation between contracting authorities and engineering consultants who act as client advisor, e.g.

- on the procurement approach
- on the definition of the performance or functional requirements to provide scope for innovative solutions.

2 – To introduce some flexibility throughout the contractual phases (including feasibility) in order to improve efficiency of project performance and introduce the possibility of teaming arrangements.

¹ any adjustments must relate to issues that could not have been foreseen and require a new contract with the provisions of Art. 31, par. 4.a.

PART B THE DISTINCTIVE CHARACTERISTICS OF INTELLECTUAL OR CREATIVE SERVICES
THEIR MAJOR CONTRIBUTION TO THE LISBON STRATEGY MAKES IT IMPORTANT TO CONSIDER TENDERING INTELLECTUAL SERVICES IN A SPECIFIC WAY.

B 1 TENDERING INTELLECTUAL-CREATIVE SERVICES

B.1.1 The facts

It is impossible to define and describe precisely the expected results of creative intellectual services before they have been delivered. This would also apply to the performance requirements. The design scope is refined as a project develops; the extent of technical assistance services depends on how the project evolves/develops.

The costs of engineering services represent 10% of total construction costs, and less than 3% of total construction & operation costs. The life-cycle perception of project value thus demonstrates the importance of the quality of engineering services rather than of their fees.

The open procedure is totally inappropriate for intellectual services and engineering consultancy services.

B.1.2 Suggested improvements

Tenders which require an assessment of non-quantifiable elements should not use price as the predominant selection criterion. Consequently, certain works contracts and service contracts requiring a substantial degree of intellectual performance, such as the design of works, should use a QBS (qualifications based selection) process for selection.

To achieve the best outcome, such contracts should be awarded on the basis of qualitative assessment and not on the basis of quoted fees or lowest price. To enhance creativity, dialogue **between contracting authorities and tenderers on the definition of scope of services is crucial.**

Therefore the selection process of consulting engineers should allow for the evaluation of team-building capacities of the consulting engineers and the client, and that would place the former in the position of trusted advisor. This means that procurement staff needs education and adequate methods, tools and resources to adopt other than the current price-based processes.

Considering the high level of transactional cost for intellectual services, incurred by both the public sector and the tenderers, open procedures are considered inappropriate for such services.

B.1.3 Proposals:

Specific arrangements in European public procurement legislation for the award of intellectual or creative services

1 - To consider restricted and negotiated procedure as the most appropriate procedure for the award of intellectual and creative services. Design contests should be sparingly used as they incur high up-front costs for the designers.

2 - To provide for adjustments of project scope and value (up to a certain percentage) in the awarding process for engineering & architectural services, in order to increase the efficiency of project delivery; then:

- contracting authorities would only need to define the functional requirements of a project for tendering,
- the alternative solutions would be investigated by the consultant undertaking the design of the project.

- the dialogue between awarding authorities and tenderers would allow for a joint definition of the performance or functional requirements and provide more scope for innovative solutions.
- the awarding authorities should ensure equal treatment and protect innovative information and solutions.

3 - To consider that Member States cannot use a predominant price-based criterion for services contracts that are intellectually related e.g. engineering design or technical assistance services. Such provision in accordance with the Directive 2004/18 provisions regarding electronic auctions is crucial to ensure that intellectual services can introduce innovation and creative solutions and hence the best solutions for clients.

4 - The Commission should dedicate resources to support training in public procurement methods and tools and call on member states to do the same, especially for intellectual and creative services, and advise them to contract out tendering processes whenever the Contracting Authority has insufficient capacity.

B.2 THE KNOWLEDGE SOCIETY, INNOVATION AND THE CONSULTING ENGINEERING INDUSTRY

B.2.1 The facts

Europe has not achieved the goal of becoming the most competitive and knowledge-based economy in the world, as many reports state. This is partially because of a lack of consideration of the value of intellectual services, especially engineering consultancy services, which can be observed in many European countries. A different situation is seen in northern America where designers are recognised as **a major player for transferring and disseminating innovation.** The Brooks Act of 1972 requires all federal procurement of architectural and engineering services to incorporate qualifications based selection (QBS).

Engineering consultants play a critical role in leading Europe in technological innovation. EFCA has recently published a **White Book on Innovation**, which clearly identifies obstacles:

- Fewer competitors create conditions for bringing in innovative ideas.
- Risk aversion on the part of public clients is a key obstacle to procurement of innovative solutions

The White Book proposes actions at firm, national and European level to foster innovation.

B.2.2 Suggested improvements

Public procurement can promote innovation under the following conditions:

- by not focussing purely on (purchase) price
- no overly restrictive selection criteria and requirements
- contacts with and negotiations of the Contracting Authority and the consulting engineering, its trusted adviser, with research institutions and contractors.

B 2.3 Proposals

1 - To facilitate the possibility to introduce incentives/disincentives to drive innovation through procurement.

2 - To recommend some specific approaches to foster innovative solutions: use of restricted procedure, dialogue, QBS, two-envelope method, and need for balanced contract conditions.

Conclusions

European public procurement policy and regulation has contributed to the opening-up of the internal market, but it has often introduced overly bureaucratic procedures and tempts to focus on lowest price based selection instead of the value that can be gained from a global analysis of a proposal and of its future impact.

These shortcomings have to be corrected and the awarding authorities and procurement staff are to become **'educated clients'** to make the most appropriate selection. This is the basic condition for efficient public procurement and means:

- Strengthening the economic engine of the private sector engineering consultancies and encouraging the public sector to contract out to the private sector
- Involvement of professionals in the team in charge of the evaluation of offers
- Training of civil servants in charge of the evaluation of bids for public tenders, with EU-wide tools and best practices (methodology, etc.)
- Considering consulting engineers as trusted advisors of awarding authorities for the selection of contractors and suppliers; prerequisites are independence and codes of conduct to ensure a high quality of service.

Public procurement legislative initiatives and policy cannot be disconnected from **other policy developments such as in the area of the Services Directive, professional qualifications, liability and insurance ... which impact on their efficiency.**

The competence of engineering consultants to offer the best quality solutions to awarding authorities through the procurement process could be improved **in line with the EU 2020 objectives on innovation and sustainable growth** through

- the negotiated procedure, that should not be an exceptional procedure
- the use of contractual arrangements allowing flexibility (e.g. alliance contracting)

PPPs should be subject to the application of a basic set of rules and principles of EU public procurement law.

EUROPEAN COMMISSION GREEN PAPER
on the modernisation of EU public procurement policy
Towards a more efficient European Procurement Market

EFCA REPLIES AND COMMENTS

1. WHAT ARE PUBLIC PROCUREMENT RULES ABOUT? (questions 1 - 13)

1.1. Purchasing activities

1.2. Public contracts

1.3. Public purchasers.

EFCA general comments: TO MAXIMIZE COST-SAVING/VALUE FOR MONEY

The facts

The development of new forms of purchasing activities, new forms of public contracts and new forms of public purchasers must adhere to the objective of maximizing cost-saving / value for money when they are supported by public resources no matter what form they take.

Public procurement rules should include any type of procurement, the economically most advantageous tender award mechanism ... and the new procurement approaches (PPP-like procedures) where these problems may be more associated with life-cycle cost considerations. All of these forms of procurement should include general, independent and long term perspectives and be in the scope of the European public procurement rules.

*Major international contractors have built up engineering capacities (high-level senior staff) for PPP projects and enter niche markets (concessions for the operation of airports, harbours, etc.) but these engineering capacities are usually not in the interest of the contracting authority. When contractors take the leadership in **PPP-like procedures**, consulting engineers may act as expert advisers either to the owner or to the contractor. Engineering consultants are sometimes regarded just as a provider of commodity services (cf. outsourcing to China and India ...).*

Suggested improvements

A set of common rules should apply to any type of procurement process involving – in the short, medium or long term – the use of public resources or public service monopoly rights (PPP-like procedures, PFI, concessions ...).

The acceptance of a 'fit for purpose' approach is to be based on a transparent and common understanding of the client's realistic clear performance requirements.

DETAILED EFCA REPLIES AND COMMENTS ON QUESTIONS 1 TO 13 OF THE GREEN PAPER

1.1. Purchasing activities

Question 1: Do you think that the scope of the Public Procurement Directives should be limited to purchasing activities? Should any such limitation simply codify the criterion of the immediate economic benefit developed by the Court or should it provide additional/alternative conditions and concepts?

R1 EFCA maintains that the scope of the Public Procurement Directives should not be limited to so called “purchasing activities”. The development of new forms of procurement supported directly and indirectly by public resources raises the need for an efficient European public procurement policy.

The criterion of the immediate economic benefit developed by the Court should be codified but it would be judicious to extend it the entire procurement market, including PPP. Although this adaptation requires work to harmonize legislative provisions, it would provide an effective and efficient tool for the Europe 2020 strategy. PPPs represent a substantial commitment of public funds and a deployment of many public policies, therefore they must be taken into account in the Green Paper on the modernisation of EU public procurement policy.

1.2. Public contracts

Classification (questions 2 and 3)

Question 2: Do you consider the current structure of the material scope, with its division into works, supplies and services contracts, appropriate? If not, which alternative structure would you propose?

Question 3: Do you think that the definition of “works contract” should be reviewed and simplified? If so, would you propose to omit the reference to a specific list annexed to the Directive? What would be the elements of your proposed definition?

R2 EFCA considers that the distinction should be made between

- supplies,
- works and conventional services and
- intellectual services.

R3 EFCA proposes that the definition of “works contract” could be reviewed and simplified, leaving out the reference to a specific list annexed to the Directive.

EFCA finds that the distinction between supplies on the one hand and works and services on the other is necessary because supplies deal with products that are mass produced and available at the time of tendering (and can thus be appropriately specified) while works and services concern deliverables that will be custom prepared after award of the tender.

The distinction between works and conventional services on the one hand and intellectual services on the other is that for works and conventional services the deliverable is fully defined, while for intellectual services the deliverable is defined during the provision of the service.

This, EFCA believes that it is important to distinguish between intellectual and commodity services and their procurement. In developing an economy based on knowledge and innovation as recommended by the Europe 2020 strategy, we must draw attention to the important role of intellectual services. Public purchasers often neglect intellectual services considering that they represent a significant cost. On the contrary, they could increase the efficiency of public spending.

About the definition of “works contract”, EFCA finds it too complicated. It should be simplified and the reference to a specific list annexed to the Directive could be omitted.

A/B-services (question 4 and 5)

Question 4: Do you think that the distinction between A and B services should be reviewed?

Question 5: Do you believe that the Public Procurement Directives should apply to all services, possibly on the basis of a more flexible standard regime? If not please indicate which service(s) should continue to follow the regime currently in place for B-services, and the reasons why.

R4 EFCA recommends a review of the distinction between A and B services.

R5 EFCA considers that the Public Procurement Directives should apply to all services, possibly on the basis of a more flexible standard regime.

The Directive should fully and equally apply to all services. There is no justification now for the distinction between A and B services and this should not be an excuse for limiting advertising and competition. For example, the current provisions result in unfair competition between some professions such as lawyers and consulting engineers.

EFCA calls for a single and simplified regime for all services with the intention of instituting more flexibility in the procurement procedures. A more flexible standard regime may not justify the regime currently in place for some B services.

Thresholds (question 6)

Question 6: Would you advocate that the thresholds for the application of the EU Directives should be raised, despite the fact that this would entail at international level the consequences described above?

R6 EFCA advocates maintaining the existing thresholds for the application of the EU Directives.

The current level of thresholds should remain. EFCA considers that thresholds of directives allow access to many business opportunities in Europe, although there is still room to improve SME access to the European market.

Exclusions (question 7 and 8)

Question 7: Do you consider the current provisions on excluded contracts to be appropriate? Do you think that the relevant section should be restructured or that individual exclusions are in need of clarification?

Question 8: Do you think that certain exclusions should be abolished, reconsidered or updated? If yes, which ones? What would you propose?

R7 and 8 EFCA believes that some exclusions should be abolished, reconsidered or updated. For example for the development of public transportation systems. The distinction between contracting authorities and contracting entities does no longer correspond to the economic reality as can be seen in the legal structure for developing the “Grand Paris” transportation system, an investment of €20 billion.

On the other hand EFCA considers that specific provisions on excluded contracts are no longer appropriate and should be an exception.

1.3. Public purchasers (questions 9 – 13)

Procurement by entities belonging to the State sphere (question 9)

Question 9: Do you consider that the current approach in defining public procurers is appropriate? In particular, do you think that the concept of “body governed by public law” should be clarified and updated in the light of the ECJ case-law? If so, what kind of updating would you consider appropriate?

R9 EFCA considers that the current approach in defining public procurers is no more efficient. In particular, EFCA thinks that the concept of “body governed by public law” should be updated and include any forms of procurers which operate mainly with the support of public resources.

The definition of “body governed by public law” provided by Directive 2004/18 could refer to all judgements rendered by the Court of Justice to be more comprehensible. Furthermore, EFCA noted that with regard to the criterion of the use of public funds, it was difficult to determine whether it concerns a public purchaser. Many economic operators include some public funds and should fall under the Directive.

Public utilities (questions 10 – 13)

Question 10: Do you think that there is still a need for EU rules on public procurement in respect of these sectors? Please explain the reasons for your answer.

Question 10.1 If yes: Should certain sectors that are currently covered be excluded or, conversely, should other sectors also be subject to the provisions? Please explain which sectors should be covered and give the reasons for your answer.

Question 11: Currently, the scope of the Directive is defined on the basis of the activities that the entities concerned carry out, their legal statute (public or private) and, where they are private, the existence or absence of special or exclusive rights. Do you consider these criteria to be relevant or should other criteria be used? Please give reasons for your answer.

Question 12: Can the profit-seeking or commercial ethos of private companies be presumed to be sufficient to guarantee objective and fair procurement by those entities (even where they operate on the basis of special or exclusive rights)?

Question 13: Does the current provision in Article 30 of the Directive constitute an effective way of adapting the scope of the Directive to changing patterns of regulation and competition in the relevant (national and sectoral) markets?

R10 EFCA maintains that there is still a need for EU rules on public procurement in respect of public utilities sectors insofar as they are operated with public resources or based on exclusive rights.

R10.1 EFCA believes that sectors currently covered could be excluded and other sectors also be subject to the provisions according to the result of an analysis of their situation on the criterion of best value of public resources involved in these sectors.

R11 EFCA considers that the scope of the Directive does not adequately define the activities that the entities concerned carry out, their legal statute (public or private) and, where they are private, the existence or absence of special or exclusive rights. These criteria should be reviewed as mentioned above

R12 EFCA believes that the presumption of profit-seeking or commercial ethos of private companies is not sufficient to guarantee objective and fair procurement by those entities (even where they operate on the basis of special or exclusive rights).

R13 EFCA considers that the current provision in Article 30 of the Directive constitutes an effective way of adapting the scope of the Directive to changing patterns of regulation and competition in the relevant (national and sectoral) markets.

Despite a liberalisation process, conditions for fair competition are not yet in place due to a lack of competitors in some sectors. There is still a need for EU rules for public utilities and the transition period is set to continue.

Basic rules applying to all contracts should exist to ensure transparency. The necessary main change is to repeal the distinction between Directive 2004/18 and Directive 2004/17. The latter provides for more flexibility in particular because of the negotiated procedure which is not an exceptional one, and a qualification system devoted to the article 53. However, this distinction of scope leads to legal uncertainty for firms; it is reasonable to recommend harmonization of provisions. The Commission could establish a set of common rules for competition and advertising (such as thresholds) which apply to all contracting authorities and entities whilst preserving some differences such as the qualification system.

The questions 12 and 13 do not require particular comment from EFCA, it is not the identification of contracting entities which is problematic but the rules that apply to them. Nevertheless it is important to point out that the profit-seeking of private companies is insufficient to guarantee objective and fair procurement because conflicts of interest, favouritism and corruption can interfere.

2. IMPROVE THE TOOLBOX FOR CONTRACTING AUTHORITIES (questions 14 – 44)

2.1. Modernise procedures

2.2. Specific instruments for small contracting authorities

2.3. Public-public cooperation

2.4. Appropriate tools for aggregation of demand/Joint procurement

2.5. Address concerns relating to contract execution

EFCA general comments: TENDERING INTELLECTUAL-CREATIVE SERVICES

The facts

It is impossible to define and describe precisely the expected results of creative intellectual services before they have been delivered. This would also apply to the performance requirements. The design scope is refined as a project develops; the extent of technical assistance services depends on how the project evolves/develops.

The costs of engineering services represent 10% of total construction costs, and less than 3% of total construction & operation costs. The life-cycle perception of project value thus demonstrates the importance of the quality of engineering services rather than of their fees.

The open procedure is totally inappropriate for intellectual services and engineering consultancy services.

Suggested improvements

Tenders which require an assessment of non-quantifiable elements should not use price as the predominant selection criterion. Consequently, certain works contracts and service contracts requiring a substantial degree of intellectual performance, such as the design of works, should use a QBS (qualifications based selection) process for selection.

*To achieve the best outcome, such contracts should be awarded on the basis of qualitative assessment and not on the basis of quoted fees or lowest price. **To enhance creativity, dialogue between contracting authorities and tenderers on the definition of scope of services is crucial.***

Therefore the selection process of consulting engineers should allow for the evaluation of team-building capacities of the consulting engineers and the client, and that would place the former in the position of trusted adviser. This means that procurement staff needs education and adequate methods, tools and resources to adopt other than the current price-based processes.

Considering the high level of transactional cost for intellectual services, incurred by both the public sector and the tenderers, open procedures are considered inappropriate for such services.

DETAILED EFCA REPLIES AND COMMENTS ON QUESTIONS 14 TO 44 OF THE GREEN PAPER

2.0. Improve the toolbox for contracting authorities (question 14)

Question 14: Do you think that the current level of detail of the EU public procurement rules is appropriate? If not, are they too detailed or not detailed enough?

R14 EFCA believes that the level of detail of the directive is appropriate (i) since it concerns the expenditure of public funds and (ii) taking into account the need to maintain a European level playing field. Some issues however are dealt with in more detail than others, e.g. the information that can be requested from candidates is specified in (too much) detail [Art. 47 and 48], while the award criteria are barely dealt with [Art. 53].

One aspect that EFCA perceives to be of fundamental importance in the public procurement framework is recognition of intellectual services, i.e. services that deliver expertise².

Finally, EFCA believes that, in order to ensure adequate coverage of the above issues, public-private partnerships could and should be awarded with the provisions of Title II of the Directive³.

Intellectual services have two distinctive characteristics:

- their content cannot be known in advance since it is determined during the provision of the service, e.g. an engineering design or a lawsuit, and
- their quality cannot be fully assessed at their submission; to a large extent, it is determined when the result of the service is put to the test, e.g. during construction for a design or in court for a lawsuit.

These characteristics introduce particular difficulties in the award of intellectual services that should in EFCA's opinion be addressed in the new legislative framework for public procurement. It should be noted that the concept of intellectual services is already included in Directive 2004/18, in Article 1, par. 7 as well as in Article 30 par. 1c.

Intellectual services are significant because they significantly affect the outcome of their subject: for engineering consultants it is the quality and cost of the constructed project, for lawyers the outcome of the trial. Moreover, intellectual services constitute the knowledge economy, which the European Commission is committed to support. Engineering consultants in particular are

² The following services are considered as intellectual services:

- financial services (category no. 6 in Annex II of Directive 2004/18)
- research & development services (no.8)
- accounting & auditing (no. 9)
- market research and public opinion polling services (no. 10)
- management consulting services and related services (no. 11)
- architectural and engineering services (no. 12)
- advertising services (no. 13)
- legal services (no. 21)
- education and vocational education services (no. 24)

³ Ref. EFCA Publication "Award Procedures for Public-Private Partnerships (PPPs) for project delivery", 2006 and 2011.

part of the public works production chain which constitutes the major part of applications of Directive 2004/18.

EFCA fully agrees that the provisions of the Directive should be made more flexible, in order to facilitate judicious applications that are consistent with the Treaty of the European Community and the fundamental principles of its application; the proposals for the enhancement of flexibility are contained herein, ref EFCA's reply to questions 19 to 23.

One issue which is clearly not adequately covered by the Public Procurement Directives is that of the award of public-private partnerships (PPP)⁴. Since PPP projects are public projects undertaken by the private sector, their award essentially constitutes a form of public procurement. As such, the award of PPPs should be in accordance with the Treaty of the European Community and its fundamental principles, with the objective of opening up public procurement to Europe-wide competition. However, the provisions of Directive 2004/18 for public works concessions are restricted to the publication of notices advertising such projects and awarding of additional works to the concessionaire; issues such as:

- methods of project award (such as open or restricted)
 - the assessment of candidates in two stages, selection and award
 - the obligation for minimum numbers of selected candidates (mainly for the restricted and competitive dialogue procedures)
 - the criteria for the assessment of the personal situation of the candidates
 - the selection criteria (and the obligation to clearly define them in the invitation)
 - the award criteria (and the obligation to clearly define them in the invitation)
 - the allowance for adequate time for preparation of tenders
- are not defined for concession contracts; thus, with the existing legal framework any award process can be used for concession contracts by the awarding authorities after publication according to the provisions of the Directive.

So EFCA has come to the conclusion that, in order to ensure adequate coverage of the above issues, public-private partnerships could and should be awarded with the provisions of Title II of the Directive⁵. In the above context, any provisions of the Directive that are considered as excessively restrictive or inflexible for the application to the award of PPP projects should in EFCA's opinion be adjusted, to the benefit of conventional public procurement rather than being used as a reason to exclude the award of PPPs from the Public Procurement Directive.

2.1 Modernise procedures (question 15 – 26)

General procedures (question 15)

⁴ considered here as a generic term including both concessions, where the users contribute to the recovery of the investment and PFI projects, where the public sector pays in instalments.

⁵ Ref. EFCA Publication "Award Procedures for Public-Private Partnerships (PPPs) for project delivery", 2006 and 2011.

Question 15: Do you think that the procedures as set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes?

If not: How should the [existing] procedures be improved in order to alleviate administrative burdens/reduce transaction costs and duration of the procedures, while at the same time guaranteeing that contracting authorities obtain best value for money?

R15 In EFCA's opinion, the procedures set out in the current Directive do not facilitate the achievement of the best possible procurement outcomes, at least for intellectual services because of the difficulty of assessing the economically most beneficial tender for such services.

For the award of intellectual services in particular, EFCA believes that:

- the open procedure and the competitive dialogue procedure should not be foreseen
- the criterion of lowest price should not be allowed, and
- price should play a secondary role.

The tenders for services typically include:

- a technical proposal setting out the resources (project team) and way in which the candidate will execute the project (methodology and schedule), and
- a financial proposal with the requested fee for execution of the project.

Regarding the technical proposals, the assumption is that:

1. The quality of the methodology reflects the quality of the services that will be provided. In fact, the quality of services depends on several important factors beyond the methodology; for consulting engineering for example, it depends on:
 - the extent of the effort that will be made to find the most appropriate solution, taking into account the operational result, the life-cycle cost, environmental sustainability, social integration etc.
 - the degree of definition of construction detail in the design, and
 - the consistency of drawings and specifications.

These aspects are not and cannot be determined on the basis of the technical proposal.

2. The contracting authority can reliably assess the submitted proposals. In fact, contracting authorities in most cases do not have the expertise or the time to assess the differences (nuances) between the various proposed methodologies; as a result, the evaluation of methodologies is often subjective to a large degree.

As a result of the above, the assessment of technical proposals in most cases does not appropriately reflect the quality of the services to be provided.

In addition, the competition in prices of service providers invariably leads to limitations in their quality. For lump sum contracts in particular which are the most common, it leads to the lowest possible cost that can cover the scope of services envisioned during preparation of the proposal. This approach is inappropriate for intellectual services however because, as mentioned in EFCA's reply to question 14:

- their content is determined during the provision of the service, and
- their quality cannot be fully assessed at their submission.

Moreover, in some countries, the criterion of lowest cost is used for award, which is clearly inappropriate for the award of intellectual services, ref. also EFCA's reply to question 70.1.1. Furthermore, in several countries the technical and financial proposals are evaluated

simultaneously; this may allow the contracting authority to assess technical proposals taking financial proposals into account – which construes a major breach of the principle of equal treatment of candidates.

Under these circumstances, service providers cannot afford to fully address unforeseen issues that will arise during the execution of the contract. Moreover, since the quality of their work cannot be fully assessed at their submission, an incentive exists “to cut corners” in the provision of their services.

As a result of the above, the procurement outcomes for intellectual services are in most cases far from the best. Moreover, since they determine to a large extent the outcome of their subject, the financial consequences extend well beyond their contracts themselves; for engineering consultants, the quality and cost of the constructed project will be directly affected.

Thus, the value for money in intellectual services, can be improved considerably more by improving value than by reducing cost; in fact reducing cost below the fair price will invariably reduce the quality disproportionately.

In addition, the transaction costs are excessive for intellectual services in view of the significant input of experienced staff required for the preparation of each proposal and the relatively high number of candidates invited to submit proposals (at least 5, while internationally they are 3 to 5); it is interesting to note that, for the award of consulting engineering services in the U.S., such proposals are not required⁶, so firms there have lower overhead costs. Transaction costs are especially high for:

2. In the open procedure, due to the large number of participating candidates; EFCA believes that the open procedure should be an exceptional one, at least for intellectual services, to be used only in very simple cases
3. In the competitive dialogue procedure, where considerable input of highly qualified staff is required to actually elaborate solutions; even though the contracting authorities sometimes offer some reimbursement to candidates for their participation in the dialogue, experience shows that the costs of such participation are over prohibitively high.

In view of the above, the use of a two envelope system, whereby:

- the technical proposal is included in one envelope and
- the financial proposal in another sealed envelope, to be opened when the evaluation of the technical proposals is completed, provided that the candidate’s technical proposal has achieved a minimum (threshold) score,

is deemed absolutely necessary for the award of any contract where a technical and financial component will be assessed.

In view of the above, EFCA believes that for the award of intellectual services in particular:

- the open procedure and the competitive dialogue procedure should not be foreseen, ref. also EFCA’s reply to question 17
- the criterion of lowest price should not be allowed, ref. also EFCA’s reply to question 70.1.1., and
- price should play a secondary role, ref. also EFCA’s replies to questions 16, 19 and 70.

⁶ award is made on the basis of qualifications, ref. EFCA’s reply to question 16

For the award of these services, EFCA feels the need to “go back to the basics”; the principal factor that determines award is the quality of the service provider, which depends mainly on:

- his experience
- his track-record
- the qualifications of the key staff of their project team, and
- the main issues of methodology, for complex projects.

These factors can be reasonably evaluated by the contracting authorities; it is thus in these directions that efforts should be focused.

Of these, experience is evaluated in the selection criteria and the project team should be evaluated in the award criteria; including an explicit reference in article 53 par. 1(a) would be useful. The issue of track-record is dealt with in EFCA's reply to question 25.

Procedures which are not available under the current directives (question 16)

Question 16: Can you think of other types of procedures which are not available under the current Directives and which could, in your view, increase the cost-effectiveness of public procurement procedures?

R16 For the award of intellectual services EFCA believes that the provisions of the negotiated procedure should be adjusted to include the right of the contracting authority to negotiate first with:

- the most qualified candidate (ref. EFCA's reply to questions 19 and 70.1.3) or, alternatively,
- the candidate that submitted the most advantageous tender⁷, ref EFCA's reply to question 70.1.3.

and conclude the contract with him if an agreement is reached.

In consulting engineering in particular, the design process defines the engineering solution and thus the construction and operation cost. In this case, the economically most advantageous tender is conceptually the one that can be expected to minimise the life-cycle cost of the project. Taking into account that the design cost is less than 5% of the overall cost, it follows that the objective of the award process in design contracts should be to get the best consultant a reasonable price. This is also appropriate, mutatis mutandis, for other intellectual services.

In the U.S. the awareness of this reality for the consulting engineering sector has taken the form of the Brooks Act (1992) by which all Federal architectural and engineering service contracts (and by now those of several States) are awarded “on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices”. The concept is to select the most qualified service provider and negotiate a contract with him, within the project budget. If that fails, the next best is selected etc. The negotiations focus around scope, required input and fees; fees are agreed after a breakdown into salaries, overhead and profits, which are audited during the execution of the contact. This is known as “Qualifications Based Selection⁸” (QBS).

⁷ omitting the word “economically” from the most advantageous tender is meant to award on the basis of the quality of the proposal, if the price is reasonable.

⁸ “selection” in the U.S. terminology is equivalent to “award” in European terms

A variation thereof called Quality Based Selection is advocated by FIDIC, the International Federation of Consulting Engineers and consists of awarding the contract to the candidate with the best technical proposal, provided that his financial proposal is within the budget.

In Europe these procedures could be introduced by adjusting the provisions of the negotiated procedure to include the right of the contracting authority to negotiate first with:

- the most qualified candidate (ref. EFCA's reply to questions 19 and 70.1.3) or, alternatively,
- the candidate that submitted the most advantageous tender⁹, ref EFCA's reply to question 70.1.3.

for the award of intellectual services and conclude the contract with him if an agreement is reached. EFCA would consider this a major breakthrough in European public procurement, ref. EFCA's reply to question 19.

To maintain, modify or abolish procedures in their current form (question 17)

Question 17: Do you think that the procedures and tools provided by the Directive to address specific needs and to facilitate private participation in public investment through public-private partnerships (e.g. dynamic purchasing system, competitive dialogue, electronic auctions, design contests) should be maintained in their current form, modified (if so, how) or abolished?

R17 Dynamic purchasing and electronic auctions are not appropriate for the award of intellectual services. EFCA firms have found the procedure of framework agreements [Art. 32] very useful however for covering the needs of contracting authorities, especially where they are concluded with a single candidate. Moreover, the competitive dialogue procedure is not considered useful in our sector since it constitutes an inefficient means of defining the project.

The current provisions of Article 1, par. 7 of Directive 2004/18 excluding intellectual services from electronic auctions should be maintained in their current form and replicated in future legislation as to avoid any confusion on this point. As a corollary, dynamic purchasing systems cannot apply to intellectual service contracts either, as their specifications cannot be determined with precision in advance; the relevant award system is that of framework agreements.

As mentioned above, we have found the procedure of framework agreements [Art. 32] very useful however for covering the needs of contracting authorities, especially where they are concluded with a single candidate. Where contracts are awarded by reopening competition between the economic operators of the framework agreement, their usefulness is marginal: the procedure reduces to a tool for having selected economic operators on standby to submit proposals, with all kinds of negative consequences¹⁰. EFCA advocates award to the *most qualified candidate* in such cases (ref. EFCA replies to questions 16 and 70.1.3), since the project on which to base award is as yet undefined.

⁹ omitting the word "economically" from the most advantageous tender is meant to award on the basis of the quality of the proposal, if the price is reasonable.

¹⁰ The candidates show a workload that may practically not materialise until they are called upon to provide services, some candidates may never get work if others undertake big contracts etc.

Moreover, the competitive dialogue procedure is not considered useful in the consulting engineering sector since it constitutes an inefficient means of defining the project: the project definition is worked on in parallel by all selected candidates, with considerable input of highly qualified staff, while a conventional multi-disciplinary engineering firm could just as well investigate and compare the alternative solutions, even for particularly complex projects¹¹. EFCA feels that the same conclusion applies, mutatis mutandis, to other intellectual services, e.g. lawyers, financial advisers.

Even if remuneration is foreseen, the experience to date is that the required (technical, financial, legal) input is so significant that it is essentially borne by the candidates, constituting a high transaction cost.

The same apply to design contests, the use of which we consider is justified only for the award of projects with adequate remuneration of the winners/participants.

Finally, in competitive dialogue, the issue of cherry-picking of the ideas of the candidates by the contracting authorities is still a major concern; after all, the purpose of the exercise for contracting authorities is precisely “to identify the means best suited to satisfy their needs” [Art. 29, par. 3].

The 2009 accelerated procedure (question 18)

Question 18: On the basis of your experience with the use of the accelerated procedure in 2009 and 2010, would you advocate a generalisation of this possibility of shortening the deadlines under certain circumstances?

Would this be possible in your view without jeopardizing the quality of offers?

R18 The presently foreseen deadlines are appropriate; this also applies to the shortened deadlines for projects that have been announced in a prior information notice. Shortening these deadlines would indeed jeopardise the quality of the offers and the development of competition, since SMEs would find it more difficult to allocate staff for project preparation at shorter notices.

Moreover, the issue should be placed in perspective: saving a few days in the invitation to submit tenders will not measurably affect the project delivery time, which in the consulting engineering’s case is substantially affected by the design and review processes, as well as the time for consultation with other authorities and permitting (environmental and other).

In any event, shortened deadlines could only be foreseen if the content of proposals is trimmed down to the essentials mentioned in EFCA’s reply to question 14, i.e. the project team and financial proposal.

More negotiation in public procurement (questions 19 – 21)

¹¹ A characteristic example is that of defining the means of a river crossing (bridge and what type, vs tunnel) mentioned in the Explanatory Note on Competitive Dialogue issued by the Commission in 1996 (ref. section 2.2): the identification of the most appropriate means of crossing could also be the subject of a conventional feasibility contract, in which alternative solutions are considered and compared.

Question 19: Would you be in favour of allowing more negotiation in public procurement procedures and/or generalizing the use of the negotiated procedure with prior publication?

R19 EFCA would be in favour of generalising the negotiated procedure with prior publication for the award of intellectual services or at least allowing its unconditional use, especially if the contracting authority were permitted to negotiate first with:

- the most qualified candidate or, alternatively,
- the candidate that submitted the most advantageous tender

and conclude the contract with him if an agreement is reached.

The negotiated procedure (with prior publication) is indeed attractive for the award of intellectual services due to its increased flexibility and smaller (minimum) number of selected candidates (3 instead of 5 for the restricted procedure).

However it should be recognised that scope of the negotiation process on the submitted tenders is questionable since it includes adapting the tenders to:

- the requirements of the contract notice and specifications (shouldn't the tenders be consistent with them anyway?)
- additional documents (Couldn't they have been furnished in advance of the tender? What if said additional documents disqualify a tenderer or substantially alter the value of his proposal?)

Because of the above, there are concerns that the procedure will be essentially used to pressure candidates to lower their prices, which, for intellectual services at least, will disproportionably reduce the value of their services, ref EFCA's reply to questions 15 and 70.1.2.

However, as discussed in EFCA's reply to question 16, EFCA believes that the negotiated procedure would be appropriate for award of intellectual services, if the contracting authority were permitted to negotiate first with:

- the most qualified candidate or, alternatively,
 - the candidate that submitted the most advantageous tender
- and conclude the contract with him if an agreement is reached (ref. also EFCA's reply to question 70.1.3). If not, the contracting authority would negotiate with the second most qualified or advantageous tenderer and subsequently with the third; if a satisfactory agreement is not reached, the project will be re-tendered.

In the former case, the candidates would only submit their qualifications; in the latter the candidates would submit their qualifications and the most suitable ones would be invited to submit technical proposals (including proposed scope of work, methodology and project team). In both cases, the negotiation with the preferred candidate would focus on:

- the required scope of work, and
- the corresponding remuneration.

EFCA believes that this form of the negotiated procedure should be foreseen as a standard procedure for the award of intellectual services, as done in the U.S.

Question 20: In the latter case, do you think that this possibility should be allowed for all types of contracts/all types of contracting authorities, or only under certain conditions?

R20 Subject to the appropriate application of the negotiated procedure, ref EFCA's reply to the previous question, it could be used for the award of intellectual services.

Question 21: Do you share the view that a generalised use of the negotiated procedure might entail certain risks of abuse/ discrimination?

In addition to the safeguards already provided for in the Directives for the negotiated procedure, would additional safeguards for transparency and non-discrimination be necessary in order to compensate for the higher level of discretion?

If so, what could such additional safeguards be?

R21 EFCA believes that the levels of transparency should be higher in negotiated procedures.

The subjectivity inherent in the selection of the preferred candidate (defined as the most qualified one or, alternatively, the one that submitted the most advantageous tender, ref. EFCA's reply to question 19) is the same as the subjectivity for assessing tenders in the open or restricted procedures today, ref. EFCA's reply to question 15.

There is a risk, however, that the remuneration agreed with the preferred candidate will be disproportionate with the scope of work. Thus, the levels of transparency should indeed be higher in such procedures, e.g. the agreed scope and price should be published when the procedure is completed.

Commercial goods and services (question 22)

Question 22: Do you think that it would be appropriate to provide simplified procedures for the purchase of commercial goods and services? If so, which forms of simplification would you propose?

R22 It would be appropriate to provide simplified procedures for the purchase of standardized goods of which the quality is defined and the main current characteristics cannot be defined before before being executed.

Simplified procedures are appropriate for standardized goods of which the quality is defined and which are currently on the market. EFCA estimates that this is not possible for intellectual services.

Selection and award (questions 23 – 24)

Question 23: Would you be in favour of a more flexible approach to the organisation and sequence of the examination of selection and award criteria as part of the procurement procedure?

If so, do you think that it should be possible to examine the award criteria before the selection criteria?

R23 EFCA would be in favour of a more flexible approach to the organisation of the selection and award criteria since, as EFCA details in its reply to the next question, the strict distinction between the criteria of the two stages does create some confusion and difficulty for intellectual services.

However, EFCA does not think it would be appropriate to reverse the order of selection and award in open procedures (it cannot indeed be applied in the other procedures foreseen in the directive since tenders are invited from the selected candidates). Indeed reversing the order may mean rejecting a tender which has been judged as economically most advantageous on the grounds that the candidate is not suitable, which may put pressure on the system to accept marginally adequate candidates.

Question 24: Do you consider that it could be justified in exceptional cases to allow contracting authorities to take into account criteria pertaining to the tenderer himself in the award phase?

If so, in which cases, and which additional safeguards would in your view be needed to guarantee the fairness and objectivity of the award decision in such a system?

R24 Thus, a more flexible interpretation of the scope of the selection and award stages regarding qualifications would be most welcome for the award of intellectual services. Since this constitutes normal procedure in most countries for decades and EFCA has no indication of abuse, EFCA is not concerned that the principle of equal treatment may be infringed.

As discussed in EFCA's reply to question 15, the most important attributes of the quality of work that the service providers can be expected to deliver are:

- their experience
- their track-record, and
- the qualifications of their project team

With the exception of the track-record, which is discussed in the reply to question 25, the experience is evaluated in the selection stage and the project team in the award stage.

However, there is a fine line between:

- the qualifications of the project team, which includes the persons that are proposed to work for the particular project; these form part of the candidates' proposal and are evaluated in the award stage
- the persons generally responsible for providing the services, the qualifications of which may be assessed in the selection stage in conjunction with the operator's experience; the idea here is to verify that the entities' quoted past experience is available in the key staff of the firm and, conversely, that an entity lacking experience should be acknowledged to have the experience carried by its key staff.

The above distinction becomes difficult to apply where the persons generally responsible for providing the services are members of the key staff of the project team; and does not actually exist in small operators or individuals, where the persons generally responsible for providing the

services are also the key staff of the project team. This has led to interpretations excluding the project team from evaluation in the award stage, which is not appropriate either, because:

- the project team is the main resource that will be used for providing the particular service and therefore constitutes part of the offer of the candidate and,
- in any event, the experience of the project team is an important attribute of the quality of services that can be expected.

Thus, a more flexible interpretation of the scope of the selection and award stages regarding qualifications would be most welcome for the award of intellectual services.

Taking past performance into account (question 25)

Question 25: Do you think the Directive should explicitly allow previous experience with one or several bidders to be taken into account?

If yes, what safeguards would be needed to prevent discriminatory practices?

R25 EFCA suggests the previous experience with candidates should be taken into account internally by the contracting authorities and accepted as an evaluation criterion, provided that it is mentioned in the invitation to tender. Some provision would have to be made to avoid discrimination against candidates that have not as yet been evaluated, e.g. by attributing to them a default (reasonably good) grade.

For the information of other contracting authorities, a certification of good performance could be foreseen, to be issued to those service providers and suppliers that have executed their contracts to the satisfaction of the contracting authority.

One could indeed envision an evaluation by the contracting authority of the *track record* of the quality of work provided by its service providers, contractors and suppliers. For services such evaluations should take place:

- at the end of the contract and,
- for those services concerning another contract, e.g. design for a project that will be subsequently constructed, at the end of that contract.

The issue is sensitive, since objectivity is often elusive; appropriate provisions should thus be made, e.g.:

- the evaluation should be made on the basis of key performance indicators, which should be defined in the invitation to tender
- the evaluation should be made by a committee
- the facts should be made known to the service provider and the committee should hear him out before concluding the evaluation.

EFCA would have reservations about making this information available to other contracting authorities; thus, for now EFCA suggests that it be used internally by them and accepted as an evaluation criterion, provided that it is mentioned in the invitation to tender. Some provision would have to be made to avoid discrimination against candidates that have not as yet been evaluated, e.g. by attributing to them a default (reasonably good) grade.

Specific tools for utilities (question 26)

Question 26: Do you consider that specific rules are needed for procurement by utilities operators? Do the different rules applying to utilities operators and public undertakings adequately recognise the specific character of utilities procurement?

R26 EFCA estimates that specific rules will not open up the market and thinks that there should be more ethical rules when auditing the purchasing office.

Specific rules will not open up the market but there should be more ethical rules concerning the audit of the purchasing office.

2.2. Specific instruments for small contracting authorities (question 27 - 29)

A lighter procedural framework for local and regional contracting authorities for the award of contracts above the thresholds of the Directives (question 27 - 28)

Question 27: Do you think that the full public procurement regime is appropriate or by contrast unsuitable for the needs of smaller contracting authorities? Please explain your answer.

Question 28: If so, would you be in favour of a simplified procurement regime for relatively small contract awards by local and regional authorities? What should be the characteristics of such a simplified regime in your view?

R27 and 28 EFCA is not in favour of a simplified procurement regime for relatively small contract awards by local and regional authorities.

It is not appropriate to distinguish contracting authorities in function of their size. Contracting authorities have to invest also in capacity and knowledge and choose the procedures which they can manage.

More legal certainty for awards below the thresholds of the Directives (question 29)

Question 29: Do you think that the case-law of the Court of Justice as explained in the Commission Interpretative Communication provides sufficient legal certainty for the award of contracts below the thresholds of the Directives? Or would you consider that additional guidance, for instance on the indications of a possible cross-border interest, or any other EU initiative, might be needed? On which points would you deem this relevant or necessary?

R 29 EFCA thinks that the case-law of the Court of Justice as explained in the Commission Interpretative Communication provides sufficient legal certainty for the award of contracts below the thresholds of the Directives.

2.3. Public-Public cooperation (questions 30 – 33)

Question 30: In the light of the above, do you consider it useful to establish legislative rules at EU level regarding the scope and criteria for public-public cooperation?

Question 31: Would you agree that a concept with certain common criteria for exempted forms of public-public cooperation should be developed? What would in your view be the important elements of such a concept?

Question 32: Or would you prefer specific rules for different forms of cooperation, following the case-law of the ECJ (e.g. in-house and horizontal cooperation)? If so, please explain why and which rules they should be.

Question 33: Should EU rules also cover transfers of competences? Please explain the reasons why.

R30 In the light of the above, EFCA considers it useful to establish legislative rules at EU level regarding the scope and criteria for public-public cooperation.

R31 EFCA does not agree that a concept with certain common criteria for exempted forms of public-public cooperation should be developed.

R32 EFCA does not favour specific rules for different forms of cooperation, following the case-law of the ECJ (e.g. in-house and horizontal cooperation).

R33 EFCA thinks that EU rules should not cover transfers of competences. This is more a national competence.

The public-public cooperation should not be taken too largely because that would lead to a restriction of competition. The public-public cooperation should not be a devious way for the contracting authorities to avoid using procurement procedures.

2.4. Appropriate tools for aggregation of demand (questions 34 – 38)

Question 34: In general, are you in favour of a stronger aggregation of demand/more joint procurement? What are the benefits and/or drawbacks in your view?

Question 35 Are there in your view obstacles to an efficient aggregation of demand/joint procurement? Do you think that the instruments that these Directives provide for aggregating demand (central purchasing bodies, framework contracts) work well and are sufficient? If not, how should these instruments be modified? What other instruments or provision would be necessary in your view?

Question 36: Do you think that a stronger aggregation of demand/ joint procurement might involve certain risks in terms of restricting competition and hampering access to public contracts by SMEs? If so, how could possible risks be mitigated?

Question 37: Do you think that joint public procurement would suit some specific product areas more than others? If yes, please specify some of these areas and the reasons.

Question 38: Do you see specific problems for cross border joint procurement (e.g. in terms of applicable legislation and review procedures)? Specifically, do you think that your national law would allow a contracting authority to be subjected to a review procedure in another Member State?

R34 to 38 In EFCA's view stronger aggregation of demand/more joint procurement could have some benefits and/or drawbacks but it seems that drawbacks would be more important than benefits. The main danger is that a stronger aggregation of demand/ joint procurement might involve certain risks of exclusion of SMEs whereas the next chapter of the Green Paper is entitled "A more accessible European procurement market".

Moreover, EFCA thinks that joint public procurement is easier for standard products but that would be an inadequate solution for infrastructure projects.

The aggregation allows for saving time but also save money: these are the main benefits of this modality. However, there are many drawbacks. At the moment the public procurement rules in the different countries are too different so it would be difficult to harmonize legislation. Furthermore, this can be very difficult for SMEs and there is a risk of exclusion of SMEs. This will mean that networks will have to be established by SMEs or even mergers. Finally, joint procurement needs far more collaboration and preparation of the public authorities; it will probably need longer procedures.

2.5. Address concerns relating to contract execution (Questions 39 – 44)

Substantial modifications (questions 39 - 40)

Question 39: Should the public procurement Directives regulate the issue of substantial modifications of a contract while it is still in force?

If so, what elements of clarification would you propose?

R39 EFCA believes that the public procurement Directives should regulate the issue of substantial modifications of a contract, in a reasonable manner.

Of the conditions considered by the ECJ for allowing such adjustments, EFCA believes the degree of change in scope and the size of the extension are more relevant; the effect of the modification on the participation or success of other tenderers is more difficult to assess. In this respect, EFCA considers that any aspects that are ancillary to the scope of the contract and/or necessary to fulfil the scope of the contract be considered permissible, independently of whether they were foreseeable or not.

The permissible size of contract extensions should be differentiated for the various types of contracts. In view of the above, project design contracts should have the largest leeway, with other intellectual services somewhat below that.

The current perception is that the contract defines the scope of services and changes are not permissible; any changes increasing the scope of the contract would necessitate a new contract to be negotiated with the economic operator without publication of a contract notice; this would be permissible [Art. 31, par. 4(a)] only for additional works or services which have, through unforeseen circumstances, become necessary for the performance of the works or services when they cannot be technically or economically separated from the original contract or are strictly necessary for its completion - provided they are less than 50 % of the amount of the original contract.

Moreover, the term “unforeseen circumstances” has been interpreted to mean “unforeseeable circumstances” which is far more restrictive, in the sense that most unforeseen circumstances can be foreseen if excessive provisions are made, e.g. extensive contingencies or excessive site investigations (e.g. geotechnical, archaeological for construction projects); this however places an onerous burden on the budget of all contracts in order to cover the unforeseen events that may rise in any one of them.

Hence the issue of modifications is an important one and should be addressed in the planned review of the Directive; the important issue is that these modifications should not be considered as constituting a new contract but an adjustment of the existing one.

Moreover, allowing flexibility in the scope of the contract would facilitate:

1. The execution of all design stages in one contract, instead of the presently necessary breakdown in two successive contracts, namely:
 - one for the feasibility design, in which various alternative forms of the project are considered and the most appropriate one selected, and
 - another for the preliminary and final design of the project.which result in considerable project delay¹².

2. The application of novel project delivery methods such as Alliance contracting, in which a contractor is hired during the design process (i.e. before his contract is fully defined) and contributes to the design effort on issues of:
 - constructability
 - value engineering
 - design-packaging for fast-track¹³
 - estimating & pricing
 - scheduling, and
 - risk identification

Construction can thus proceed in parallel with the design and the designer is retained in the construction process for supervision of construction.

Question 40: Where a new competitive procedure has to be organised following an amendment of one or more essential conditions would the application of a more flexible procedure be justified?

What procedure might this be?

R40 If a competitive procedure is organised, it will be difficult to adopt a different procedure without being perceived as bending the rules. In EFCA’s opinion, the objective is to avoid entering into a new competitive procedure unless necessary.

Changes concerning the contractor and termination of contracts (questions 41 – 43)

Question 41: Do you think that EU rules on changes in the context of the contract execution would have an added value? If so, what would be the added value of EU-level rules? In particular,

¹² In fact, one of the reasons competitive dialogue was foreseen was to avoid these two award procedures [Explanatory Note on competitive dialogue (1996), section 2.1].

¹³ i.e. construction of completed parts of design, while design is being carried out on other parts

should the EU rules make provision for the explicit obligation or right of contracting authorities to change the supplier/ terminate the contract in certain circumstances? If so, in which circumstances? Should the EU also lay down specific procedures on how the new supplier must/ may be chosen?

Question 42: Do you agree that the EU public procurement Directives should require Member States to provide in their national law for a right to cancel contracts that have been awarded in breach of public procurement law?

Question 43: Do you think that certain aspects of the contract execution – and which aspects - should be regulated at EU level? Please explain

R43 The regulation at the EU level of certain aspects of the contract execution would be most welcome because national provisions vary from one Member State to another and in some cases are clearly unfair. Such aspects are:

- the level of guarantees,
- the requirement for life-cycle costing
- the level of liability
- the level of required insurance, and
- the clauses regarding joint & several liability.

As mentioned above, the aspects which could be regulated at EU level are:

1. The level of guarantees required for the performance of the contract to the satisfaction of the contracting authority; clearly these guarantees should be proportional to the value of the contract being awarded. In the case of joint ventures, such guarantees should cover the joint responsibility of all service providers for the execution of the contract.
2. The requirement for life-cycle costs to be considered in the considerations of alternative solutions, in addition to environmental aspects; the consideration of the full financial implication of any choice is an obvious requirement from the consulting engineering profession.
3. The level of liability, which is tending to increase independently of the capability of the service provider to be insured for it. Disproportionately high levels of liability are counterproductive for consulting engineering services because they lead to excessively conservative designs which society is called upon to pay; in addition, innovation is stifled since conventional solutions are called for if minimisation of risk is the main objective. EFCA believes that contractual liability for intellectual services should be limited to insurable levels, i.e. correspond to a multiple of the contract value.
4. The clauses regarding the level of professional indemnity insurance, which should be commensurate with liability.
5. The clauses regarding joint & several liability of the service providers of a joint venture; although EFCA is aware that the concept of joint & several liability has deep roots in existing national legislation, it is ultimately unfair and fundamentally wrong because service providers should not and cannot be liable for the work of others in the joint venture, e.g. a lawyer cannot be responsible for the work of an accountant in the joint venture, or an environmental consultant for the structural design of a bridge. Each service provider should only be held accountable for his work; in cases where more than one party is responsible for the failure, the liability should of course be shared between them. This may take

onerous proportions for a consultant in a joint venture with a contractor, who is responsible for a failure but is bankrupt and cannot pay for the damages.

In fact, the development of standardised European General Conditions of contract could be envisioned for services, works and supplies; such standardisation would reduce one important barrier to cross-border commerce and the further opening of the internal market. FIDIC, which EFCA represents in Europe, has elaborated such standardised conditions some time ago (the so-called White Book), which could be adapted to the requirements of Europe.

Subcontracting (question 44)

Question 44: Do you think that contracting authorities should have more possibilities to exert influence on subcontracting by the successful tenderer? If yes, which instruments would you propose?

R44 EFCA thinks that contracting authorities should have more possibilities to exert influence on subcontracting by the successful tenderer. Nevertheless, this subject has to be only concerned by national law because there is no possibility to harmonize.

3. A MORE ACCESSIBLE EUROPEAN PROCUREMENT MARKET (questions 45- 61)

3.1. Better access for SMEs and Start-ups

3.2. Ensuring fair and effective competition

3.3. Procurement in the case of non-existent competition/exclusive rights.

EFCA general comments: NON-DISCRIMINATION, OPENING OF THE MARKET

The facts

*Productivity and innovation in the engineering sector have been fostered in the construction sector through the establishment of **cross border networks or subsidiaries rather than through direct exports**. Many national barriers such as language, national regulation to practise some professions, national liability systems in construction and the recent increase of public in-house engineering in some countries limit the cross-border activities of intellectual service providers (consulting engineers, architects...).*

*Over the past decade, trans-border provision of consulting engineering services was very limited. Firms primarily opt for setting up subsidiaries (use of local staff) to overcome recurring problems with regard to licenses (regulatory restrictions on professions) and focus on regional and local markets. Export/import and trans-border activity in the internal market mainly concerns foreign establishment i.e. subsidiaries or branch offices and use of local staff. Moreover, procurement of consulting services is based on trust and productive relationships between client and service provider; **such trust can be built easier with firms that are established in the country and especially with local staff** (“cultural affinity”).*

*Through their networks and direct involvement in public tenders, intellectual services providers (consulting engineers, architects...) foster the knowledge society. However, very few such developments are seen because **of the lack of protection of property rights**. One has observed public competition whereby the terms of reference were copied from offers in other unsuccessful public competitions!*

***In-house engineering** of contractors has decreased as a result of European policies, in particular policies on conflict of interest. In-house engineering in the public sector decreased also as a consequence of European privatisation policies. However, in some sectors and countries, private sector firms still face in-house public competitors who engage in commercial operations. The recent crisis gave the opportunity for new developments of in-house engineering in many public or semi-public entities. Consequently:*

- *The market, open to competition for consulting engineering, varies considerably from one country to another (e.g. transportation infrastructure and systems).*
- *It may reduce competitiveness of the European economy.*
- *The in-house public engineering departments often distort the competitive market since they have unfair and unclear advantages over private sector firms.*

EFCA continues to advocate the public sector contracts out planning, engineering design and related professional services to the private sector. It is an important objective of European policies.

SMEs in the European market. Major companies are able to participate in public procurement because they have procurement specialists and even departments. However, the rules and practices remain challenging to SMEs, which are however crucial for the EU's economic growth and performance. Public procurement markets are quasi inaccessible to SMEs from another EU country in spite of the Services Directive.

Suggested improvements

To foster productivity and limit obstacles to cross-border activities in Europe – two major objectives of the single market – other legislative initiatives and policy instruments e.g. with regard to services, professional qualifications, competition and liability should be linked up more closely with the public procurement policies.

The following proposal refers to these policies: they are a condition to improve the efficiency of the public procurement policy and cannot be separated from it.

DETAILED EFCA REPLIES AND COMMENTS ON QUESTIONS 45 - 61 OF THE GREEN PAPER

A more accessible European procurement market

Question 45: Do you think that the current Directives allow economic operators to avail themselves fully of procurement opportunities within the Internal Market? If not: Which provisions do you consider are not properly adapted to the needs of economic operators and why?

R.45 The current Directives do not allow economic operators to avail fully of procurement opportunities within the Internal Market.

When contemplating whether the directives should be completed with further provisions in order to facilitate the access for the economic actors to procurement in other Member States, account must be taken to the transaction costs for the contracting authorities and the need to avoid making the procurement process more complicated and burdensome than necessary.

3.1. Better access for SMEs and Start-ups (questions 45 – 52)

Reducing administrative burdens in the selection phase

Other suggestions (question 46 to 52)

Question 46: Do you think that the EU public procurement rules and policy are already sufficiently SME-friendly? Or, alternatively, do you think that certain rules of the Directive should be reviewed or additional measures be introduced to foster SME participation in public procurement? Please explain your choice.

R.46 Provisions of the Directives allow consideration of the SMEs' interests but their implementation by contracting authorities may make market access difficult.

Question 47: Would you be of the opinion that some of the measures set out in the Code of Best Practices should be made compulsory for contracting authorities, such as subdivision into lots (subject to certain caveats)?

R.47 An improved dissemination of the Code of best Practices would allow contracting authorities to better take into account the economic importance of SMEs. Without further changes to current guidelines, a transposition of the Code of best Practices would be a factor in improving SMEs' access to the European procurement market. The possibility to reduce the administrative burden for tenderers should be reviewed and measures introduced if this is found to be appropriate.

Question 48: Do you think that the rules relating to the choice of the bidder entail disproportionate administrative burdens for SMEs? If so, how could these rules be alleviated without jeopardizing guarantees for transparency, non-discrimination and high-quality implementation of contracts?

R48 The application by the contracting authorities of the provisions can lead to unreasonable administration for the tenderers. If the data/information that the contracting authority requires in order to make the selection is found with another authority, contracting authorities should themselves be able to gather the data/the information. Such a procedure could also have a positive effect on the formulation by the contracting authorities of the requirements on the tenderers and should increase the reflection of contracting authorities before to set the requirements.

Question 49: Would you be in favour of a solution which would require submission and verification of evidence only by short-listed candidates/ the winning bidder?

R49 The documents regarding the "personal situation of the tenderer" (art. 45 of the Directive) could certainly be replaced by a self-declaration and the relevant documents requested on from the candidate to who the contract is awarded¹⁴; this would be very useful in reducing the administrative burden. However, the solution which would require submission and verification of evidence regarding financial standing or technical and/or professional ability only by short-listed candidates / the winning bidder has the potential to cause a lack of fairness and equality between different traders. Moreover, it could lead to a situation in which the contracting authorities do not adequately check whether the conditions are met by the economic operator after contract award. It is thus preferable to focus on selection criteria which ensure that the contract execution will take place under good conditions, and the economic operators are assured that the procurement is conducted fairly and equally.

Question 50: Do you think that self-declarations are an appropriate way to alleviate administrative burdens with regard to evidence for selection criteria, or are they not reliable enough to replace

¹⁴ If he could not fulfil the requirements, then the candidate would be excluded and the relevant information requested from the second-best candidate; where appropriate, the first candidate would be considered as having misinformed the contracting authority.

certificates? On which issues could self-declarations be useful (particularly facts in the sphere of the undertaking itself) and on which not?

R50 EFCA considers that self-declarations can be particularly useful for documents regarding the “personal situation of the tenderer” ref. our reply to the previous question.

Question 51: Do you agree that excessively strict turnover requirements for proving financial capacity are problematic for SMEs? Should EU legislation set a maximum ratio to ensure the proportionality of selection criteria (for instance: maximum turnover required may not exceed a certain multiple of the contract value)? Would you propose other instruments to ensure that selection criteria are proportionate to the value and the subject-matter of the contract?

R51 Turnover requirements are required to assess the capability of the candidates to finance the execution of the contract and should thus be proportional to its size; we consider that setting a maximum ratio of turnover to contract value would be positive since it would ensure that this proportionality is applied in practice.

Question 52: What are the advantages and disadvantages of an option for Member States to allow or to require their contracting authorities to oblige the successful tenderer to subcontract a certain share of the main contract to third parties?

R52 And as for the question of advantages and disadvantages of an option for Member States to allow or to require their contracting authorities to oblige the successful tenderer to subcontract a certain share of the main contract to third parties, it is preferable that this question be treated by national law.

3.2. Ensuring fair and effective competition (questions 53 – 58)

Question 53: Do you agree that public procurement can have an important impact on market structures and that procurers should, where possible, seek to adjust their procurement strategies in order to combat anti-competitive market structures?

<p>R53 EFCA agrees that public procurement can have significant impact on market structure and EFCA confirms the Commission point of view about cases of high contract values and in sectors where public authorities are the main clients and private demand is not big enough to compensate the impact of the public authorities' purchases on the market.</p>
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Question 54: Do you think that European public procurement rules and policy should provide for (optional) instruments to encourage such pro-competitive procurement strategies? If so, which instruments would you suggest?

R54 The best way to counter this issue would be to train public purchasers in these situations. Public purchasers should be aware of the market structure before they implement a procurement procedure, they should not be disconnected from the economic environment of the private sector. The Commission could educate public purchasers and develop a Communication

setting out the actions to be taken so that these public purchasers adapt their strategy execution in each case.

Question 55: In this context, do you think more specific instruments or initiatives are needed to encourage the participation of bidders from other Member States? If so, please describe them.

Question 56: Do you think the mutual recognition of certificates needs to be improved? Would you be in favour of creating a Europe-wide pre-qualification system?

R56 About the mutual recognition of certificates there is a risk that an introduction of a European pre-qualification system leads to administrative costs that are not proportionate to the intended benefits. The introduction of a European pre-qualification system could also lead to the reduction of irrelevant requirements put up by contracting authorities. It would be more difficult to include and maintain irrelevant requirements in a European pre-qualification system; such requirements would be too onerous for tenderers from member states other than the member state of the contracting authority and distort the level playing field.

Question 57: How would you propose to tackle the issue of language barriers? Do you take the view that contracting authorities should be obliged to draw up tender specifications for high-value contracts in a second language or to accept tenders in foreign languages?

R57 So EFCA does not think that it should be obligatory to translate the tender specifications into another language or to the accept tenders in another language. This should impose an unreasonable burden on the contracting authorities.

Question 58: What instruments could public procurement rules put in place to prevent the development of dominant suppliers? How could contracting authorities be better protected against the power of dominant suppliers?

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Preventing anti-competitive behaviours (question 59)

Question 59: Do you think that stronger safeguards against anti-competitive behaviours in tender procedures should be introduced into EU public procurement rules? If so, which new instruments/provisions would you suggest?

R59 The strongest safeguard against anti-competitive behaviour in tender procedures would consist in encouraging contracting authorities to involve competition authorities and ensure that anticompetitive practices will be made public.

3.3. Procurement in the case of non-existent competition/exclusive rights (questions 60 – 61)

Question 60: In your view, can the attribution of exclusive rights jeopardise fair competition in procurement markets?

R60 In In EFCA's view, the attribution of exclusive rights cans jeopardise fair competition in procurement markets but for practical reasons it ought to be necessary in certain cases.

Question 61: If so, what instruments would you suggest in order to mitigate such risks / ensure fair competition? Do you think that the EU procurement rules should allow the award of contracts

without procurement procedure on the basis of exclusive rights only on the condition that the exclusive right in question has itself been awarded in a transparent, competitive procedure?

R61 EFCA thinks that the EU procurement rules **should not** allow the award of contracts without procurement procedure on the basis of exclusive rights even if the exclusive right in question has itself been awarded in a transparent, competitive procedure.

As mentioned in its Policy Paper (A.1.2), EFCA considers that a set of common rules should apply to any type of procurement process involving– the use of exclusive rights. The challenge is the involvement in the short, medium or long term of public resources.

4. STRATEGIC USE OF PUBLIC PROCUREMENT IN RESPONSE TO NEW CHALLENGES (questions 62 – 97)

- 4.1. “How to buy” in order to achieve the EU 2020 objectives**
- 4.2. “What to buy” in support of EU 2020 policy objectives**
- 4.3. Innovation**
- 4.4. Social services**

EFCA general comments: THE KNOWLEDGE SOCIETY, INNOVATION AND THE CONSULTING ENGINEERING INDUSTRY

The facts

Public tendering incurs high transaction costs and onerous procedural requirements, resulting in ‘formal competition’ merely to justify the award decision.

The crisis led to increased competition based solely on the lowest price – which is possible under European procurement legislation – which results in abnormally low prices. In construction, this means poor quality, postponed problems, and in general bad value for money: short-term savings often hamper innovation and creativity, life cycle costs are not considered, many relevant aspects or impacts of proposals are ignored.

Europe has not achieved the goal of becoming the most competitive and knowledge-based economy in the world, as many reports state. This is partially because of a lack of consideration of the value of intellectual services, especially engineering consultancy services, which can be observed in many European countries. A different situation is seen in northern America where designers are recognised as a major player for transferring and disseminating innovations. The Brooks Act of 1972 requires all federal procurement of architectural and engineering services to incorporate qualifications based selection (QBS).

Engineering consultants play a critical role in leading Europe in technological innovation. EFCA has recently published a White Book on Innovation, which clearly identifies obstacles : fewer competitors create conditions for bringing in innovative ideas; and risk aversion on the part of public clients is a key obstacle to procurement of innovative solutions. The White Book proposes actions at firm, national and European level to foster innovation.

Suggested improvements

<p><i>All procurement, and not only PPP approaches, should consider :</i></p>

- | |
|---|
| <ul style="list-style-type: none"><i>- direct and indirect cost of a proposal to the contracting authority;</i><i>- the long term performance (economic cost including not only construction but also operation and maintenance cost, social cost, cultural cost, etc) of the offer.</i> |
|---|

<p><i>EFCA supports the introduction of environmental factors in public procurement and advocates the integration of the LCC (life cycle costing) approach complemented with environmental costs and social aspects.</i></p>
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Public procurement can promote innovation under the following conditions:

- *by not focussing purely on (purchase) price;*
- *no overly restrictive selection criteria and requirements;*
- *contacts with and negotiations of the contracting authority and the consulting engineering, its trusted adviser, with research institutions and contractors.*

DETAILED EFCA COMMENTS ON QUESTIONS 62 TO 97TH OF THE GREEN PAPER

4.1. “How to buy” in order to achieve the Europe 2020 objectives

Describing the subject matter of the contract and the technical specifications (questions 62 to 68)

Question 62: Do you consider that the rules on technical specifications make sufficient allowance for the introduction of considerations related to other policy objectives?

R62 Currently, due to the sustainability criteria (GPP), there is enough room for policy objectives that promote the EU's strategic objectives for 2020. Otherwise the Commission may recall that the technical specifications should not be necessarily related to the subject of the contract so that contracting authorities consider more easily other policy objectives.

Question 63: Do you share the view that the possibility of defining technical specifications in terms of performance or functional requirements might enable contracting authorities to achieve their policy needs better than defining them in terms of strict detailed technical requirements? If so, would you advocate making performance or functional requirements mandatory under certain conditions?

R63 Performance or functional requirements can bring the parties to come with sustainable and/or innovative solutions for certain policy objectives, particularly when these are included in the award criteria and costs do not play a crucial role. Nevertheless, EFCA does not advocate making the possibility of defining technical specifications in terms of performance or functional requirements mandatory. For each project the most appropriate solution could be different. In any case, contracting authorities must focus on performance or functional requirements when determining the engineering services they want to procure. Indeed, intellectual services provided by engineering companies have an important ‘creative’ dimension as the outcome and results are difficult to define and cannot be known in detail prior to execution.

Question 64: By way of example, do you think that contracting authorities make sufficient use of the possibilities offered under Article 23 of Directive 2004/18/EC concerning accessibility¹⁵ criteria for persons with disabilities or design for all users? If not, what needs to be done?

R64 Criteria for persons with disabilities or design for all users are sometimes used but this is not very common. When contracting authorities need buildings, they should focus on the firm submitting a project design taking into account accessibility for persons with disabilities if two projects are equivalent.

¹⁵ Accessibility in this context means accessibility by persons with functional limitations (disabilities).

Question 65: Do you think that some of the procedures provided under the current Directives¹⁶ (such as the competitive dialogue, design contests) are particularly suitable for taking into account environmental, social, accessibility and innovation policies?

Question 66: What changes would you suggest to the procedures provided under the current Directives to give the fullest possible consideration to the above policy objectives, whilst safeguarding the respect of the principles of non-discrimination and transparency ensuring a level playing field for European undertakings? Could the use of innovative information and communication technologies specifically help procurers in pursuing Europe 2020 objectives?

Question 67: Do you see cases where a restriction to local or regional suppliers could be justified by legitimate and objective reasons that are not based on purely economic considerations?

Question 68: Do you think that allowing the use of the negotiated procedure with prior publication as a standard procedure could help in taking better account of policy-related considerations, such as environmental, social, innovation, etc.? Or would the risk of discrimination and restricting competition be too high?

R65 to 68 Finally, regarding to procurement procedures, EFCA firms have experience with a number of design contests in which parties are challenged to develop innovative and sustainable solutions for a fixed fee. But if some of the procedures provided under the current Directives are particularly suitable for taking into account environmental, social, accessibility and innovation policies, the Commission must ensure a better protection of information exchanged between parties and contracting authorities. Innovative information and communication technologies should help procurers in pursuing EU 2020 objectives and to secure information exchange. For example, the use of the negotiated procedure currently increases the chance of unequal treatment of parties, especially if no further requirements are placed on the negotiations. If all criteria are not sufficiently predetermined there is a considerable chance of randomness that is particularly the case when, during negotiation, major items are changed compared to the initial description.

Requiring the most relevant selection criteria (question 69)

Question 69: What would you suggest as useful examples of technical competence or other selection criteria aimed at fostering the achievement of objectives such as protection of environment, promotion of social inclusion, improving accessibility for disabled people and enhancing innovation?

R69 EFCA believes that the criteria for selection should increase the awareness of firms about social, environment and innovation aspects.
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It is important to have insight into the level of transparency of companies regarding their corporate social responsibility. For example, reports on compliance with environmental management systems and reporting of sustainable and innovative initiatives in the market.

Using the most appropriate award criteria (question 70)

¹⁶ For the description of the procedures, please refer to section 2.1 above.

Question 70: The criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objectives. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts/ some specific sectors/ in certain circumstances):

Question 70.1.1 To eliminate the criterion of the lowest price only

R70.1.1 The criterion of lowest price only should be eliminated for award of services, especially intellectual services; it could be maintained for the award of public works (although even there it is questionable) and the purchase of supplies.

EFCA believes that the award of intellectual services with the criterion of lowest price is inappropriate because, as discussed in EFCA's reply to question 15:

1. The pressure on price will inevitably reduce quality. When faced with the dilemma of offering a realistic price for the appropriate quality which will not succeed in the award or offering a competitive price cutting corners, most if not all service providers will prefer the latter; the result will necessarily be inferior work, since the quality of such services cannot be fully assessed at their submission.
2. The consequences of reduced quality are usually a multiple of the financial gain from the lower price. In consulting engineering for example, the design process defines the engineering solution and thus the construction and operation cost and its cost is less than 5% of the overall cost. Thus gaining 30% in the design cost will save less than 1,5% of the life-cycle cost of the project – but the consequence of this saving may well be in the range of 10-20%, i.e. ten times as much.
3. The pressure on price stifles innovation; it is clear than, when pressed for price, service providers will need to follow the “beaten path” in order to arrive at the required deliverables with the least possible effort. Since innovation is one of the five objectives of Europe 2020 for Europe to become a smart, sustainable and inclusive economy, this aspect becomes particularly important.

One justification that has been put forward for awarding with the criterion of lowest price even for services is that it constitutes an objective criterion, as opposed to the subjectivity of assessing the quality of the service that will be delivered, especially in countries where corruption is perceived to exist. It is also easier to administrate, since no assessment procedure is necessary. EFCA's opinion is that contract award based on quality... is like democracy: it may not be perfect, but there is no better alternative for intellectual services; and it is preferable to work on improving an imperfect system than opting for a system that definitely delivers substandard quality. And for those contracting authorities that do not have the time or expertise to assess tenders, EFCA can only suggest using an external independent adviser to assist them.

Since award with the criterion of lowest price may be useful for certain types of projects, e.g. supplies, where the conformity of the product to specifications defined in the tender can be readily verified, EFCA does not believe that it is necessary to eliminate it. But, on the basis of the above, EFCA does request that the award of intellectual services is foreseen only to the economically most advantageous offer.

Question 70.1.2 To limit the use of the price criterion or the weight which contracting authorities can give to the price

R70.1.2 EFCA believes that, for intellectual services at least, the weight of price or the use of the price criterion should be limited, in the interest of the life-cycle cost of the project.

Regarding the weight that contracting authorities can give to price, our experience is that, for a balanced influence of quality and price on the outcome of a tendering procedure, the weight of the price component should be restricted – otherwise the procedure can essentially become one of award to the lowest price, with the consequences detailed in EFCA’s reply to the previous question.

Taking the above into account, EFCA believes that for the award of intellectual services to the economically most advantageous tender the weight of price should be less than 20%.

In the above discussion EFCA has interpreted the term “economically most advantageous” as relating the quality of the tender to its price; to this end, quality and price are evaluated and weighed for all candidates, which are then sorted according to their overall grading. However, in view of the economic consequences of the award process on the life-cycle cost of the project, as detailed in EFCA’s reply to question 16, the economically most advantageous tender for project-related services should be understood as the one that is expected to minimise the life-cycle cost of the project - and that is the one with the highest quality, if its price is within the budget.

In view of the above, EFCA suggests that the directive facilitates the economically most advantageous tender to be determined on the basis of quality alone for intellectual services, provided that the price is within the budget or, alternatively, that the directive foresees award to the most (not economically) advantageous tender, ref. EFCA’s reply to the next question.

A third possibility of award (question 70.1.3)

Question 70.1.3. to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer?

If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives more effectively and guarantee a level playing field and fair competition between European undertakings?

R70.1.3 The criterion of award to award to the **most advantageous tender** (not economically) should be considered for award of intellectual services; it consists in selecting the candidate with the best technical proposal, provided that his price is within the budget; this can be used with any award procedure, e.g. the restricted or negotiated procedures.

Also, the criterion of award to the **most qualified candidate** at a reasonable price makes sense for intellectual services; this would be used only with the negotiated procedure as proposed in EFCA’s reply to question 16.

As presented in EFCA’s reply to the previous question, award to the **most advantageous tender** (not economically) should be considered for award of intellectual services, in view of their significant impact on the outcome of their subjects, ref. also EFCA’s reply to question 14

(which in the case of projects is the life-cycle cost of the project); it consists in selecting the candidate with the best technical proposal, provided that his price is within the budget. This award method aims at achieving the best added value from the services tendered and could be used with any award process (open, restricted or negotiated).

Also, in EFCA's reply to question 16, EFCA presented the U.S. system of Qualifications Based Selection, in which the most qualified candidate is selected and the contract scope and remuneration negotiated with him, which is used for the award of architectural and engineering service contracts. Indeed, the award of the contract to the most qualified candidate at a reasonable price makes sense for intellectual services, e.g. engineering, lawyers. The contracting authority essentially is permitted to hire the best in the market for the requirements of the particular project; this would constitute another award criterion, that of award to the **most qualified candidate**. The process would be used for the award of intellectual services with the negotiated procedure as well as framework contracts, ref. EFCA reply to question 17.

EFCA understands that several concerns may be raised in this respect:

1. How to avoid accumulation of awards to the same service provider, who is becoming more qualified by the day?

In EFCA's experience (and considering the experience from the U.S. too) real life generates different needs for each different projects; this natural diversity creates the opportunity for different consultants to thrive. In addition, contracting authorities do have an incentive to have a reasonable dispersion of awards both for reasons of policy (to maintain an experienced pool of service providers) and public relations.

2. Wouldn't this award process stoke corruption?

This award system may indeed stoke corruption where it exists; it is therefore not advisable for countries where corruption may be perceived to exist. In any event, full disclosure of the results of the negotiation to all other selected candidates is a useful tool against corruption.

3. How to ensure that adequate competition has taken place?

In this award procedure, the weight of competition is in the selection stage, where any service provider may participate; the submitted information should be duly reviewed for the selection of the most suitable candidates.

EFCA believes that these two alternative award methods have significant merits (and challenges) and deserve to be duly considered. They would permit the other policy objectives (e.g. innovation) to be pursued more effectively and guarantee a level playing field in Europe.

The score attributed to environmental, social or innovative criteria (question 71)

Question 71: Do you think that in any event the score attributed to environmental, social or innovative criteria, for example, should be limited to a set maximum, so that the criterion does not become more important than the performance or cost criteria?

R71 EFCA does not envision that the score attributed to the environmental social or innovative criteria may become excessive and thus do not consider that a maximum needs to

be set, unless the scores attributed to all factors considered for award will be defined; in the latter case, EFCA could effectively contribute its opinion.

Comprehension about the possibility of including environmental or social criteria in the award phase (question 72)

Question 72: Do you think that the possibility of including environmental or social criteria in the award phase is understood and used?

Should it in your view be better spelt out in the Directive?

R72 EFCA believes that the possibility of including environmental or social criteria in the award phase is important for the award of design-build or PPP projects and better spelt out in the directive for these cases. For the other conventional award procedures where solutions are not elaborated in the award phase, the applicability of these criteria in the award phase is limited.

Environmental and social criteria are significant in the provision of most intellectual services, certainly in the construction sector; the most appropriate design solution is the one that balances performance, environmental & social impact and cost. These aspects could indeed be spelled out in a clearer way in the Directive or an interpretative document in the award of design-build and, PPP contracts as well as for design contests where applied (ref. also EFCA reply to question 17), where solutions are actually elaborated in the award phase..

For the other (conventional) award processes of intellectual services, where solutions are not elaborated in the award phase, the above aspects are part of the quality of the proposals; the candidates are essentially putting forward:

- an indication of the environmental management measures they apply (as a selection criterion [Art. 48, 2(f)]), and
- their proposals for the methodology by which they plan to take environmental and social requirements into account¹⁷ (as an award criterion),

The degree of innovation that each candidate will put into his design cannot be foreseen; only the commitment to search for innovative ways to address the subject of the contract can, as substantiated from the track record of the candidate, ref. EFCA's reply to question 25.

Life-cycle costs and economically most advantageous offer (question 73)

Question 73: In your view, should it be mandatory to take life-cycle costs into account when determining the economically most advantageous offer, especially in the case of big projects?

In this case, would you consider it necessary/appropriate for the Commission services to develop a methodology for life-cycle costing?

R73 Life cycle costs should definitely be taken into account where available in the award phase, notably for design-build and PPP projects where solutions are elaborated in the award stage, since they reflect the total (construction and operation) cost to society.

¹⁷ as foreseen by the contracting authority in the special conditions of the contract [Art. 26 & preamble point 46]

For the award of most other intellectual services, however, solutions are not (and should not) be elaborated in the award phase, as these are the subject of the contract to be awarded. In these cases the quantification of life-cycle costs is not possible. In these cases, the life-cycle costs should be taken into account in the feasibility study as well as any subsequent stages where alternative solutions are being compared; it would be good to include this provision as part of the contract conditions being included in the Directive, ref. EFCA's reply to question 43. In this context, EFCA believes that it would indeed be valuable to develop further the available methodologies for evaluating life-cycle costs, especially in grey areas such as the cost to the environment.

As detailed in EFCA's reply to questions 16 and 70.1.2, EFCA considers that, in project-related intellectual services in particular, the economically most advantageous tender should be understood as the one that is expected to minimise the life-cycle cost of the project - which is practically the best one, provided that the price is within the budget. As a result of the above, considerable weight should be placed on quality when awarding consulting engineering projects, as discussed in EFCA's replies to the above questions.

Imposing proper contract performances clauses (questions 74 – 76)

Question 74: Contract performance clauses are the most appropriate stage of the procedure at which to include social considerations relating to the employment and labour conditions of the workers involved in the execution of the contract. Do you agree? If not, please suggest what might be the best alternative solution.

R74 EFCA considers contract performance clauses the most appropriate stage of the procedure to include social considerations that relate to the employment and labour conditions of the workers involved in the execution of the contract.
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Contract performance clauses are the way to ensure that certain social considerations and labour conditions are fulfilled. In order to facilitate adequate compliance monitoring and inspections it is important to specify the conditions and requirements in a SMART manner,. It will provide more certainty when, prior to the granting phase, it is determined how during the execution, the relevant work conditions and –circumstances of employees are safeguarded. However, it is debatable whether or not it is justified to oblige the market to guarantee this early on in the project. Because the conditions of contract need not be met at the time of submitting the tender, it is common to include social considerations in the contractual clauses of the execution of a contract.

Question 75: What kind of contract performance clauses would be particularly appropriate in your view in terms of taking social, environmental and energy efficiency considerations into account?

Question 76: Should certain general contract performance clauses, in particular those relating to employment and labour conditions of the workers involved in the execution of the contract, be already specified at EU level?

R75 and 76 EFCA has no comments because it believes that the possibilities currently offered by the Directive are particularly suitable. Nevertheless, from a social-cultural point of view, it is desirable to aim at a level playing field with regard to employment protection and working conditions in contract performances clauses even if the national legal employment frameworks are widely.

Verification of the requirements (questions 77 – 78)

Question 77: Do you think that the current EU public procurement framework should provide for specific solutions to deal with the issue of verification of the requirements throughout the supply chain? If so, which solutions would you propose to tackle this issue?

Question 78: How could contracting authorities best be helped to verify the requirements? Would the development of "standardised" conformity assessment schemes and documentation, as well as labels facilitate their work? When adopting such an approach, what can be done to minimise administrative burdens?

R77 and 78 EFCA does not believe that the current EU public procurement framework should provide for specific solutions to deal with the issue of verification of the requirements throughout the supply chain.

Explicitly prescribing specific solutions that need to be taken to ensure that environmental or social requirements are met will not always fit because each project has its specificities. In addition, such verification takes a lot of time, especially when the supply chain is located in another country. A general provision that verification of the requirements should take place is sufficient. It is the responsibility of the contracting authorities how this should be checked. The development of standardized conformity assessment schemes for supply chains would assist the contracting authorities; also documentation and labels would facilitate their work.

Link with the subject matter / with the execution of the contract

Question 79: Some stakeholders suggest softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract (this could make it possible to require, for instance, that tenderers have a gender-equal employment policy in place or employ a certain quota of specific categories of people, such as jobseekers, persons with disabilities, etc.). Do you agree with this suggestion? In your view, what could be the advantages or disadvantages of loosening or dropping the link with the subject matter?

Question 80: If the link with the subject matter is to be loosened, which corrective mechanisms, if any, should be put in place in order to mitigate the risks of creating discrimination and of considerably restricting competition?

Question 81: Do you believe that SMEs might have problems complying with the various requirements? If so, how should this issue be dealt with in your view?

R79 to 81 EFCA believes that the relaxation of the link between the subject of the contract and the requirements imposed by contracting authorities may lead to situations of discrimination in the award. This link must be preserved so that abuses cannot occur.

There is a risk that factors, totally unrelated to the contract itself, will play a determining role. This can lead to discrimination and unnecessary restriction of competition. At least this should be handled with caution. Therefore, there should be at least some relation to the subject matter, such as how delivered products are produced and by whom (reducing CO₂ emissions at life-cycle level, preventing child labour, etc.). A possible option would be to introduce a relative weighting system whereby the more remote the aspect/characteristic from the subject matter of the contract, the lower its relative weighting in the evaluation.

Especially, SMEs might have problems complying with the various requirements. EFCA would suggest limiting requirements for large contracts that discriminate against SMEs.

Question 82: If you believe that the link with the subject matter should be loosened or eliminated, at which of the successive stages of the procurement process should this occur?

There should be at least some link with the subject matter. This should preferably occur in the stage of selection (weighting).

Question 82.1: Do you consider that, in defining the technical specifications, there is a case for relaxing the requirement that specifications relating to the process and production methods must be linked to the characteristics of the product, in order to encompass elements that are not reflected in the product's characteristics (such as for example - when buying coffee - requesting the supplier to pay the producers a premium to be invested in activities aimed at fostering the socio-economic development of local communities)?

Setting conditions for process and production methods that have little or no relation with the product delivered by the supplier is a cumbersome way to enforce something. The added value of contacting companies about matters that do not relate to their products is questionable. It is more useful to accept labels or certificates as a means of proof of fulfilment of specific requirements.

Question 82.2: Do you think that EU public procurement legislation should allow contracting authorities to apply selection criteria based on characteristics of undertakings that are not linked to the subject of the contract (e.g. requiring tenderers to have a gender-equal employment policy in place, or a general policy of employing certain quotas of specific categories of people, such as jobseekers, persons with disabilities, etc.)?

Only to a limited extent; the criteria should have a plausible relation to the subject of the contract. For example: mandatory employment of job seekers for highly specialized technical work is neither useful nor reasonable.

Question 82.3 Do you consider that the link with the subject matter of the contract should be loosened or eliminated at the award stage in order to take other policy considerations into account (e.g. extra points for tenderers who employ jobseekers or persons with disabilities)?

In EFCA's view minimum requirements should have a realistic relation with the subject matter. Specific aspects that are less directly related to the subject matter can be used as a 'benchmark': they can be partly taken into account in the weighting. In this way contracting authorities may pursue other policy objectives through public procurement.

Question 82.3.1. Award criteria other than the lowest price/ the economically most advantageous tender/ criteria not linked to the subject-matter of the contract might separate the application of the EU public procurement rules from that of the State aid rules, in the sense that contracts awarded on the basis of other than economic criteria could entail the award of State aids, potentially problematic under EU State aid rules. Do you share this concern? If so, how should this issue be addressed?

Meaning contracts awarded on the basis of other than economic criteria is not a problem, as long as it is in compliance with the principles of European procurement law.

Question 82.4: Do you think that the EU public procurement legislation should allow contracting authorities to impose contract execution clauses that are not strictly linked to the provision of the goods and services in question (e.g. requiring the contractor to put in place child care services for the his employees or requiring them to allocate a certain amount of the remuneration to social projects)?

It is unreasonable to include provisions to the contract that do not relate to the scope of goods and services. If this is allowed it is possible that contracting authorities will include several provisions that are unrelated to the contract what will lead to loss of transparency and fair competition. It is also an expensive and needlessly complicated way to reach another policy goal.

4.2. "What to buy" in support of Europe 2020 policy objectives (questions 83 – 90)

Question 83: Do you think that EU level obligations on "what to buy" are a good way to achieve other policy objectives? What would be the main advantages and disadvantages of such an approach? For which specific product or service areas or for which specific policies do you think obligations on "what to buy" would be useful? Please explain your choice. Please give examples of Member State procurement practices that could be replicated at EU level.

R83 EFCA believes that the leeway given to the contracting authorities must be strictly regulated to avoid discrimination. However, European regulations should not restrict contracting authorities in determining their needs.
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Question 84: Do you think that further obligations on "what to buy" at EU level should be enshrined in policy specific legislation (environmental, energy-related, social, accessibility, etc) or be imposed under general EU public procurement legislation instead?

R84 Requirements on what can be purchased are an appropriate way to achieve policy objectives, such as sustainability and innovation. It is only possible when there is sufficient EU-wide market development to ensure effective competition. This approach has the advantage that it avoids fragmentation of procurement policies and increase predictability to the benefit of economic operators. And SMEs do not have to adapt to different frameworks in different countries. Disadvantage of this approach is that the introduction of requirements on 'what to buy' may lead to discrimination or restrict competition in procurement markets. It also may lead to problems for suppliers, especially for SMEs. SMEs do not have the capacity and resources for following up (technological) developments. Concerning services, requirements on what to buy are less useful. As to products there is also a lot to achieve (e.g. transport). Particularly in relation to works in the construction industry, recycling, sustainable materials, CO2 reduction, life cycle cost and energy reduction or extraction can result in considerable advantages.

Question 85: Do you think that obligations on "what to buy" should be imposed at national level? Do you consider that such national obligations could lead to a potential fragmentation of the internal market? If so, what would be the most appropriate way to mitigate this risk?

R85 If obligations on "what to buy" had to be imposed, these should be imposed at national level; Member States are able to take such political decisions and approaches within the national procurement system.

Question 86: Do you think that obligations on what to buy should lay down rather obligations for contracting authorities as regards the level of uptake (e.g. of GPP), the characteristics of the goods/services/works they should purchase or specific criteria to be taken into account as one of a number of elements of the tender?

Question 86.1: What room for manoeuvre should be left to contracting authorities when making purchasing decisions?

Question 86.2: Should mandatory requirements set the minimum level only so the individual contracting authorities could set more ambitious requirements?

Question 87: In your view, what would be the best instrument for dealing with technology development in terms of the most advanced technology (for example, tasking an entity to monitor which technology has developed to the most advanced stage, or requiring contracting authorities to take the most advanced technology into account as one of the award criteria, or any other means)?

Question 88: The introduction of mandatory criteria or mandatory targets on what to buy should not lead to the elimination of competition in procurement markets. How could the aim of not eliminating competition be taken into account when setting those criteria or targets?

Question 89: Do you consider that imposing obligations on "what to buy" would increase the administrative burden, particularly for small businesses? If so, how could this risk be mitigated? What kind of implementation measures and/or guidance should accompany such obligations?

Question 90: If you are not in favour of obligations on "what to buy", would you consider any other instruments (e.g. recommendations or other incentives) to be appropriate?

R86 to 90 The criteria should be objective and non-discriminatory, and should only be used when there are EU-wide market developments that ensure effective competition. The market must be continuously examined. In addition, when there is doubt about effective competition, performance requirements may be used, so competition is less restricted. But these obligations would increase the administrative burden. The businesses have to prove that their products/services meet the requirements and/or criteria.

4.3. Innovation (questions 91 – 96)

Question 91: Do you think there is a need for further promote and stimulate innovation through public procurement? Which incentives/measures would support and speed up the take-up of innovation by public sector bodies?

R91 EFCA believes that it necessary to encourage innovation through public procurement, especially for intellectual service contracts. To this end, the obstacles to innovation such as competition of candidates on price, excessive liability levels and cherry-picking in competitive dialogue procedures should be addressed.

EFCA believes that the most important obstacles to innovation are:

1. Price restrictions as a result of the tendering procedure: Where price plays an important part during award of the contract, the pressure to be competitive leads to low prices which do not have the necessary financial margins for investigating novel solutions, ref. also EFCA reply to question 16.

2. Excessive liability levels usually drive the service providers to conservative solutions, i.e. to adopt true-and-tested solutions, ref EFCA reply to question 43; while liability should be high in order to protect the consumer, excessive liability leads to higher project costs.
3. In the case of competitive dialogue, which is designed to promote innovation, the danger of cherry-picking actually acts as a barrier to investing on innovation in such projects any more than absolutely necessary, ref. also EFCA reply to question 17. The Commission says the current EU directives on public procurement adopt a flexible approach which enables contracting authorities to make use of innovation-oriented tendering, which can encourage industry to find new advanced solutions.

The removal of these obstacles is required;

- as mentioned in our reply to questions 16 and 70.1.3, EFCA believes that intellectual services should be awarded to the most advantageous tender or the most qualified candidate
- as mentioned in EFCA reply to question 43, EFCA believes that liability of intellectual services should be limited to insurable levels, i.e. correspond to a multiple of the contract value, and
- as mentioned in EFCA reply to question 17, the competitive dialogue should not be used for the award of intellectual services.

Also further promotion and stimulation innovation through public procurement is needed. Some incentive/measures could be: grants, to create a platform for exchanging views on innovation, to repeat orders, the use of innovation aspects as one of the award criteria will encourage companies to develop innovative solutions. The price should not always be crucial.

Question 92: Do you think that the competitive dialogue allows sufficient protection of intellectual property rights and innovative solutions, such as to ensure that the tenderers are not deprived of the benefits from their innovative ideas?

R92 Concerning the competitive dialogue, in theory it provides sufficient protection for intellectual property rights, but in reality the contracting authorities are in a bind between the obligation to protect the confidential information and the need to disclose some information in order to identify solutions which are best suited to satisfying needs. Because participants aren't ensured that they get the contract, it may be a disincentive for participants to propose highly innovative solutions. The contracting authorities feel the need to disclose information to find the innovative solution, but have to do with intellectual property rights of the tenderers. That's why the Commission should direct contracting authorities to conclude confidentiality agreement with participants prior to starting competitive dialogue.

Question 93: Do you think that other procedures would better meet the requirement of strengthening innovation by protecting original solutions? If so, which kind of procedures would be the most appropriate?

R93 However the negotiated procedure seems to be the best procurement procedure for intellectual services. It allows contracting authorities to better take into account the qualitative aspect of such a benefit that is difficult to define in a tender.

Question 94: In your view, is the approach of pre-commercial procurement, which involves contracting authorities procuring R&D services for the development of products that are not yet available on the market, suited to stimulating innovation? Is there a need for further best practice sharing and/or benchmarking of R&D procurement practices used across Member States to

facilitate the wider usage of pre-commercial procurement? Might there be any other ways not covered explicitly in the current legal framework in which contracting authorities could request the development of products or services not yet available on the market? Do you see any specific ways that contracting authorities could encourage SMEs and start-ups to participate to pre-commercial procurement?

R94 About the approach of pre-commercial procurement, which involves contracting authorities procuring R&D services for the development of products that are not yet available on the market, it suits to stimulating innovation if the tenderers are not impeded in the procurement of commercial procurement. There is a need for further best practice sharing and for example there should be also a platform for exchanging views and information on innovation and also for best practice sharing and facilitating the wider use of pre-commercial procurement.

Question 95: Are other measures needed to foster the innovation capacity of SMEs? If so, what kind of specific measures would you suggest?

R95 Finally, SMEs are not strong enough financially to foster the innovation capacity. Some measures to change that EFCA may suggest, are the following: creation of specific Fund to be used by SMEs; specific, affordable Insurance to cover various risks which are undertaken by SMEs within this process should be made available to them.

Question 96: What kind of performance measures would you suggest to monitor progress and impact of innovative public procurement? What data would be required for this performance measures and how it can be collected without creating an additional burden on contracting authorities and /or economic operators?

4.4. Social services

Question 97: Do you consider that the specific features of social services should be taken more fully into account in EU public procurement legislation? If so, how should this be done?

Question 97.1: Do you believe that certain aspects concerning the procurement of social services should be regulated to a greater extent at EU level with the aim of further enhancing the quality of these services? In particular:

Question 97.1.1: Should the Directives prohibit the criterion of lowest price for the award of contracts / limit the use of the price criterion / limit the weight which contracting authorities can give to the price / introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer?

Question 97.1.2: Should the Directives allow the possibility of reserving contracts involving social services to non-profit organisations / should there be other privileges for such organisations in the context of the award of social services contracts?

Question 97.1.3.: Loosening the award criteria or reserving contracts to certain types of organisations could prejudice the ability of procurement procedures to ensure acquisition of such services "at least cost to the community" and thus carry the risk of the resulting contracts involving State aid. Do you share these concerns?

Question 97.2: Do you believe that other aspects of the procurement of social services should be less regulated (for instance through higher thresholds or de minimis type rules for such services)? What would be the justification for such special treatment of social services

EFCA does not have specific comments on the issue of social services but recalls that the Directives should prohibit the criterion of lowest price for the award of contracts. It is necessary to prioritise quality over the lowest price as has been mentioned previously. Then, the Green Paper seems to imply that some markets could be reserved to non-profit organisations. On behalf of equal competition between traders, the Directives should not favour anyone. Indeed, as stated in the Green Paper, reserving contracts to certain types of organisations could prejudice the ability of procurement procedures to ensure acquisition of such services "at least cost to the community" and thus carry the risk of the resulting contracts involving State aid.

5. ENSURING SOUND PROCEDURES_(questions 98 – 110)

- 5.1.Preventing conflict of interests
- 5.2.Fighting favouritism and corruption
- 5.3.Exclusion of unsound bidders,
- 5.4.Avoiding unfair advantages.

EFCA general comments: TO ENSURE INTEGRITY OF PUBLIC PURCHASING PROCEDURES

The facts

All the suggestions ts above to improve public procurement procedure do not guarantee an application respectful of freedom access to public procurement, equal treatment of candidates and transparent procedures, if the integrity of procedures is violated.

The linkages between different actors in the public commission on both the horizontal and vertical are likely to affect negatively the decision of contracting authorities and contracting entities. This view is shared by the engineering sector, which is often used for framing needs for the public purchaser and determining characteristics of a project.

Suggested improvements

EFCA supports the Commission in its efforts to strengthen safeguards. However, it is the national law who should give a solution to these issues because it is at national level that can be effectively reconciled the different views on the subject and the effectiveness of this approach to promote the integrity of the proceedings.

The engineering sector takes a special role in the procurement procedure because upstream he is responsible for implementing the design needs of public purchasers and he can hold an advantage over competitors. On this point EFCA considers that the Commission should not punish or attempt to bring balance to the situation

DETAILED EFCA REPLIES AND COMMENTS ON QUESTIONS 98 TO 110TH OF THE GREEN PAPER

5.1. Preventing conflicts of interest (questions 98 – 99)

Question 98: Would you be in favour of introducing an EU definition of conflict of interest in public procurement? What activities/situations harbouring a potential risk should be covered (personal relationships, business interests such as shareholdings, incompatibilities with external activities/ etc.)?

Question 99: Do you think that there is a need for safeguards to prevent, identify and resolve conflict-of-interest situations effectively at EU level? If so, which kind of safeguards would you consider useful?

R98 EFCA is not in favour of introducing an EU definition of conflict of interest in public procurement. This task left to the national law.

R99 EFCA thinks that there is a need for safeguards to prevent, identify and resolve conflict-of-interest situations effectively at EU level.

In view of differences of understanding of the concept of conflict of interest, it does not seem appropriate that the Commission develops such a definition. Each Member State has identified situations of conflicts of interest but it does not follow from this patchwork a common definition which could be resumed by the Commission.

Nonetheless, it is possible to consider that there is conflict of interest in the following well-defined circumstances:

- A conflict of interest resulting from family conflict or stemming from close relatives ties between evaluators and tenderers or other personal affinity reasons
- A conflict of interest between consulting activities and procurement of goods or work
- A conflict of interest among consulting assignments (preparation of tender and participation in the corresponding tender; project/study execution and evaluation of those services ; design of a project and execution of its impact on the environment; advice given to both government and buyer in case of a privatization)

For each public procurement, candidates would have to sign an attestation certifying that they are not in one of the situations described above. These situations could serve as benchmarks for the Commission to identify conflicts of interest. Nevertheless, such cases should be evaluated on a case by case basis.

5.2. Fighting favouritism and corruption (questions 100 – 103)

Question 100: Do you share the view that procurement markets are exposed to a risk of corruption and favouritism? Do you think EU action in this field is needed or should this be left to Member States alone?

Question 101: In your view, what are the critical risks for integrity at each of the different stages of the public procurement process (definition of the subject-matter, preparation of the tender, selection stage, award stage, performance of the contract)?

Question 102: Which of the identified risks should, in your opinion, be addressed by introducing more specific/additional rules in the EU public procurement Directives, and how (which rules/safeguards)?

Question 103: What additional instruments could be provided by the Directives to tackle organised crime in public procurement? Would you be in favour, for instance, of establishing an ex-ante control on subcontracting?

R100 EFCA shares the view that procurement markets are exposed to a risk of corruption and favouritism, and thinks EU action in this field should be left to Member States alone. It must pursue the course that corruption in public procurement should be tackled by increasing the level of transparency in procurement cycle.

R101 EFCA considers that the critical risks for integrity exist at each of the different stages of the public procurement process : corruption and favouritism are a global issue.

The same previous remarks can be transposed here. Each Member State has to take his measures about corruption and favouritism. Otherwise, corruption and favouritism represent a risk for public markets but not necessarily a particular risk.

It must pursue the course that corruption in public procurement should be tackled by increasing the level of transparency. During the evaluation process, it must encourage disclosure of evaluation scores to all participants.

Especially the Commission could refer to guidance from various institutions as FIDIC Business Integrity Management System to reduce and manage risks. A Code of Conduct should be a solution to institute more transparency and influence behaviour. Then, all states could adapt this code of conduct at national level but would not jeopardize its great lines. Otherwise, the Commission may impose an obligation for each Member State to implement a code of conduct whose main provisions are set by the Commission and without reference to a code that already exists.

Finally, EFCA must remember that public purchasers have to choose the ‘economically most advantageous tender’. In this view, the Commission could include the respect of a Business Integrity Management System or a Code of conduct as sub-criterion (with a weighting). It was emphasized that all criteria need to relate to the subject matter of the contract and transparency relates to the subject matter of the contract.

5.3. Exclusion of “unsound” bidders (questions 104 – 108)

EFCA believes that the current situation is satisfactory, but acknowledges that some improvements can be implemented by the Commission. The EFCA's proposals are listed below.

Question 104: Do you think that Article 45 of Directive 2004/18/EC concerning the exclusion of bidders is a useful instrument to sanction unsound business behaviours? What improvements to this mechanism and/or alternative mechanisms would you propose?

R 104 EFCA believes that the Article 45 of the Directive enables an effective protection against illicit commercial practices but certain exclusions may be added to those currently existing. To protect technical creations under public procurement procedures, the Commission will create a possible exclusion of firms guilty of cherry-picking ideas to others candidates. Once sensitive information or an idea of a firm is identified and recovered by a competitor, it will be recommended to contracting authorities to exclude these firms accused of looting.

Question 105: How could the cooperation among contracting authorities in obtaining the information on the personal situation of candidates and tenderers be strengthened?

R105 When a contracting authority excludes a bidder, he writes in a file which should be created at the national level the identity of the economic operator excluded and reasons of his exclusion. This file would be updated daily and would permit to contracting authorities to quickly

grasp the business covered by Article 45 of the Directive. The Commission could require states to implement such a file.

Question 106: Do you think that the issue of "self-cleaning measures" should be expressly addressed in Article 45 or it should be regulated only at national level?

R106 "Self-cleaning measures" should be expressly addressed in Article 45 by the Commission; a reasoned decision to reject a tender or an application is an appropriate sanction to improve observance of the principle of equality of treatment; but concerning a criminal sanction it is the role of Member States; but however it is up to Member States to develop any minimum standards of criminal sanctions.

Question 107: Is a reasoned decision to reject a tender or an application an appropriate sanction to improve observance of the principle of equality of treatment?

Question 108: Do you think that in light of the Lisbon Treaty, minimum standards for criminal sanctions should be developed at EU level, in particular circumstances, such as corruption or undeclared conflicts of interest?

5.4. Avoiding unfair advantages (questions 109 – 114)

Question 109: Should there be specific rules at EU level to address the issue of advantages of certain tenderers because of their prior association with the design of the project subject of the call for tenders? Which safeguards would you propose?

R109 EFCA considers that there is no specific rules to take at EU level concerning unfair advantages.

It follows from the jurisprudence of the Court of Justice that if the company shows that it cannot distort competition through its experience gained during the previous phase, then she may bid. This position must be preserved and not be the subject to further clarification by the Directives. The question of equal treatment should not be pushed to its limit and cause a subsequent challenge to the conditions of competition between firms.

Question 110: Do you think that the problem of possible advantages of incumbent bidders needs to be addressed at EU level and, if so, how?

6. ACCESS OF THIRD COUNTRY SUPPLIERS TO THE EU MARKET

EFCA general comments: MUTUAL RECOGNITION OF RIGHT TO PROVIDE ENGINEERING SERVICES

The facts

Due to national regulations of practice of engineering consultancy in many developed countries (United States, Canada, Brazil ..), it is difficult for European graduated engineers, self employed or employed by consulting engineering firms, to get full recognition of their capacity when working in these countries.

Rules to be recognized and registered in the local structures, as chambers of engineers, are a major obstacle to opening of the market for suppliers of the consulting engineering sector. So the European public procurements are more open than the procurement markets of many external partners of Europe.

Suggested improvements

For intellectual services an important counterpart to access of a third country supplier should be the recognition by that country, of the provision of such services in any EU country as a qualification for suppliers of these EU countries to provide these services in that third country.

DETAILED EFCA REPLIES AND COMMENTS ON QUESTIONS 111 – 114 OF THE GREEN PAPER

6.1 The mechanisms set out in article 58 and 59 of the directive 2004/17 (Questions 111 – 112)

Question 111: What are your experiences with and/or your views on the mechanisms set out in Articles 58 and 59 of Directive 2004/17/EC?

Question 111.1.: Should these provisions be further improved? If so, how? Could it be appropriate to expand the scope of these provisions beyond the area of utilities procurement

Question 112: What other mechanisms would you propose to achieve improved symmetry in access to procurement markets?

R111 EFCA members experiences and views on the mechanisms set out in Articles 58 and 59 of Directive 2004/17/EC lead to a positive appreciation of such mechanisms. However, the lack of concrete examples which can be shared by EFCA should mitigate such a comment.

R111.1 If an expansion of the scope of these provisions beyond the area of utilities procurement would be appropriate, other mechanisms should be adopted to achieve improved symmetry in access to procurement markets through an intervention by the Commission. She will encourage litigants to resolve their dispute by signing an international convention. In all cases the path of bilateral recognition will be chosen by Member States.

Due to a lack of mutual recognition of skills of the engineering sector and difficulties in accessing third country markets, firms surmount such regulatory constraints through mergers and acquisitions, and collaboration set-ups with local firms. The Government Procurement Agreement provides for guaranteed market access in the areas which are reciprocally covered. Licensing and certification of engineering professionals as well as alternatives to residency requirements including bonding and professional liability insurance to provide for the protection of consumers should not constitute unnecessary barriers to trade.

The Article 59 of Directive 2004/17/EC precise that “Member States shall inform the Commission of any general difficulties, in law or in fact, encountered and reported by their undertakings in securing the award of service contracts in third countries”. This provision should be transposed in the Directive 2004/18/EC.

Then, to improve Articles 58 and 59 of Directive 2004/17 a paragraph could be added:

“Before proceeding with measures referred to in paragraph 5, the Commission invites simultaneously Member States and the third country concerned to conclude a multilateral or bilateral negotiations about any general difficulties, in law or in fact, encountered and reported by their undertakings in securing the award of service contracts in this third countries.”

The Commission would be the trigger point of contact to find a solution between the parties. Maybe EFCA could attend the birth of standard agreements on some difficulties.

7. OTHER ISSUES AND PRIORITIES

EFCA general comments: CREATIVE / INTELLECTUAL SERVICES, TRUSTED ADVISERS OF AWARDING AUTHORITIES

The facts

*The major tasks of designers (consulting engineers and architects) in the construction sector include the provision of assistance to the contracting authority in the definition of their needs, respective technical/performance-based specifications and the selection of contractors and suppliers. Designers also supervise the project implementation and provide programme, design, construction and facility management services to the contracting authorities. **They have therefore a particular position in the supply chain as trusted adviser to the Contracting Authority.***

In that role designers are key players in the implementation of Europe 2020 and the development of the competitiveness of the European construction sector.

Public procurement has significant economic leverage; designers can, and should, actively contribute in achieving these political targets through securing 'best value for money' in European public procurement.

Suggested improvements

As trusted adviser of public awarding authorities, creative and intellectual services must have a specific position in the European public procurement policy and regulation.

When the outcome and results of such services cannot be defined and known in detail prior to their execution, the selection and position in the supply chain of suppliers of such services should be mainly based on confidence based on references, methods, collaborative experience, and their relations with the stakeholders of a project cannot be limited to contractual aspect.

Public procurement policies should take into account the specific character of creative and intellectual services to contribute, as trusted adviser, to the sustainable quality of projects they might be involved in.

As trusted adviser of the awarding authorities, creative and intellectual services need specific disposals in the EU public procurement policy and regulation, which means qualified purchasing authorities with adequate methods and selection criteria.

DETAILED EFCA REPLIES AND COMMENTS ON QUESTIONS 113 AND 114 OF THE GREEN PAPER

Other issues to be addressed in a future reform of the EU public procurement Directives

Question 113: Are there any other issues which you think should be addressed in a future reform of the EU public procurement Directives? Which issues are these, what are - in your view - the problems to be addressed and what could possible solutions to these problems look like?

R113 EFCA considers important for the efficiency of EU public procurement policy and regulation to address in a future reform of the EU public procurement Directives, the qualification of public purchasers.

Problems in the quality of procurement procedures are often not due to legal requirements but due to a bad culture of public procurement. Generally, the public purchaser does not have sufficient expertise for the procedure takes place under optimum conditions whereas this could partly be improved by training and expertise availability, partly by different measures of awareness raising.

Therefore the Commission could require contracting authorities in awarding of public contracts in certain areas and for a certain amount (e.g. a works contract requiring engineering expertise and a value above the threshold imposed by the Directive) to prove their competence. This could be established in respect of qualifications of the staff of the contracting authority in reference to a degree level defined by the Commission or Member States. Otherwise, the contracting authority will necessarily resort to an assistance to pass the market.

Ranking of the importance of the various issues to modernize European public procurement in the Green Paper and others (question 114)

Question 114: Please indicate a ranking of the importance of the various issues raised in this Green Paper and other issues that you consider important. If you had to choose three priority issues to be tackled first, which would you choose? Please explain your choice.

R114 EFCA proposes three priorities to be tackled first:

1. Quality of Public purchasers' staff
2. Ensuring fair and effective competition (anti-collusion measures)
3. Using the most appropriate award criteria (e.g. not lowest price only for consulting services; introduce LCC criteria; reasonable use of selection versus award criteria taking into consideration the specificity of task procured)

Because it's essential to distinguish between intellectual and commodity services in directives, EFCA estimates necessary to point out that public purchasers have to justify a certain degree of expertise when they need intellectual services. That would be an effective and efficient for the Europe 2020 strategy due to the crucial role of innovation. This can also be seen in connection with question 70 of the Green Paper – a possible elimination/limitation of the criterion of the lowest price.