

Evaluation of EU public procurement legislation and policies

EFCA policy paper

Based on the contribution of the European Public Market committee

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.