

Issues on implementation of the new directive on public procurement (2014/24/EU)

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Introduction

On 15 January 2014, the European Parliament adopted three directives which greatly modernize the public procurement law in all Member States of the European Union. The new EU directives replace the previous ones which are now 10 years old. This paper only considers Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC. During that decade the issues and challenges of sustainable development have become very important in public policies. The provisions of the new Directive are consistent with the Europe 2020 strategy for smart, sustainable and inclusive growth. They may result in significant changes to the missions that will be assigned to engineering firms and their role in public procurement. These changes will inevitably spill over to private procurement.

Innovation: a goal of public procurement.

Innovation is necessary for our future and a challenge for which European engineering consultants among the EFCA membership have already proposed measures. In "Taking Hold of Our Future" EFCA identifies future changes in the most strategic markets and shows the increasingly central role that professional engineering will play in the development of innovative and sustainable projects. In this respect, the provisions of the new public procurement directive, in particular the new innovation partnership procedure (Article 31), are significant.

Sustainable development: backbone of the reform of public procurement.

The Directive is based on a premise of sustainable development. It is a challenge for which FIDIC, the International Federation of Consulting Engineers, has developed and promotes specific tools such as the Sustainable Development Pack. The pack allows a concrete application of engineering skills to ensure sustainable development through projects.

The White Paper "Rethink Cities" developed by engineering consultancy industry stresses the paramount importance of cities where sustainability problems are concentrated. To cope with these problems and give satisfactory answers, engineering consultancies offer a systemic approach of construction and development projects. This approach is part of the logic of several provisions in the Directive, in particular taking into account the life-cycle costing (Article 68).

Certain provisions of the Directive are left to the discretion of Member States. It is therefore essential that the EFCA members associations carefully examine the provisions of the Directive with the relevant authorities in their countries in view of the transposition of the directive in national legislation within a maximum period of two years (starting on 17th April 2014).

It is within this context that EFCA elaborated the recommendations contained in this document as a support for the dialogue in which the members associations should engage with the relevant partners in the Member States. These recommendations for national transposition are aimed at encouraging innovative engineering procurement and high quality results. In this paper, we clarify and advise on the proper implementation of the major issues, which we see as important for engineering and architectural services. The issues are:

- Definition of intellectual services
- Most Economically Advantageous Tender (MEAT); what does it mean?
- The use of the competitive procedure with negotiation
- Innovation partnership

- Scope for practical modification of contracts
- Procurement capacity
- Duration of valid project references
- Allowance for clarifications / additional information
- Life-cycle costing (LCC)

In general, EFCA recommends that member associations check very carefully whether the translation and transposition of the Directive from English into their national language is being done with respect to the correct meaning and content of the key words and phrases intended to transpose the articles.

Intellectual services

On several subjects, the Directive makes exceptions for contracts, which have as their subject matter, intellectual services or performances. An example of where a distinction is made in this regard is the use of electronic auctions (art. 35), where “contracts with intellectual performances shall not be the object of electronic auctions”. It is obvious that services like engineering, consultancy, architecture or design are covered by the collective description of intellectual performances or services (e.g. art. 35).

Most Economically Advantageous Tender (MEAT); what does it mean?

The new Directive moves away from contract award based on ‘lowest price’ only, towards award to the ‘most economically advantageous tender’ based on both quality and price criteria. It includes a definite shift towards quality in the award process - not only for services, but also for works and supplies. Indeed, Member States may prohibit use of price only for certain types of contracts [Article 67, and preamble 37]; EFCA strongly believes that service contracts fall in this category.

In particular, contract award is envisaged in every case to the most economically advantageous tender (commonly referred to as MEAT), with the objective of cost effectiveness [Article 67].

The MEAT should be interpreted as the tender which ranks best according to the award criteria, where marks are apportioned between quality-based and price-based criteria, according to the adopted proportion between price and quality, i.e. the price-quality ratio [Article 67, par. 2,]. For the evaluation of the MEAT it is also possible to accommodate fixed prices for a contract and have candidates compete on quality [art. 67, par. 2]; this would clearly apply to situations where national legislation determines contract prices [Article 67, par. 1].

The quality of consulting services in the design process, from conception to detailed design, and the project implementation, through construction management, exercises the greatest possible influence on the success of the project outcome. Taking into account that consulting services:

- amount to a small fraction of the life-cycle cost of the project (typically between 5% to 10% of the construction cost and below 3% of the life-cycle costs)¹
- exert a highly-leveraged beneficial impact on the project construction and operation cost, consulting engineering services contracts should be awarded predominantly on quality².

Award criteria may now include experience [Article 67, par. 2], which is especially applicable for intellectual services such as consultancy services³.

¹ Publication, ‘Infraguide’, Federation of Canadian Municipalities and National Research Council, 2006.

² Indeed, this is the thrust of the Brooks Act of 1972 in the U.S. whereby award is made on the basis of quality only

³ This constitutes a departure from the provisions of the previous Directive, as interpreted by jurisprudence whereas experience constituted only a selection criterion; obviously, it should be avoided to use experience both as a selection and award criterion.

Since it is not possible to define the qualitative aspects (e.g. specifications) of intellectual services in advance, the use of price as the only criterion (Art. 67, par 5) cannot be used for engineering consultancy services.

EFCA recommends that Member States award intellectual service contracts to the most economically advantageous tender, with appropriate price and quality weights; quality criteria should be relevant to the project and the required services and quality assessed on the basis of technical proposals including:

- experience of staff allocated to the project and their proposed organisation, and
- proposed methodology, including (i) the assessment of potential risks to the project outcome in terms of time, cost or quality and (ii) the description of the approach and methods proposed for providing the services, including environmental and social aspects.

Finally, EFCA recommends that Member States, in transposing Art 67 into national law and in using the discretion there, use “**should**” instead of “**may**” in so that of the use of the price only for intellectual services or performances is prohibited.

In view of the paramount importance of consulting engineering services to the development of the design and the successful outcome of the project EFCA encourages Member Associations to press for:

- the use of a two-envelope system for Quality and Price submissions, for the independent assessment of these components
- the development of meaningful quality criteria
- the use of the full range of quality marks in tender appraisal, in order to avoid ‘selection on price by unintended default’
- a common approach to the grading of both quality and price, recognising that an absolute grading of quality with relative grading of price distorts the weights attributed to the two components,

Taking the above into account, EFCA encourages the use of procurement systems that are consistent with the principles of MEAT, such as QBS or BVP.⁴

Competitive procedure with negotiation

The most common procedure presently used for the award of consulting contracts is the Restricted Procedure. In the new Directive however, it is foreseen that Member States shall provide that contracting authorities may use the competitive procedure with negotiation [Article 29] (among others) for projects that include design or innovative solutions; and a similar wording exists in Directive 2004/18.

EFCA recommends that design contracts for complex projects be awarded with the competitive procedure with negotiation. Since this is a complicated procedure and requires significant input on behalf of the consultants and the clients, clients and service providers should be encouraged to ensure that they have enough capacity in their procurement or tender team to manage the requirements of the procedure.

⁴ EFCA will develop instruments for these items in the coming year.

For the application of this procedure [Article 29] the contracting authorities discuss with the tenderers the initial and subsequent tenders with the objective of improving them; the scope of “negotiations” may cover all characteristics of the services including, for instance, quality, quantities, commercial clauses as well as social, environmental and innovative aspects, insofar as they do not constitute minimum requirements [Preamble, 15c].

In view of the high transaction costs of this procedure, EFCA recommends that the number of candidates should be limited to three, unless the contracting authority has clear reasons to invite more. In any event, the contracting authority should state in the invitation to tender the number of candidates that will be invited to participate in the negotiation.

During the negotiation process it is important that:

- negotiation is carried out with equal treatment of the tenderers; and the contracting authority shall not provide any information to some of the tenderers that may give them some advantage over others
- contracting authorities shall not reveal to other tenderers confidential information communicated by a tenderer without his agreement, and shall respect the intellectual property of tenderers.

In the course of negotiations, technical specifications or other procurement documents may be changed by the contracting authority; the award criteria however cannot be subject to negotiation.

EFCA recommends that negotiations concern primarily the scope of the services to be offered, in order to meet the objectives of the design contract; and that only the final tender is invited to include the financial proposal, for the finalised scope of services.

For all other consulting contracts, EFCA recommends the use of the restricted procedure. The use of the open procedure should be limited in view of the high transactions costs involved (preparation of proposals by a larger number of candidates, evaluation of these proposals by the contracting authorities).

Innovation Partnership

One of the objectives in the modified EU Procurement Directives is to promote innovation. Article 31 contains a new procedure enabling the creation of Innovation Partnerships (IP), allowing Authorities to propose the development of an innovative product, service or works and to form a partnership with private sector entities to develop and deliver something new that is not available in the market. Innovation Partnerships will comprise public and private organisations working in partnership to achieve a common goal. Their introduction is intended to facilitate a new approach to research during the procurement of goods and/or services where no current solution exists.

In the new IP procedure it is possible to continue from R&D phase to commercial phase with the same innovation partners:

The creation of innovation partnerships will enable a public authority to enter into a structured partnership with a supplier with the objective of developing an innovative product, service or works, with the subsequent purchase of the outcome.

EFCA recommends that member states legislate article 31 in a way that allows for maximum flexibility in the use of Innovation Partnerships. However, innovation partnerships have to follow transparent procedures to ensure a fair treatment of the partners and their competitors.

Modification of contracts

The Directive foresees that contracts may be modified in several cases, as long as the overall nature of the contract is not altered [Article 72, par. 1]:

1. Where the modifications have been foreseen in the initial procurement documents in clear, precise and unequivocal review clauses, which may include:
 - price revision clauses or
 - options for additional work*irrespective of their monetary value*. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used.
2. For additional services not foreseen in the initial procurement (*up to 50% of the value of the original contract, per modification*) that have become necessary and that were not included in the initial procurement where a change of contractor:
 - cannot be made for economic or technical reasons (e.g. inter-changeability or interoperability with the services procured under the initial procurement), and
 - would cause significant inconvenience or substantial duplication of costs for the contracting authority.
3. For additional services not foreseen in the initial procurement where the need for modification has been brought about by unforeseeable circumstances, *up to 50% of the value of the original contract, per modification*.
4. Where the modifications, *irrespective of their value*, are not substantial; substantial modifications are defined as those modifications that [Article 72, par. 4], where it renders the contract materially different in character from the one initially concluded; in any case, a modification shall be considered substantial where:
 - it introduces conditions which, had they been part of the initial procurement procedure, would have attracted additional candidates or would have allowed for the admission of other candidates, or
 - it changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract, or
 - it considerably extends the scope of the contract.
5. Furthermore if modifications have not been provided for in the initial procurement documents, service contracts may be modified if the value of the modification is below the thresholds for the application of the Directive [Article 4] and *10% of the initial contract value*. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

Also, modifications are allowed in certain cases where a new contractor replaces the original one [Article 72, par. 1 (d) and par. 4 (d)].

These provisions are especially helpful for consulting contracts since:

- design contracts involve significant uncertainties in the amount of work input required, depending on the solutions being adopted and the findings during the design process
- construction management and project management contracts involve significant uncertainties in the amount of work input depending on the duration of the project implementation phase and the issues that will require attention.

In view of the above significant uncertainties, EFCA recommends that the above provisions, which provide considerable flexibility in contract execution, are transposed into national legislation by the Member States, especially with regard to consulting contracts.

Procurement capacity

For the success of the procurement process and the project execution, it is essential that the Contracting Authority disposes and can allocate adequate number of staff with the required experience and integrity.

Whenever the Contracting Authority (CA) is missing any of the above for oncoming procurement or project execution, it is strongly recommended to arrange for a preceding procurement process to select a Consultant as a trusted Advisor to support the CA. Such an arrangement would increase both the quality as well as economic result of the procurement procedure, and would also shorten and ease the delivery period.

EFCA advises that contracting authorities may award these contracts or use framework agreements for this, to avoid delays in the overall planning. Irrespective of the procurement procedure, member associations should develop a code of conduct to guarantee their clients that a conflict of interest or an unfair competition advantage shall not occur if they hire service contractors (reference to art. 41).

Duration of valid project references

The required technical and professional ability may refer to [Article 58, par. 4]:

- human and technical resources,
- (company) experience, as substantiated by references from contracts performed in the past.

Evidence of the above mentioned technical abilities may be provided by [Article 58, par. 4 and Annex XII, Part II], principally, a list of services carried out over at the most the past three years; where necessary, and in order to ensure an adequate level of competition, contracting authorities may allow for evidence of projects carried out more than three years before. This is particularly significant for consulting contracts, which are usually specialised and not often tendered.

EFCA recommends that, in order to ensure an adequate level of competition for such projects, projects completed within the last 10 years should be used as references in most cases, except for:

- specialised projects that are procured less often, e.g. dam design, airports, nuclear plants, where projects completed within the last 15 years should be requested.

Clarifications / additional information

There are provisions in the Directive⁵ to allow for clarifications/additional information by the tenderer in case of a minor administrative mistake, in order to avoid excluding tenderers because of formal mistakes and reducing competition in the process. This goal is one of the two complementary objectives of the new Directive stated as “... simplification and relaxation of the existing public procurement rules ...”

In view of the above, EFCA recommends that in legislation, this allowance for clarifications is possible in case of:

- Personal situation of candidates;
- Clarification of selection criteria.
- Clarifications of submitted proposals.

Life-cycle costing (LCC)

A major change in the new public procurement Directive is the widening of the award criteria, giving clients the opportunity to tender for efficient, sustainable projects that are cost-effective throughout their whole life-cycle. The shift has been towards longer-term, more holistic thinking and away from an over-reliance on price.

For procurement processes requiring proposals of solutions (e.g. competitive procedure with negotiation), the new award process relies on a matrix where price is joined by other criteria such as plan of approach, sustainability, and life-cycle costs, all geared towards adding value. Known as ‘most economically advantageous tender’ (MEAT) this instrument allows clients to set their own weightings on the criteria.

The new MEAT criteria for such projects open the door to “a cost-effectiveness approach, such as life-cycle costing (LCC) in accordance with Article 68”. Such approach may cover “all of the costs of a product, service or works, borne by the contracting authority or other users”, costs of use, maintenance, end of life, and costs imputed to externalities such as the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs. Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the Union, that common method shall be applied for the assessment of life-cycle costs.

⁵ These provisions can be found in the Explanatory Memorandum and Preamble 32, 33 and articles 57, 58, 59, 63 and 82

The LCC approach will have an important impact for the consulting engineering industry not only at tender level, but on the practice of consulting engineering firms during execution of design contracts: alternative solutions should be assessed on the basis of LCC, including environmental costs, to the extent possible. The directive recommends that “Common methodologies should be developed at Union level for the calculation of life-cycle costs for specific categories of supplies or services and where such common methodologies are developed their use should be made compulsory.”

Today, the only requirement made mandatory by a legislative act of the Union (directive 2009/33/EC) refers to the promotion of clean and energy-efficient road transport vehicles. Therefore “*The methods which contracting authorities use for assessing costs imputed to environmental externalities should be established in advance in an objective and non-discriminatory manner and be accessible to all interested parties. Such methods can be established at national, regional or local level, but they should, to avoid distortions of competition through tailor-made methodologies, remain general in the sense that they should not be set up specifically for a particular public procurement procedure.*” (Recital 96)

Some firms have expertise in LCC. But “*to avoid distortions of competition through tailor-made methodologies,*” and private data bank, LCC assessment methods developed or to be developed in partnering with the consulting engineering industry at European, national, regional or local level should be recommended. Similar work will be undertaken by EFCA in dialogue with FIDIC, the international federation.

The transposition of the directive should clearly clarify conditions for LCC methods being acceptable according to the directive requirements (recital 96) and not source of distortions of competition.