

**FIEC position on the inclusion of social aspects in public procurement
Contribution to DG EMPL consultation**

FIEC is the European Construction Industry Federation, representing via its 33 national Member Federations in 28 countries (26 EU & EFTA, Croatia and Turkey) construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as “global players”, performing all sorts of building and civil engineering activities.

I. Preliminary comments

This FIEC position paper is a contribution to the Commission (DG EMPL) consultation on the inclusion of social considerations in public procurement which aims at contributing to the drafting of a guide on socially-responsible public procurement.

FIEC express its concern as regards the current consultation process: the recent study (dated 21/07/2008) ordered by the Commission and aimed at providing the basis for the drafting of DG EMPL's future guide, has been published very late and only after many requests from the various stakeholders.

In this context, FIEC requests the circulation of the future draft guide before it is finalized in order to be able to further express its views if necessary.

II. Comments on social considerations in public procurement

Being in line with DG MARKT policy on this point, FIEC recognizes that the EU Directives on public procurement (2004/18/EC and 2004/17/EC) leave room for the inclusion of social considerations.

However, social considerations cannot be included anyhow and anywhere, but only at specific stages of the tender procedure and in the appropriate manner, provided that they respect the provisions of the current EU Directives on public procurement. Social considerations should always be linked to the object of the contract.

While including social considerations in public procurement, contracting authorities should always take account of the specificities of the construction sector (cf. on-site working conditions) and be aware that such a social objective may lead to extra costs which the contracting authority will have to bear.

Contracting authorities should also be aware that awarding the contract to an abnormally low tender generally leads to negative effects on social concerns.

Furthermore, it does not make much sense for a contracting authority to engage in a social approach without having sufficiently trained and experienced human resources at its disposal.

1) Subject matter of the contract and technical specifications:

Beyond the definition of the contract subject matter - which can in itself be “socially-oriented” (e.g. construction of schools, hospitals, nurseries etc.) - the contracting authority can also specify in the technical specifications any requirement for **service quality** linked to the object of the contract. Contracting authorities may also use the technical specifications to include accessibility standards requirements in the design of the projects.

2) Selection phase (i.e. exclusion criteria):

According to the wording of article 45, paragraph 2 point d of Directive 2004/18/EC:

“Any economic operator **may be** excluded from participation in a contract where that economic operator: (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate.” The Directive further provides that “Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.”

Non-compliance with employment and safety regulations can be considered as grave professional misconduct and lead to exclusion from the tendering procedure.

On the same grounds, non-compliance with existing national legislation on non-discrimination, equal opportunities and accessibility criteria can be sanctioned: bidders who have been found guilty of not complying with such legislation can be excluded from public contracts. The respect of laws and regulations is a general obligation of everyone and must, therefore, never be part of the competitive aspects of a procurement procedure.

Furthermore, the sanction should always remain proportionate to the breach of legislation.

3) Award criteria:

Considering that respecting existing laws and regulations is a general obligation, this must never be part of the competitive award criteria. Consequently, as regards the construction sector, social considerations should not play any role in the award phase of the contract. As long as it is not linked to the object of the contract, there is no reason to evaluate tenderers, for example, for employing more than the statutory number of women or disabled persons, or for providing jobs for local long-term unemployed people. And finally, how would it be possible to evaluate the relative weight of different social award criteria, such as equal opportunities, employment of disabled persons and women?

4) Contract performance conditions

Contract performance conditions, conceived by the ECJ ("Beentjes") and now included in the directives (cf. Article 26 of Directive 2004/18/EC), are the only adequate way to introduce social considerations such as employment, safe and healthy working conditions, as well as equal opportunities and accessibility into public procurement. They are not part of the competition and oblige any contractor winning the contract to provide specific social measures during contract delivery.

Examples:

- a) As regards specific **labour market insertion measures**, the performance condition can, for example, consist in providing vocational training for certain groups such as long-term or young unemployed people – according to national laws and systems; requiring the winning tenderer to recruit a certain percentage of the employees working on the delivery of the contract from groups such as those mentioned above. This percentage has to be the same for all bidders. If the idea is to have local people employed and if the awarding authority does not provide the persons to be employed, there is a danger of discrimination, because this condition would be easier to fulfill for local firms.

Such requirements obviously only make sense if the considered project is large and long enough as to justify hiring additional workers. Otherwise, they will cause the dismissal of workers in order to replace them by new ones from the desired target groups or provide an unjustified advantage to the most understaffed companies.

Again, FIEC recalls that considering the specificities of the construction sector – specific skills in high demand, risks linked to on-site working conditions, lack of available skilled construction workers, etc. – hiring people from the above mentioned groups requires that they be skilled and have received health and safety training. On the contrary, hiring unskilled and untrained people on construction sites often leads to increase the safety risks.

- b) As regards specific **safe and healthy working conditions**, the performance condition can, for example, consist in providing better health and safety measures than the ones required by existing collective agreements and national legislation.

In any case, in order to comply with EU procurement law, contract performance conditions must be **non-discriminatory** (each tenderer should have the same possibility of delivering the required measures). Moreover, the ability of the contractor to deliver these measures **should, under no circumstances**, be used as a selection or award criterion for the tender itself. They also have to be indicated in the contract notice or in the contract documents.