

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

**on modernisation of public procurement**  
(2011/2048(INI))

**FIEC analysis of the most important paragraphs in the report of the IMCO Committee**

Text of the report:	Comments:
– having regard to its resolution of 12 May 2011 on equal access to public sector markets in the EU and in third countries	Additional reference as requested by FIEC.
B. whereas European public procurement rules have contributed substantially to increased transparency and equal treatment, to combating corruption and to professionalising the procurement process;	This paragraph corresponds to an amendment supported by FIEC.
C. whereas the current economic climate makes it more important than ever to ensure optimal efficiency in public spending, whilst limiting costs borne by businesses as much as possible, and a better functioning procurement market would help achieve these two objectives;	good
<b>First task: improving legal clarity</b>	
4. Asks for clarification of the scope of the directives; notes that the main purpose of public procurement is the purchase of goods, works and services by public authorities to accommodate the needs of their citizens and ensure effective use of public funds; points out that there must be a direct benefit for the contracting authority in order for a procedure to qualify as public procurement;	Contrary to FIEC voting recommendation, this paragraph was kept, although the meaning of the last sentence is not clear at all...  Also, in its response to the Commission's Green Paper, FIEC considered that the scope of the directives did not need clarification.
5. Calls for clarification of the definitions in the directives – for example the definition of a 'body governed by public law' – in line with the case-law of the ECJ and without reducing the scope of EU public procurement rules;	In its response to the Commission's Green Paper, FIEC considered that the definitions were clear enough.
6. Recalls its resolution of May 2010 on recent developments in public procurement, which took note of the ECJ case-law and took the view that public-public cooperation was not subject to public procurement rules as long as the following criteria were met: that the purpose of the partnership was the provision of a public-service task conferred on all the public authorities concerned; that the task was carried out solely by the public authorities concerned, i.e. without the involvement of private capital; and the activity involved was essentially performed on behalf of the public authorities concerned; underlines the fact that transferring tasks between public sector organisations is a matter for the Member States' internal administrative organisation and is not subject to procurement rules; takes the view that these clarifications should be codified in the procurement	In its voting recommendations, FIEC supported an alternative amendment which stated that the ECJ had established enough legal clarity on public-public cooperation and that this issue did not need to be codified in the public procurement directives.

directives;	
<p>7. Emphasises the exclusion of service concessions from the scope of European procurement rules; reiterates that due account must be taken both of the complexity of the procedures and of the differences between Member States in terms of legal culture and practice with regard to service concessions; takes the view that the process of defining the term ‘service concession’ and establishing the legal framework governing such concessions has evolved as a result of the 2004 public procurement directives and the CJEU’s supplementary case-law; insists that any proposal for a legal act dealing with service concessions would be justified only with a view to remedying distortions in the functioning of the internal market; points out that such distortions have not hitherto been identified, and that a legal act on service concessions is therefore unnecessary if it is not geared to an identifiable improvement in the functioning of the internal market;</p>	<p>In line with FIEC views, the IMCO Committee supports here the fact that no legal act on service concessions is necessary for the moment.</p> <p>(Note: the Commission however still plans to adopt such a legislative proposal by mid-December.)</p>
<p><b>Second task: developing the full potential of public procurement – best value for money</b></p>	
<p>13. Takes the view that, in order to develop the full potential of public procurement, the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender, in terms of economic, social and environmental benefits – taking into account the entire life-cycle costs of the relevant goods, services or works; stresses that this would not exclude the lowest price as a decisive criterion in the case of highly standardised goods or services; asks the Commission to develop, in close cooperation with the Member States, a methodology for the calculation of life-cycle costs on a broad and non-obligatory basis; stresses that supporting the criterion of ‘maximum economic benefit’ would foster innovation and efforts to achieve the best quality and value, i.e. to comply with the requirements of the Europe 2020 strategy; stresses that this is particularly relevant in relation to public procurement of goods that have an impact on consumers’ health – in the food sector, for example – where quality and production methods play an important role; emphasises that public procurement rules should be flexible enough to ensure that passive consumers, for example in hospitals, care facilities for the elderly, schools and kindergartens, have equal access to healthy, value-for-money food, rather than merely the cheapest available option;</p>	<p>In line with the FIEC position, the IMCO Committee supports that the MEAT criterion be the privileged one – not any more the price only – and that the life-cycle costs (LCC) be taken into consideration – if possible according to a common methodology.</p> <p>However, the last sentence of the paragraph concerning “flexible rules for passive consumers” sounds extremely dubious...</p>
<p>18. Underlines the fact that whether or not a product or service has been sustainably produced is rightly considered to be a characteristic of the product, which can be used as a criterion for comparison with products or services that have not been sustainably produced, so as to enable contracting</p>	<p>Although the IMCO Committee recalls the importance of the link with the subject-matter of the contract, this concept of “sustainable production” seems to be dangerous, unclear, and does not correspond to the</p>

<p>authorities to control the environmental and social impact of contracts awarded by them in a transparent way but at the same time not to weaken the necessary link to the subject matter of the contract; points out the need to clarify the scope for including requirements relating to the production process in the technical specifications for all types of contract, where relevant and proportionate; points to the Wienstrom case, which has become the classic example of how and why production characteristics can be categorised as technical specifications;</p>	<p>concept of “production processes and methods” as presented in the Annex VI of Directive 2004/18/EC under the definition of “technical specification”.</p>
<p>19. Underlines the need to strengthen the sustainability dimension of public procurement by allowing it to be integrated at each stage of the procurement process (i.e. ability test, technical specifications, contract performance clauses);</p>	<p>That is?...</p>
<p>20. Points out that, in response to increased awareness of the environmental and climate impact of goods, works and services, procurement authorities should include environmental costs in their assessment of the ‘most economically advantageous offer’ and their calculation of life-cycle costs; stresses in this connection that, if criteria which are not procurement-related are taken into account, this should be done on a voluntary basis and the decision to use such criteria must be reserved for the public authorities, or the decision-making bodies behind them which possess direct democratic legitimacy, following an individual policy-making procedure on the spot; urges the Commission to clarify the concepts of ‘local supplier’ and ‘locally produced’;</p>	<p>This paragraph is dangerous and contradicts the willingness to keep a link to the subject-matter of the contract.</p> <p>Contrary to FIEC views, it opens a door to criteria which would not be “procurement-related”!...</p>
<p>22. Considers that the current provisions on subcontracting should be strengthened, as the use of several levels of subcontracting can cause problems in terms of compliance with collective agreements, working conditions and health and safety standards; suggests therefore that the public authorities be informed of all details relating to the use of subcontractors before a contract is concluded; asks the Commission to assess, with an eye to the future review of the directives, whether further rules on the award of subcontracts are needed, for example on the establishment of a chain of responsibility, specifically to avoid SME subcontractors being subject to conditions worse than those applicable to the main contractor awarded the public contract;</p>	<p>Contrary to FIEC voting recommendations, the IMCO Committee has supported this amendments.</p> <p>However, both the greater control of the contracting authority on subcontracting and the establishment of a chain of responsibility can be burdensome and extremely complex.</p>
<p>23. Recognises the role the EU can play in facilitating the development of successful public-private partnerships (PPPs) by promoting fair competition and sharing best practice across Member States in relation to social and employment policies; notes, however, that major disparities exist between Member States in terms of the legal and procedural requirements applying in this area; calls, accordingly, on the Commission to clarify</p>	<p>Although FIEC does not believe that a clarification of the concept of PPPs be necessary, the wording of this paragraph is much more positive as an alternative amendment which had been rejected by FIEC in its voting recommendations.</p>

<p>the concept of PPPs, in particular as regards how the parties will bear shared risks and meet their financial obligations;</p>	
<p>24. Calls on the Commission to reassess the appropriate level of thresholds for supply and services contracts, and if necessary raise them, so as facilitate access to public procurement by, amongst others, not-for-profit and social-economy operators and SMEs; asks that very careful consideration be given to the legally binding requirements of the WTO Agreement on Government Procurement; emphasises that, given the difficulties which already exist in negotiations on the issue of access to public procurement, it should also be borne in mind that raising thresholds in Europe could easily lead to further complications for EU trade policy; considers further that aligning these thresholds to the already harmonised thresholds of the Utilities Contracts (2004/17/EC) and Defence Procurement (2009/81/EC) Directives would deliver the highest level of simplification and clarity for contracting authorities and suppliers alike;</p>	<p>The IMCO Committee does not make reference to works contracts when mentioning a possible raise in the thresholds...</p> <p>At least, the IMCO Committee raises the attention on the importance of the WTO Agreements on Government Procurement in this respect.</p> <p>What about aligning all thresholds to those of the Utilities Contracts (2004/17/EC) and Defence Procurement (2009/81/EC)???</p> <p>In its response to the Commission's Green Paper, FIEC supported that the thresholds must remain untouched.</p>
<p>25. Emphasises that any extension of the EU procurement rules into the area of 'what to buy' would represent a significant change to the current regime and should be carefully assessed; doubts that this would contribute to simplifying and streamlining, and fears rather that it would lead to more complicated rules, with many exemptions, which would be difficult to administer in practice – procurement directives being procedural ('how to buy') guidelines that should not be supplemented with provisions on 'what to buy';</p>	<p>FIEC also supported this view that the "what to buy" concept must not supplement the current "How to buy" concept.</p>
<p><b><i>Third task: simplifying the rules and allowing more flexible procedures</i></b></p>	
<p>29. Advocates assessing whether wider use of the negotiated procedure with prior EU-wide publication might be allowed, beyond that provided for in the current directives, so that contracting authorities and economic operators can communicate better, and supply and demand can be coordinated effectively; takes the view that, if any extension of the scope of the negotiated procedure is envisaged, further safeguards against abuse should be introduced – e.g. an obligation on contracting authorities to establish, for any bidder at the outset, at least some minimum conditions regarding the performance of the procedure, in line with what is sound practice in private procurement – as well as requirements for written documentation;</p>	<p>In its response to the Commission's Green Paper, FIEC has advocated that the negotiated procedure should remain used under the current strict conditions and that a wider use of this procedure could be dangerous and lead to abuses.</p> <p>Although the IMCO Committee wishes to have more room for this procedure, the wording of this paragraph remains much more careful and realistic than the ideas expressed by some MEPs.</p>
<p>31. Reiterates its insistence on the systematic admission of alternative bids (or variants), as they are crucial to promoting and disseminating innovative solutions; stresses that specifications referring to performance and functional requirements and the express admission of</p>	<p>This paragraph is in line with what FIEC has always supported in order to promote innovation in public procurement.</p>

<p>variants give tenderers the opportunity to propose innovative solutions, particularly in highly innovative sectors such as ICT; asks also that all avenues – both legislative and non-legislative – be explored to ensure that public procurement is more engaged in promoting innovation in Europe;</p>	
<p>34. Points out the contracting authorities should be able to benefit from previous experience with a tenderer on the basis of an official evaluation report; recommends setting a time limit for exclusions, which should guarantee transparency and objectivity; points out the need for legislative clarification in Directives 2004/17/EC and 2004/18/EC stating that a bidder found guilty of a misconduct in a previous procurement procedure can regain reliability after having substantially proved that he has undergone an effective ‘self-cleaning’ procedure; considers that such a clarification would foster anti-corruption mechanisms by underpinning incentives to accelerate the elimination of corrupt practices, and would remove serious legal uncertainties;</p>	<p>In its response to the Commission’s Green Paper, FIEC stated that there was no need to take into account previous experience as some possibilities to exclude and/or select bidders already exist in the directive: on the basis of reputation (art.45 paragr. 2 (c) and (d) of Directive 2004/18/EC) or on the basis of technical and/or professional ability (art. 48 of Directive 2004/18/EC).</p>
<p>35. Regrets the Green Paper’s failure to mention shortcomings, the lack of expertise and knowledge about procurement and the inadequacy of public procurement strategies; stresses the importance of promoting professionalism and guaranteeing objectivity on the part of both contracting authorities and market operators, particularly by supporting the development of targeted training programmes; recommends setting up a network of centres of excellence within the existing national frameworks, and promoting exchanges of information and good practices between Member States; also encourages umbrella organisations, at both national and EU level, to take shared responsibility for making relevant information available and to facilitate exchanges of information between their members throughout Europe; stresses the importance of clear and readily comprehensible manuals for both contracting authorities and tenderers; finds it regrettable that the documents ‘Buying green! A handbook on environmental public procurement’ and ‘Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement’, published in 2005 and 2010 respectively, are not sufficiently useful in this respect;</p>	<p>FIEC has always very much supported this aspect of the problem.</p>
<p><b><i>Fourth task: improving access for SMEs</i></b></p>	
<p>38. Points out that selection criteria on financial standing, e.g. in relation to company turnover, should be proportional to the character of a given contract; warns the Commission and the Member States, when adopting flexible and user-friendly instruments, not to create any new barriers for SMEs and to take account of their interests as a matter of priority; asks the Commission, with the aim of improving access to public procurement</p>	<p>In its response to the Commission’s Green Paper, FIEC supported the fact that requirements must be proportionate to the given contract, but for all businesses, and not only for SMEs.</p>

<p>procedures and improving their transparency, particularly for the benefit of smaller contracting authorities and tenderers, to modernise the Tenders Electronic Daily (TED) website to make it more accessible by improving its appeal and user-friendliness, with particular attention to search criteria and the quality and detail of the summary translations for each tender; recommends that TED should offer an alert service for users, to inform them when new tenders of interest are published;</p>	
<p>39. Asks the Commission to secure the inclusion in the Government Procurement Agreement of a clause allowing the EU to give preference to European producers, especially SMEs, in the award of certain public procurement contracts, along the lines of such clauses already applied by other states parties to that agreement;</p>	<p>The wording of this paragraph seems to be very dubious. Moreover, reciprocity is not a question of protectionism but of fair rules on a level playing field.</p>
<p>40. Asks the Commission to increase awareness of the importance of splitting contracts into lots, and to consider the implementation of the ‘apply or explain’ principle, whereby rules on matters such as division into lots must be complied with, or the failure to comply explained;</p>	<p>Both this paragraph and the following promote division of public contracts into lots as a way to improve the access of SMEs to public procurement.</p> <p>However, the IMCO Committee does not go as far as requesting the mandatory division of contracts into lots.</p> <p>This approach therefore remains in line with the FIEC position, which is to divide contracts into lots when technically and economically relevant/useful.</p>
<p>42. Proposes that self-declarations be allowed where feasible, and that original documents be requested only from the shortlisted candidates or the successful tenderer, whilst avoiding any delays or market distortions caused by incorrect declarations; asks the Commission to promote the option of an ‘electronic procurement passport’ accepted by all Member States and proving that the economic operator fulfils the conditions required under EU legislation on public contracts; underlines the point that a European pre-qualification system should be a helpful instrument if it is kept simple, cheap and easily accessible for SMEs;</p>	<p>In its response to the Commission’s to the Green Paper, FIEC has supported the idea that only the winning bidder be obliged to present the original documents.</p> <p><b>However, questionable is what is exactly understood under “electronic procurement passport”!?</b></p> <p><b>In any case, FIEC is against a European pre-qualification system, but advocates for the mutual recognition of national certificates.</b></p>
<p><b><i>Fifth task: ensuring sound procedures and avoiding unfair advantages</i></b></p>	
<p>47. Calls on the Commission to assess the problems associated with exceptionally low bids and to propose appropriate solutions; recommends that contracting authorities provide, in the event of abnormally low bids being received, for early and sufficient information to other bidders, in order to allow them to assess whether there is ground for initiating a review procedure; asks for greater</p>	<p>FIEC welcomes that at least one reference is made to the problem of abnormally low tenders (ALTs); as well as to the necessary consistency between EU external trade commitments and Member States behaviour.</p>

<p>consistency between the EU's common external trade policy and the practices in Member States where exceptionally low bids are accepted;</p>	<p>However, the paragraph remains very poor in its proposal... which is more than dubious.</p>
<p><b>Sixth task: expanding the use of e-procurement</b></p>	
<p>50. Underlines the fact that, to ensure interoperability of different systems and avoid vendor lock-in, open standards and technology neutrality must be observed; asks the Commission to assure real interoperability between the different e-procurement platforms that already exist in Member States, making more use of results obtained by EU initiatives such as PEPPOL and e-CERTIS;</p>	<p>FIEC supports these efforts towards greater interoperability between the existing platforms.</p>

**Moreover:**

- Contrary to FIEC voting recommendations, absolutely no reference has been made on the issue of third country companies access to the EU procurement market and the reciprocity principle!...
- This aspect of the problem had been already only poorly addressed by the INTA Committee in its opinion.