

**Amendments to IMCO draft report on the
Modernisation of public procurement
2011/2048(INI)**

FIEC voting recommendations in view of the IMCO vote

FIEC is the European Construction Industry Federation, representing via its 34 national Member Federations in 29 countries (26 EU & EFTA, Croatia and Turkey) construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as “global players”, carrying out all forms of building and civil engineering activities.

General statement:

The basic purpose of public procurement is to ensure value for money, that is, to ensure the optimization of taxpayers' money for the realization of public services and infrastructure.
FIEC recalls that environmental and social aspects can already been taken into account in the current public procurement directives, provided that they are linked to the subject matter of the contract.
Environmental and social matters must be tackled in the appropriate specific legislative frameworks.
Hence, FIEC is not in favour of the many amendments pushing for more environmental and social considerations to be taken into account in public procurement.

Voting recommendations:

Motion for a resolution – Amendment 7:

Citation 6 a (new)

<i>Motion for a resolution</i>	<i>Amendment</i>	<i>FIEC voting recommendation</i>
	- having regard to its resolution of 12 May 2011 on equal access to public sector markets in the EU and in third countries,	+

Justification:

This Resolution is fundamental regarding the international aspects of public procurement and should be taken into account.

Motion for a resolution – Amendment 13:

Recital A a (new)

<i>Motion for a resolution</i>	<i>Amendment</i>	<i>FIEC voting recommendation</i>
	Aa. whereas European public procurement rules have contributed substantially to increase transparency and equal treatment, to fight against corruption and to professionalise the procurement process;	+



Justification:

The 2004 public procurement directives have contributed to improve the situation on the EU public procurement market.

Motion for a resolution – Amendment 17:

Recital A b (new)

<i>Motion for a resolution</i>	<i>Amendment</i>	<i>FIEC voting recommendation</i>
	<p><i>Ab. whereas public procurement directives have become too detailed and legalistic in their approach having so contributed to an increase of the external cost as well as a climate of mistrust between public procurers and private suppliers and thus hindered the dialogue between procurers and the market;</i></p>	<p style="text-align: center;">---</p>

Justification:

FIEC advocates that it is not correct to present such a negative assessment of the 2004 public procurement directives, which, at that time, already aimed at simplifying the EU procurement rules. It should rather be regarded in the national implementation processes and in the application of the rules in the praxis. Also incorrect is the climate of mistrust between public procurers and private suppliers.

Replaced by AM 183:

Motion for a resolution – Amendment 23:

Paragraph 1 b (new)

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<p><i>1b. considers that the European market cannot, on a unilateral basis, be open to third-country operators and calls for the Commission to consider the use of a tool to ensure reciprocity vis-à-vis States which do not provide equivalent access to European operators, including those that are signatories to the Agreement on Government Procurement (GPA); points out that the GPA provides for special and differentiated treatment for developing countries;</i></p>	<p style="text-align: center;">+</p>

Justification:



~~FIEC supports very much that the principle of reciprocity be ensured on public procurement markets between the EU and third countries and encourages the European Commission to come up with the appropriate instrument (=> In this field, see also FIEC contribution, dated 2/8/2011, to the Commission's questionnaire on an initiative on access of third countries to the EU's public procurement market).~~

~~**Note: This justification also concerns AM 183.**~~

Motion for a resolution – Amendment 32:

Paragraph 3:

Motion for a resolution:	Amendment:	FIEC voting recommendation:
<p>3. Asks for clarification of the scope of the directives; recalls 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; points out that there must be a direct benefit for the contracting authority in order for a procedure to qualify as public procurement;</p>	<p>3. Asks for clarification and clear delineation of the scopes of the directives 2004/17/EC and 2004/18/EC; recalls 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 that the main purpose of EU public procurement rules is to ensure equal treatment, non-discrimination, mutual recognition, proportionality and transparency by guaranteeing the opening-up of public procurement to competition;</p>	+

Justification:

The second part of the original paragraph is not clear at all and should be replaced by the clear wording proposed in AM 32.

Motion for a resolution – Amendment 44:

Paragraph 5:

Motion for a resolution:	Amendment:	FIEC voting recommendation:
<p>5. 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 local authorities concerned and that the task was carried out solely by the</p>	<p>5. Recalls its resolution of May 2010 on recent developments in public procurement, which took note of the ECJ case-law; considers that the Court of Justice has established sufficient legal certainty by means of its case-law on public-public cooperation, so that public-public cooperation should not be affected by the modernisation of EU public procurement law and should not be codified in any other context either;</p>	+



<p><i>public authorities concerned, i.e. without the involvement of private capital; underlines that those clarifications should be codified in the procurement directives;</i></p>		
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Justification:

FIEC believes that no codification of the ECJ rulings on public-public cooperation is necessary.

Motion for a resolution – Amendment 65:

Paragraph 8 a (new)

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<p><i>8a. Underlines the need to ensure reciprocity and equal access to public procurement markets in the EU and in third countries in order to guarantee fair and effective competition;</i></p>	<p style="text-align: center;">+</p>

Justification:

Same justification than for AM 23.

Motion for a resolution – Amendment 69:

Paragraph 8 b (new)

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<p><i>8b. Warmly welcomes therefore the Commission's intention, as specified in the Communication on the Single Market Act of 13 April 2011, to propose an EU legal instrument defining the terms for access of third-countries' businesses to EU public procurement markets to create an actual level-playing field; calls on the Commission to submit a proposal by the end of 2011 at the latest; underlines that this instrument should provide for appropriate solutions to the problems associated with extraordinary low bids, which distort procurement and penalise companies from EU Member States;</i></p>	<p style="text-align: center;">+</p>



Justification:

Same justification than for AM 23.

In addition, Articles 55 paragraph 3 of Directive 2004/18 and 57 paragraph 3 of Directive 2004/17 provide for the possibility to reject an abnormally low offer of which it has been established that it contains state-aid, unless the tenderer proves that this state-aid has been granted legally.

The EU has developed strict public aid policies, aimed at combating illegal state aid. It is evident that the EU has no power to extend this regime to third countries. But the EU has the power to ensure that these rules are respected in all public procurement procedures in the EU.

Taking into consideration recent developments, FIEC considers that these rules should be strengthened immediately, in order to ensure that fair competition on the Internal Market cannot be flawed by Member States and their contracting authorities accepting abnormally low offers submitted by state-owned and – aided tenderers.

*FIEC considers that this could be done, for example, by an adaptation of the current wording of the current text to the new situation (see **annexed amendment**).*

Motion for a resolution – Amendment 72:

Paragraph 9:

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
9. Takes the view that, in order to develop the full potential of public procurement, the <i>critterion of the lowest price should be removed, and that in principle there should be only one option for the award of contracts: the most economically advantageous tender</i> – including the entire life-cycle <i>costs</i> of the relevant goods, services or works – should be chosen;	9. Takes the view that, in order to develop the full potential of public procurement, the most economically advantageous <i>offer</i> including the entire life-cycle <i>cost</i> of the relevant goods, services or works should be <i>the principle, following the apply or explain principle which means either you follow this principle or you have to explain publicly why you have chosen another criteria; asks the Commission to develop a methodology for the calculation of life-cycle costs on a broad basis;</i>	+

Justification:

FIEC agrees that only the MEAT criterion enables public procurers to properly take into account the whole life-cycle cost of the building or infrastructure, as well as those additional aspects which the directives allow. This is a key condition for innovative and sustainable public procurement, especially in the context of the current economic crisis, and should therefore be promoted as much as possible.

However, FIEC believes that the lowest price criterion should not be eliminated, as it is still relevant for simple contracts.

Motion for a resolution – Amendment 86:

Paragraph 9 a (new)

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<i>9a. Points out that within the</i>	



	<p><i>current legal framework, public procurers can already apply additional award criteria in support of the EU2020 objectives, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles of equal treatment, the non-discrimination, mutual recognition, proportionality and transparency; asks the Commission to give procurement bodies further guidance to make better use of these possibilities;</i></p>	<p>+</p>
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Justification:

*FIEC supports this statement and advocates that, in any case, it is essential that requirements imposed by the contracting authority remain linked to the subject-matter of the contract **at any stage of the contract.***

**Motion for a resolution – Amendment 94:
Paragraph 9 c (new)**

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<p><i>9c. Stresses the importance of supporting innovation in public procurement, for example by developing pre-commercial procurement and by ensuring that contracting authorities respect the confidentiality of innovative solutions – especially in terms of know-how – presented by tendering companies; therefore calls for a proactive policy for support and training and for legal certainty for public authorities looking to choose innovative solutions;</i></p>	<p>+</p>

Justification:

FIEC supports this statement and advocates for using the following measures in order to promote innovation in public procurement:

- Promote the recourse to MEAT criterion, rather than lowest price criterion (see answer to Q70 and following);*
- Leave contractors free of presenting alternative offers (variants) in general (The current directives allow them only when it is specifically permitted by the client, which is too restrictive);*
- Encourage contracting authorities to determine performance-oriented requirements;*



- Ensure the strict respect of confidentiality of the offers, while “cherry picking” of innovative solutions is a major issue which has been raised particularly with regard to the competitive dialogue (also see Explanatory Note on Competitive Dialogue – problematic footnote 21);

Motion for a resolution – Amendment 103:

Paragraph 10 a (new)

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<p>10a. Calls on the Commission to put forward a proposal for a European corporate social responsibility certification system and takes the view that, once such a system has been introduced, it should be possible for contracting authorities to include among the selection criteria for public procurement procedures the requirement that companies must have such certification or other forms of EU quality or environmental certification (or certification from other countries recognised as equivalent by the EU);</p>	<p style="text-align: center;">---</p>

Justification:

FIEC rejects the idea of creating an EU-wide CSR certification system. CSR must remain an individual voluntary approach for each company. It should in no case be used as a selection criteria.

Motion for a resolution – Amendment 111:

Paragraph 11

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
<p>11. Points out that increased awareness of the environmental and climate impact of products and activities means that the possibility for public authorities to favour local suppliers should be considered, and the extent to which internal market rules allow this examined;</p>	<p>11. Considers that enabling public authorities to favour local suppliers to take into account environmental concerns is not necessarily fair, and that including the entire life-cycle costs of the relevant goods, services or works should be privileged;</p>	<p style="text-align: center;">+</p>

Justification:

Indeed, the purpose of the EU public procurement directives is not to restrict the market to local suppliers, but on the contrary to open up markets, according to the principle of the Internal Market. As the Commission is criticising the fact that the share of cross-border procurement is currently much too low, it would not be logical that the European Parliament asks on the contrary to favour local markets.



**Motion for a resolution – Amendment 115:
Paragraph 11 a (new)**

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	11a. Asks for a proper examination of the significant thresholds as well as the advantages and disadvantages of an aggregation of demand – especially in the view of giving SMEs' ready access to public procurement;	+

Justification:

FIEC considers that the thresholds are appropriate and do not need a revision. Therefore, a careful examination of these thresholds before any proposal for change would be the least effort that the Commission could make.

**Motion for a resolution – Amendment 116:
Paragraph 11 a (new)**

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	11a. Stresses that, in view of the aims of the European Union laid down in Article 3 of the Lisbon Treaty, the public authorities should have the power to give preference to providers who provide documentation to show that they respect social rights and fair-trade principles and/or have a quality label to this effect;	---

Justification:

All businesses must respect EU social rights. There should be no discrimination between EU companies on that basis.

**Motion for a resolution – Amendment 117:
Paragraph 11 a (new)**

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	11a. Underlines that Public Private Partnerships is not a best practice contracting model and the EU Commission does not	



	<p><i>have a role in promoting this form of contracting. There is wide evidence that PPP's too often fail to deliver value for money to the taxpayer;</i></p>	<p>---</p>
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Justification:

FIEC considers that this statement is much too strong and would not be appropriate in the current report. FIEC believes that PPPs can be promoted on case by case, depending on their economic return/usefulness.

Note: This justification also concerns AM 133.

Motion for a resolution – Amendment 128:

Paragraph 12 a (new)

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<p><i>12a. Stresses the strategic value of public procurement, including with regard to social criteria; calls on the Commission to consider relaxing the principle of 'linkage with the subject of the contract'; draws attention to the enormous potential of public procurement to contribute towards the attainment of the EU 2020 objectives; cites as examples, in this connection, the advancement of women and support for fair trade;</i></p>	<p>---</p>

Justification:

Same justification than for AM 86.

Note: This also concerns AMs 136 and 137.

Motion for a resolution – Amendment 131:

Paragraph 12 a (new):

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<p><i>12a. 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</i></p>	<p>---</p>



	<p>subcontractors before a contract is concluded, and a chain of responsibility be established which makes contractors liable for any shortcomings by subcontractors in complying with regulations and social, environmental and quality objectives;</p>	
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Justification:

Increasing the power of direction and control of public authorities subcontractors would transform a private legal relation into a public relation, with consequences in terms of administrative procedures, responsibilities, etc. Besides, monitoring and control by public authorities of all aspects of subcontracting on a construction site may be an excessive complex task, which may even slow down the works.

NOTE: This justification concerns also AM 121.

Motion for a resolution – Amendment 138:

Paragraph 13 a (new):

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<p>13a. Calls on the Commission to reduce complexity by shortening the mandatory time for advertising e-procurements by 5 to 10 days, considers that this would not have any adverse effect on competition;</p>	<p>---</p>

Justification:

FIEC believes that such a shortening of advertising time for e-procurement would not reduce complexity but rather transparency.

Motion for a resolution – Amendment 139:

Paragraph 13 b (new)

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<p>13b. Stresses that it is essential to ensure that all the terms – in particular those covering working conditions and environmental and quality requirements – that contractors must meet are also met by subcontractors; considers, furthermore, that a chain of liability should be established, under which contractors are held liable for any breaches by</p>	<p>---</p>

	subcontractors, in particular in connection with working conditions, on the basis of a principle of joint and several liability between contractors and subcontractors;	
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Justification:

According to a study undertaken by EUROFUND, currently 8 Member States already have a legal system of chain liability at their national level. These systems differ significantly one from another and therefore, an EU intervention on this matter is not desirable.

Motion for a resolution – Amendment 153:**Paragraph 15**

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
15. Advocates that negotiated procedures with prior announcement be allowed as a standard procedure; takes the view that further safeguards against abuse should be introduced in the form of requirements for written documentation; urges the Commission to include more flexible provisions for framework agreements in the directives;	15. Takes the view that further safeguards against abuse should be introduced in the negotiated procedure in the form of requirements for prior announcement and written documentation;	+

Justification:

In general, contractors criticises in those procedures with negotiation (negotiated procedure and competitive dialogue) the non-respect of the confidentiality principle which leads to a cherry-picking of contractors' ideas by the competitors and the contracting authority itself. Therefore, the principle of negotiation should NOT be generalised, but remain under strict conditions for specific cases only. The negotiated procedure also leads to higher transaction costs which are not advisable for simple contracts. Also, in a period of crisis, negotiations tend to address the price only!

Regarding framework agreements, there is a growing tendency in some Member States to use framework agreements for construction contracts. FIEC considers that this tendency can have negative consequences as framework agreements are inappropriate for practically all construction contracts – except, for instance, for repetitive maintenance works – and are in particular damageable for SMEs.

Motion for a resolution – Amendments 160 and 161:**Paragraph 18**

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
18. Points out that the contracting authorities should have the possibility to benefit	deleted	



<p><i>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;</i></p>		+
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Justification:

FIEC recalls that the Directive already contains some possibilities to exclude and/or select bidders 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).

**Motion for a resolution – Amendment 179:
Paragraph 20 a (new)**

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<p>20a. Asks that very careful consideration be given to the legally binding requirements of the WTO Agreement on Government Procurement, should the issue of thresholds crop up when the directives are reviewed; emphasises that given the difficulties that 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 quite easily lead to further complications for EU trade policy;</p>	+

Justification:

FIEC considers that the current thresholds are appropriate and do not need a revision. Furthermore, FIEC agrees that changing the thresholds at EU level would have a negative impact on EU's commitments at international level.

Note: This justification also concerns AM 146.

**Motion for a resolution – Amendment 183:
Paragraph 20 a (new)**

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	<p>20a. Stresses that the European public procurement market is more open than the markets in the EU's international partners, which is why EU undertakings are not</p>	

	<p>able to compete on an equal footing with foreign undertakings and have difficulty accessing third-country markets; calls on the Commission to examine public procurement policy towards third countries with a view to ensuring more balanced and mutual access to EU and foreign public procurement contracts;</p>	<p>+</p>
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Justification:

FIEC supports very much that the principle of reciprocity be ensured on public procurement markets between the EU and third countries and encourages the European Commission to come up with the appropriate instrument (=> In this field, see also FIEC contribution, dated 2/8/2011, to the Commission's questionnaire on an initiative on access of third countries to the EU's public procurement market).

Note: This justification also concerns AM 23.

Motion for a resolution – Amendment 191:

Paragraph 22

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
<p>22. Proposes that self-declarations be allowed where feasible, and that original documents be requested only from the shortlisted candidates or the successful tenderer; asks the Commission to promote the option of a 'procurement passport', preferably in the form of a standardised electronic registration system at national level, since a passport of this kind would demonstrate that an operator has the declarations and documentation that are requested; believes that this would save considerable time and costs;</p>	<p>22. Proposes that self-declarations be allowed where feasible, and that original documents be requested only from the shortlisted candidates or the successful tenderer; asks the Commission to promote the option of a 'procurement passport', preferably in the form of a standardised electronic registration system at national level, since a passport of this kind would demonstrate that an operator has the declarations and documentation that are requested; believes that this would save considerable time and costs; <i>underlines that a European pre-qualification system could be a helpful instrument if it is kept simple, cheap and easily accessible for SMEs;</i></p>	<p>--</p>

Justification:

FIEC is not in favour of creating an EU-wide pre-qualification system. ~~Although advisable, s~~Such a system has proven being impossible to set up considering the unsuccessful experience of TC 330. Hence, for now, the mutual recognition of certificates should be promoted.



**Motion for a resolution – Amendment 194:
Paragraph 22 a (new)**

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	22a. Points out that selection criteria on financial standing such as company's turnover requirements should be proportional to the character of a given contract;	+

Justification:

FIEC advocates that, in principle, minimum requirements and selection criteria as put up by the contracting authority should be in a reasonable proportion to the nature and size of the work to be performed. This principle is established in Directive 2004/18/EC article 44 paragraph 2, but in the practice is often not respected by contracting authorities.

In any case, economic and financial standing (article 47) and technical and/or professional ability (article 48) should be proportionate to the subject-matter of the contract, submission and verification of evidence should be requested to the winning bidder only and administrative burdens should be reduced not only for SMEs but for all businesses.

**Motion for a resolution – Amendment 202:
Paragraph 22 c (new)**

<i>Motion for a resolution:</i>	<i>Amendment:</i>	<i>FIEC voting recommendation:</i>
	22c. Calls on the Commission to assess the problems associated with extraordinary low bids and to propose appropriate solutions; recommends contracting authorities to provide for early and sufficient information to other bidders in cases of abnormally low bids in order to allow them to assess if there is ground for initiating a review procedure; asks for a better coherence between the common external trade policy of the EU and practices in Member States accepting exceptionally low bids.	+---

Justification:

~~*Same justification than for AM 69. However, it should be clarified exactly WHEN the competitors shall be notified of WHICH details concerning abnormally low tender.*~~

~~*While FIEC agrees with the 1st sentence and welcomes the fact that attention is given to the problem of abnormally low tenders, the 2nd part of the amendment doesn't make sense regarding the current procedure to assess and reject an abnormally low tender.*~~



ANNEX:

Directive 2004/18/EC - Article 55 - Abnormally low tenders

3a. Where a contracting authority ~~establishes~~ suspects that a tender is to be abnormally low because the tenderer has obtained State aid, the tender ~~can~~ has to be rejected on that ground ~~only~~ after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally, i.e. respecting the principles laid down in EU competition law. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.

3b. Where a tenderer whose tender the contracting authority intends to accept is a state-owned or state-supervised and –managed enterprise, it is deemed to receive or have received state aid. ~~Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid~~ In this case, the contracting authority the tender can accept the tender be rejected on that ground alone only after consultation with the tenderer where the latter tenderer is unable to prove, within a sufficient time limit fixed by the contracting authority, that no aid had been granted or that the aid in question was granted legally, i.e. respecting the principles laid down in EU competition law. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.