efca Position Paper

Facilitating Innovation: Role of EU Public Procurement Legislation
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The European Federation of Engineering Consultancy Associations (EFCA) has member associations in 27 countries, representing more than 10,000 companies from the European engineering consultancy industry and related fields. Based in Brussels, EFCA is committed to facilitating constructive dialogue with European Institutions on issues impacting our industry; and engaging with international stakeholders on shared interests.

Summary of Key Recommendations

1. Lowest price must be curtailed as much as possible when procuring intellectual (engineering) services, to ensure innovation, competitiveness and long-term value creation.

2. Apply the most economically advantageous tender (MEAT) criterion. If MEAT still leads to 'lowest-price selection', the contract should be awarded to the price offer closest to the median of all submitted prices.

3. If price remains an award criterion for intellectual services, the abnormally low price (ALP) can be eliminated via minimum price thresholds and the selection of the second lowest price.

4. Sound public procurement practices can promote sustainable and durable solutions, as they require higher upfront investment but yield greater societal benefits over the longer term.

5. The 'two envelope system' ensures that tenderers first comply with the qualitative requirements and technical specifications before being assessed on their price offers.

6. Procurement procedures can be simplified by cutting red tape measures: supplementing bids on non-quality criteria, aligning or completely removing the requirements of references, removing barriers for SMEs in consortia, promoting market dialogue and negotiation.

7. Improve digitalisation in procurement practices via procurement systems based on contemporary digital capabilities, transitioning from notification-based to transaction-based systems, etc.

8. Intellectual Property Rights (IPR) should not be locked in a single project. Instead, we need conditions that enable and reward investment and commitment to development and innovation. The knowledge and experience gained can be further developed and used in other projects, helping new technologies, processes and services while reducing costs.

Introduction

The engineering services sector possesses the expertise necessary to enhance a competitive, innovative, and resilient European society. As such, engineering services are a strategic sector for the European Union. The new public procurement legislation should provide public procurers with rules and incentives to promote innovation-friendly public procurement. This can be achieved by distinguishing the services that have an inherent ability to create innovation, such as technical consulting services, architectural services, and IT services. These types of services must receive their own definition as "intellectual services" or be regulated through a separate chapter, to distinguish them from other general services. The award criterion of lowest price should be prohibited for intellectual services, which is not the case in Directive 2014/24/EU on public procurement. As further explained below, innovation is not achieved through price dumping in public procurement, but by harnessing the expertise of consultants. Contracting authorities should therefore increasingly allow consultants to propose solutions by procuring based on functional requirements and evaluating tenders on the quality of proposed solutions, rather than prescribing technical specifications and awarding contracts based on the lowest price. If the European Union aims to foster innovation and competitiveness, this approach must be a central part of its public procurement strategy.

Lowest price kills innovation

Based on an extensive survey conducted by EFCA from late 2024 to early 2025, which included 16 content-related questions and reflected the main concerns of its members, the most common and nearly unanimous complaint was the excessive use of lowest price as the sole award criterion in public procurement. Moreover, even when multiple award criteria are formally applied, procurement outcomes frequently hinge on price, as qualitative factors lack sufficient weight to meaningfully influence the result.

The preference for low rates/prices in tenders and the preference for the lowest bidder must be curtailed as much as possible when procuring intellectual services. Intellectual services contracts should mainly be awarded on qualitative criteria. Intellectual services, i.e. services defined by their knowledge-intensive nature, are also characterised by their problem-solving nature and reliance on specialised expertise. This category refers primarily to architectural and engineering consultancy, where professional judgement, creativity, and responsibility are central to delivering high-quality outcomes. These services should be distinguished from general services in public procurement to enable award criteria that prioritise quality and innovation over lowest price.

Using lowest price as the main criterion discourages investment in innovative solutions, favouring low-cost offerings over tailored, high-value services. It also limits competition by disadvantaging SMEs, which drive innovation, but cannot compete solely on price. A focus on functionality and quality ensures procurement that fosters competitiveness and long-term value creation**.** An emphasis on lowest price may lead to technical specifications that favour existing service providers or standard solutions, thereby effectively excluding innovative competitors. This narrows market entry possibilities and innovation opportunities

significantly. Furthermore, this part aligns with the Letta report, which states that "*the European Commission has championed innovation procurement for a significant time, but overreliance on price as the most important award criterion is probably the most prominent reason for its limited success so far*" (Letta 2024, p. 46).

The use of the lowest price criterion also leads to the use of lowest hourly wages which also incentivises European engineering consulting firms to increasingly rely on foreign, cheaper non-European consultants as subcontractors. While foreign subcontractors are not inherently detrimental, they should not be utilised as a strategy to lower prices in a manner that contravenes the European Union's objectives of enhancing competitiveness and innovation.

Price dumping in the intellectual services sector reduces the sector's overall attractiveness. The low hourly rates do not allow for an appealing salary for young people considering studying to become engineers, which results in a shortage of skilled personnel. This gradually depletes our industry in terms of skilled engineers and innovation. If appropriate compensation levels for recent graduates are undermined by price dumping in public procurement, young individuals will opt for different fields of study. This development is a reality. As reported by the EFCA Barometer Spring 2025 edition, the shortage of personnel continues to be the primary challenge facing the consulting engineering sector (EFCA, *The State of the European Consulting Engineering Sector*, p. 12)[1].

It is also important to emphasise that selecting tenders based on the lowest price or lowest hourly rate does not necessarily result in the lowest overall cost for the public client. This approach often fails to account for life-cycle costs, including operating costs such as maintenance, energy use, or the current urgent need for renovation and modernisation. Moreover, a low hourly rate may incentivise suppliers to compensate by increasing the number of billable hours, ultimately undermining efficiency and cost control.

Despite current provisions, electronic auctions are still applied in the procurement of intellectual services, which is fundamentally inappropriate. These services require qualitative assessment based on professional judgement, not automated ranking based on price. Although Article 35(1) of Directive 2014/24/EU explicitly excludes contracts involving intellectual performance that cannot be ranked automatically, this safeguard has proven insufficient in practice. We therefore call for a clear and categorical prohibition on the use of electronic auctions for intellectual services. The revised directive must unambiguously exclude such procedures where quality, not price, is the determining factor.

Below are the proposals from EFCA to address this problem that undermines European innovation and international competitiveness.

Most Economically Advantageous Tender

To achieve public procurement that genuinely rewards quality and innovation, services related to intellectual services in innovation-intensive sectors need to be distinguished from general services. For the former services, it should therefore be prohibited for the lowest price to be

[1] https://www.efcanet.org/sites/default/files/2025-06/EFCA_Barometer_Spring_2025_final.pdf

the only basis for award, which is not the case in Directive 2014/24/EU on public procurement. However, price may still be part of the assessment, as before, in determining which bid is the most economically advantageous.

EFCA advocates that contracting authorities should be explicitly allowed to require tenderers to demonstrate how functional requirements are met. This promotes innovation instead of requiring all tenderers to demonstrate how technical specifications, already determined by the contracting authority, will be achieved. The aforementioned approach is the most effective means of tapping into the expertise present within engineering firms to foster innovation.

Furthermore, in the event that all tenderers receive the same score when applying the most economically advantageous tender (MEAT) criterion, this situation must still be addressed. In these cases, the procurement effectively becomes a lowest-price procurement, despite the formal application of MEAT. To avoid this outcome, the contracting authority should not be allowed to select the tenderer offering the lowest price. Instead, the authority should be required to award the contract to the tenderer whose price is closest to the median of all submitted prices. This approach provides an incentive for the contracting authority to conduct a more competent quality evaluation, while also discouraging tenderers from gambling on price being the decisive factor by submitting strategically low bids.

Facilitating competition by addressing Abnormally Low Prices

If price still would constitute an acceptable award criterion for intellectual services, the regulation on abnormally low tenders must be made more effective. Related to the need to curtail the excessive use of the lowest price as an award criterion is the way that tenderers can argue that their low price should be admissible, rendering the Directive's regulation on abnormally low prices ineffective.

As things stand, fair competition is being eroded because service providers can significantly undercut prices during the tender process—at the expense of their competitors—only to later litigate concerning remuneration, in an attempt to obtain additional payment. While the provision may appear sound in theory, in practice it rewards service providers who exploit the opportunity to recover their costs during the contract period. Service providers submitting abnormally low tenders should be subject to a greater burden of justification, to be awarded a public contract.

Furthermore, contracting authorities should explicitly be allowed to set minimum price thresholds. Thus, contracting authorities would be able to set adequate levels of remuneration incentivising tenderers to compete on qualifications and innovation, while the contracting authority is given a tool to ensure that quality is delivered at an appropriate price level. This would be a way to avoid the issue of abnormally low bids.

Contracting authorities should also be allowed to use the second lowest price as an award criterion, i.e. awarding the contract to the tenderer with the second lowest bid, which is not the case in Directive 2014/24/EU on public procurement. This reduces the risk of winners' curse and ensures that public contracts are not awarded because of price dumping. This

recommendation is made, as stated in the introductory paragraph of this chapter, only if the lowest price continues to be an allowed criterion for the awarding of intellectual services contracts.

Sustainable Development

Prioritising lowest price in procurement creates barriers to developing sustainable and durable solutions that typically require higher upfront investment but yield greater societal benefits over the longer term. Innovation in public services and infrastructure depends on flexibility and strategic foresight, both of which are challenging under a strict lowest-price regime. The green transition is therefore yet another argument for banning lowest price procurement for intellectual services which are crucial for ensuring environmentally sustainable development within the European Union. This perspective aligns with the Letta Report, which emphasises that "*over relying on the cheapest bid can lead to sacrifices in quality, sustainability, innovation, and social value*," ultimately resulting in "*suboptimal services, long-term inefficiencies, and a failure to address broader societal and environmental goals, such as the maintenance of local ecosystems and critical supply chains in Europe*". The report further states: "*A shift in mindset is necessary, moving away from the lowest price as the sole determinant to a more holistic value-for-money approach, where factors such as quality, life-cycle costs, and broader social and environmental benefits are given equal consideration. For comparison, the European Commission, as a rule, uses a weighted average of 70 % for quality (which may include all aspects mentioned above) and 30 % for the cost*" (Letta 2024, p. 45).

Two Envelope System

EFCA furthermore advocates the 'two envelope system'. This system should be enforced in the new European legislation on public procurement. In the context of public procurement within the European Union, the two envelope system serves as a procedural safeguard to uphold the principles of transparency, non-discrimination, equal treatment, and competition, as enshrined in the EU procurement directives. This system requires that tenderers submit their offers in two separate envelopes (this can be done digitally): one containing the technical proposal and the other the financial offer. These are evaluated in a sequential and independent manner, ensuring that economic operators are assessed solely based on objective criteria relevant to each stage of the procedure. Initially, the contracting authority examines the technical envelope to verify that the tenderers comply with the qualitative requirements and technical specifications set out in the procurement documents. Only those bids that meet these minimum standards proceed to the next stage, where the financial envelope is opened and assessed.

This sequential evaluation process is designed to prevent undue influence of pricing considerations on the technical assessment. It ensures that contracting authorities do not favour bids with lower prices at the expense of quality, nor allow knowledge of pricing to distort the technical scoring process. By clearly separating the technical and financial

evaluations, the two envelope system reinforces the integrity of the procurement process and reduces the risk of arbitrary decision making or manipulation. It supports the EU's overarching objectives of securing value for money, ensuring legal certainty, and fostering trust in public procurement.

Cutting red tape

Supplementing the bid

In case C-336/12, Manova, the EU Court has stated that "*a contracting authority may request the correction or amplification of details of such an application, on a limited and specific basis, so long as that request relates to particulars or information, such as a published balance sheet, which can be objectively shown to pre-date the deadline for applying to take part in the tendering procedure concerned*" (paragraph 39 of the judgment).

We believe that the perspective expressed by the EU Court in the Manova case should be formulated into a general rule in the procurement directives (which it is not today), thereby allowing for the supplementation of a bid that shows deficiencies in relation to the requirements of a specific procurement, when it does not involve changing the offer as such.

Such an arrangement could, for example, allow for the completion of bids that lack the requested copies of certificates, accreditation documents, reference forms, documentation related to requirements for economic and financial standing, etc. This could lead to a significant increase in the number of qualified bidders in public procurements compared to having to reject bids on formal grounds when these shortcomings do not relate to the bidder's actual capability or the quality of the bid. This would also benefit SMEs.

Considering the principle of equal treatment, the ultimate limit for permissible clarifications and supplements should be ensuring that a tenderer does not effectively submit a new bid. For example, it should be acceptable to clarify details about deliverables. Similarly, it should be permissible to provide supplementary contact details for reference projects initially described in the tender, even if such information was omitted initially. The same applies to changing a contact person for a reference if the previously named individual has left their position or is unavailable due to illness.

To avoid favouritism towards tenderers, all clarifications and supplements should be documented by contracting authorities to allow competing tenderers to verify their legality.

References

Under the current directive, references relating to services are limited to the past three years, but older references may be considered in specific cases where necessary to ensure sufficient competition. For works, references up to five years old are permitted. This distinction is unjustified. EFCA therefore recommends either removing all time restrictions on references or, as a minimum, aligning the reference period for services with that for works by allowing references up to five years old — particularly for intellectual services, where relevant experience may span longer timeframes.

European Single Procurement Document

The original idea of the European Single Procurement Document (ESPD) as a kind of 'European Passport' for companies has not materialised. Many tenderers instead perceive the ESPD as a burdensome and complex documentation requirement that is both time-consuming and difficult to complete. It is therefore necessary to reconsider whether the ESPD is fit for purpose, or whether alternative solutions should be explored.

Opportunities for collaboration in consortia

SMEs often find it difficult to participate in large tenders independently. On the one hand, the procurement rules and practices support the possibility of submitting a joint bid via a consortium. On the other hand, in the competition rules the approach to consortia is significantly more restrictive. Unfortunately, this creates a high degree of ambiguity, uncertainty and risk for companies. The consequence is that many companies are reluctant to engage in consortia. This can lead to less effective competition and inhibit innovation, which is not in the interests of companies, contracting entities or society. Hence, the current restrictive approach of competition authorities should be changed to better support opportunities for consortia in public procurement.

Market dialogue and negotiation

Negotiations should be allowed for improving the dialogue between the supplier and the contracting authority. Therefore, the competitive procedure with negotiation and competitive dialogue should always be allowed and have the same status as open and restricted procedures. These procedures are designed in a way that competition is fully secured and therefore no exception is required. This will enable contracting authorities to better leverage the know-how in the sector for intellectual services. Moreover, it is essential to ensure that the consultant receives compensation, as these procedures are expensive, because without adequate compensation for participation the consultant's motivation to engage in these procedures would diminish.

Market dialogue should also be promoted in the form of requests for information and through external referrals. It is an excellent way to create trust and understanding between the parties regarding collaboration and compensation models, as well as the iterative work process that is often needed to achieve innovative solutions.

Digitalisation

As the European Court of Auditors special report *Public procurement in the EU* (28:2023) highlights, the 2014 reform of the EU legal framework on public procurement was intended to simplify and modernise procurement, including through digitalisation, but has failed to deliver key objectives — and continues to impose heavy administrative burdens that may hinder innovation. The current system primarily digitised analogue processes rather than redesigning procurement practices for the digital age. Although electronic procurement was

expected to simplify processes, this has not been fully achieved due to several inherent limitations in the existing framework.

EFCA urges the Commission to find a better way to make procurement systems work together with other administrative systems and data sources on both national and EU level. To gain the full potential of new digital tools, one should rethink how the legislation can support digitalisation with a view to streamlining the process and thereby gaining more quality whilst reducing the administrative burden.

Adopt a Digital-First Legal Framework

EU policymakers must take a clean slate approach, redesigning procurement systems based on contemporary digital capabilities—not on outdated procedural assumptions. The core question should be: *If we were to design EU procurement today, how would we build it from the ground up?*

Transition from notification-based to transaction-based systems

There are international examples that have implemented transaction-based procurement systems which automatically capture data. This is more efficient than relying on manual notices and should be considered. This combined with regulating procurement platforms on the EU level would entail standardised data capture and seamless data flow.

Integrate procurement into broader public administration

Public procurement should not exist in isolation. It must be integrated with other administrative and digital ecosystems to enhance efficiency. The Interoperable Europe Act offers a promising model for cross-border integration. Without structural reform, improved data alone will not lead to better decisions. The EU needs a procurement regime that reflects the digital realities of 2025 and beyond, not the procedural constraints of 2014.

Intellectual Property Rights

While Intellectual Property Rights (IPR) are primarily contractual issues rather than matters for the procurement legislation, their importance warrants attention, e.g. for the competitiveness of the European union and therefore must be addressed.

It is very common that the contracting authority stipulates exclusive rights or ownership of the assignment deliverables which risks leading to:

- potential tenderers refraining from submitting bids,
- the service providers being prevented from delivering the best solutions in the project, and
- development and efficient use of resources being hindered.

A recurring problem encountered by the consultancy sector is that procurement documents include unnecessarily extensive acquisition of rights, unrelated to the purpose or needs of the contracting authority. This results in valuable intellectual property being taken over by public

entities that lack the competence, interest, or ability to utilise such rights through further development or commercialisation. In addition, this requires deferring these obligations to subcontractors, which are often SMEs.

Locking knowledge into projects is not the way forward for intellectual services. Instead, we need conditions that enable and reward investment and commitment to development and innovation. This provides the most beneficial conditions for society and innovation, to the benefit of all actors. The contracting authority should use the deliverables as intended while the consultant can use the experience as a basis for further business and technical development.

Consulting firms continuously build up knowledge and experience from their assignments. This knowledge then forms the foundation for future work. A key reason why clients hire consultants is precisely because they want access to the consultant's expertise and experience. If the client chooses to claim exclusive rights or ownership to the deliverables, the consultant cannot reuse this experience in future projects, which directly inhibits the development of new technologies, processes, and services.

This type of requirement also risks driving up costs unnecessarily, as consultants are forced to constantly reinvent solutions if they are not allowed to reuse previous materials and solutions. Ultimately, it is the clients who bear the costs of this repeated rework.

Clients insisting on extensive acquisition of rights dampens both competition and the potential to access the market's best solutions – after all, why would anyone want to give up these rights just to have them used in one single project? A consultant investing in service development and new technical solutions is unlikely to risk future business opportunities and hard-earned investments in projects where the client demands exclusive or full ownership of part or all the deliverables.

The consultant who is awarded the contract may also be forced to choose an inferior solution just to avoid giving away something developed over years of investment in a single project. Such contract conditions can ultimately prevent the consultant from delivering the best solution to the client, both in terms of quality and costs.

In effect, this kind of acquisition of rights risks undermining companies lacking the expertise to fully assess the implications of transferring Intellectual Property Rights. Meanwhile, firms that understand the consequences may choose not to bid or opt not to use the tools and technical solutions available to them. The result is that the contracting authority misses out on the most relevant tools and solutions that could lead to better project outcomes.

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