

**Joint position of FIEC and EFBWW on
Fighting against Abnormally Low Tenders (ALTs) in public procurement
21/02/2013**

BACKGROUND:

The widespread practice of awarding public contracts on the basis of the “lowest price” and of accepting “Abnormally Low Tenders” (ALTs) are at the source of various forms of unfair competition and social fraud, which are strongly condemned by FIEC and the EFBWW, the EU social partners for the construction industry. Furthermore, in the end ALTs very often result in higher final costs for the client and significantly affect the level of quality provided.

In its proposal of 20/12/2011 for a Directive on public procurement, the Commission therefore proposed to strengthen the framework for handling ALTs by setting 3 cumulative “identification criteria” according to which contracting authorities shall require economic operators to explain the price or costs charged¹. The Commission also proposed to introduce a mandatory rejection of ALTs in case of non-respect of social, labour or environmental laws.

FIEC and the EFBWW supported very much these proposals in the sense that they were aimed at fighting against the award of public contracts to ALTs, which creates unfair competition between those contractors who respect social, labour and environmental rules and provide best value for money, and those who don't and just provide cheap works in poor conditions.

For FIEC and the EFBWW the Commission's proposals could have been further strengthened by narrowing the % of identification proposed². In addition, they share the view that as soon as a tender appears to be abnormally low, and whatever the reason is, contracting authorities shall be obliged to request explanations. This is a matter of coherency and efficiency. Moreover, the same mandatory rejection should be applied to ALTs based on illegal State aid: it is neither coherent, nor acceptable that ALTs because of illegal State Aid be not treated in the same way as ALTs because of the non-respect of social, labour and environmental laws. Finally, these rules must apply to bids submitted by both EU or non-EU companies.

PROBLEM => MISSED OPPORTUNITY:

However, in spite of all reasonable arguments in favour of stricter provisions in this regard, both the European Parliament and the Council dropped the “identification criteria” proposed by the Commission and did not extend the mandatory rejection of ALTs to illegal State aid cases. This is not acceptable, as it does not improve the existing situation where contracting authorities have all discretion for defining what an ALT is and which has proven being very unsatisfactory and leading to a large number of Court cases. In the Council's version, contracting authorities are even no longer obliged to require economic operators to explain the price or costs proposed in their tender when this one appears to be abnormally low in relations to the works!

¹ (a) the price or cost charged is more than 50% lower than the average price or costs of the remaining tenders; (b) the price or cost charged is more than 20% lower than the price or costs of the second lowest tender; (c) at least five tenders have been submitted.

² In its position of 25/06/2012, FIEC advocated for even stricter identification criteria: (a) the price or cost charged is more than **20%** lower than the average price or costs of the remaining tenders; **or** (b) the price or cost charged is more than 20% lower than the price or costs of the second lowest tender. With no reference to a specific minimum number of tenders.

SOLUTION:

The large number of cases before the European Court of Justice and the Public Contracts Appeals Board clearly show that the above mentioned concerns are fully justified.

FIEC and the EFBWW therefore call the Council and the European Parliament for strengthening the provisions aimed at fighting against the award of public contracts to abnormally low tenders.

This is possible through applying strict mandatory predefined criteria based on mathematic rules for identifying what is considered to be an abnormally low tender and by systematically rejecting the identified abnormally low tenders, whatever the underlying reasons are (i.e. infringement to social, labour, environmental, State aid rules, etc.).

<p><i>The EFBWW is the European trade Union Federation for the construction, wood, furniture and forestry sector. The EFBWW represents blue and white collar workers from 72 national trade unions in 31 countries</i></p>	<p><i>FIEC is the European Construction Industry Federation, representing via its 33 national Member Federations in 29 countries (27 EU & EFTA, Croatia and Turkey) construction enterprises of all sizes, i.e. craftsmen, small and medium-sized enterprises as well as “global players”, carrying out all forms of building and civil engineering activities.</i></p>
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