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Kortenberg, 6 December 2012.

Comments of the AIE on the EC proposal for a Directive on public procurement Directive (COM(2011) 896 final)

The AIE – the European Association of electrical contracting companies - represents through its 21 national member associations about 175,000 specialist contracting companies employing about 1,000,000 workers in the EU-countries and beyond.

AIE member companies have an in-depth knowledge and high-quality expert skills to carry out all kind of electrical engineering and infrastructure works (high, medium and low voltage) and installing all type of electrical and electronic equipment and systems a.o. (public) lighting, control and automation systems, access control and alarm systems, ICT as well as energy management systems and electrical building equipment.

The overall turnover of the sector is approx. 75 billion Euros.

The AIE represents companies from all sizes, the big majors and a majority of small and medium size enterprises.

The AIE acknowledges this is a most important piece of legislation. These comments summarise the principal concerns of the AIE. The Association would be pleased to discuss these and wider aspects of the draft.

In view of the imminent possible adoption by the European Parliament's IMCO Committee of the revision of public procurement legislation, the AIE would like to draw your attention to the following crucial topics.

First: the AIE would like to recall the importance of the main aim of the Directive which is to create a legal framework for public authorities which is simple and allows easy access for SME's. Some of the proposed amendments are, however, too detailed and risk creating procedural complexity.

In order to both be easily implemented by local authorities and to stimulate the access and participation of SME's, the provisions and rules of the Directive should remain simple and flexible.

In particular the following items are important:

▪ **Choice of procedure (art.24) :** negotiated procedure

The AIE believes it is a problem that contracting authorities as a general rule may apply the negotiated procedure. We think that this procedure lacks transparency and may lead to concerns about equal treatment.

We would however favour for sustainable high-tech building projects an open and transparent pre-procurement dialogue process between the public contracting authorities and possible tenderers, prior to the procedure, to stimulate innovation and creative solutions. The AIE refers to a European funded project called INNOBUILD, implementing this procedure in practice.

▪ **Contract award criteria (art.54 and 66)**

- The AIE is strongly in favor of adopting the ***economically most advantageous tender (MEAT)*** as the rule rather than lowest price for all project contracts, so long as the procedure is transparent and neutral. Therefore it is of the utmost importance that the weighting of the different criteria must be known in advance, in the announcement of the tender and before the selection, to all potential tenders.

The MEAT approach will indeed enhance innovation and trigger creative and sustainable solutions taking into account e.g. the area of ambient assisted living.

We do, however, believe that the purchase of standard products could still be based on "lowest price", provided that strict quality criteria were applied and all precautions taken against counterfeiting. In the interests of efficiency and simplicity, the option of lowest price could be retained as a high exception, used only for very simple and small contracts and subject to a thorough motivation.

For all projects and other major contracts, however, the 'economically most advantageous' tender should apply.

- In case the procedure is on the basis of the 'economically most advantageous' tender, the company's continuous ***investment in training*** for its workforce should be considered. Training is essential to ensure the sustainability of the industry, especially in the technical building services industry. To bridge the lack of young and skilled people in the sector has been identified at European level by all stakeholders as a top priority and is high on the agenda in the sector in each country. Therefore it is of importance that companies do engage and invest in training. One knows that better and regularly trained people deliver better quality.

Differences between companies who do invest in training and those who don't obviously do affect the overhead costs, the competence and skills of the workforce within a company.

Member States should therefore be strongly recommended to stimulate the public authorities to require an engagement of the company in training,

proportionate to the size of the company to avoid increasing the burden on very small companies.

- Concerning the possibility given to public purchasers to base their award decisions on **life-cycle costs** of the products, services or works to be purchased, the AIE believes that the inclusion of the LCC analysis definitely will increase quality and sustainability. We strongly agree that it is important to take life cycle costs into account. They must however be easily compared/benchmarked according to a common methodology and in a transparent manner.
 - We do also have major concerns about art. 66 – specification of the weighting attached to the subheadings after submission of tenders. We agree with the position of FIEC in this matter.
- **Strategic societal aspects and subcontracting (art.71)**
- The AIE supports BUSINESSEUROPE’s position that the public procurement Directive must under no circumstances include provisions that would contradict or interfere with the provisions of Directive 96/71/EC on the posting of workers as this would undermine the latter and result in significant legal uncertainty and confusion. We don’t believe that mixing up legal rules and employment issues would be wise in this area.
 - Regarding **subcontracting** the AIE does not favour a limitation of subcontractors as this would certainly not help SME’s to participate and access contracts in the framework of public procurement. The legislation covers very many different type of contracts, from small to big ones and most different type of works or services. Each of these sectors has organized its proper value chain.

However, though we believe that the contractual relationship with subcontractors is regulated by private contract law and should therefore not be regulated by directives of public procurement, the AIE believes that direct payment of subcontractors might be a good solution to avoid abusive positions of the main contractor towards subcontractors while withholding payment.

To encounter this specific problem faced by SME’s and to secure payment of subcontractors in case of bankruptcy, Member States should ensure according to the national laws and regulations, to secure the money for the subcontractors and allow preferential payment of subcontractors in strict circumstances.

The AIE would not support chain responsibility which can have disastrous consequences and because contractual responsibility between the contractors does exist but would rather support a severe check of the immediate subcontractor regarding his compliance of social and fiscal obligations.

In the framework of the creation of quality labels, the AIE would strongly suggest and support the efforts and investment in **training** of companies to be considered as an added value as mentioned supra. In this field sector trade associations can provide information and support at national level.

- **Reducing document requirements** (art.59 and 63)
Reducing document and administrative burden for the companies is good as well as to have a European procurement Passport, as long as it is linked to a common European database, easily accessible by both public authorities and the contractors. The AIE doesn't see how otherwise it could work.

- **SME access.**
 - Division of contracts into lots (art.44)
The AIE believes that the division into lots would have obvious benefits towards SME's for their participation and access to public procurement contracts whilst avoiding a wide range of subcontractors. However in practice, the decision should be made on a case-by-case basis and be left to the public authority.

The AIE would however strongly support the contracting authority to ***subdivide the contract into lots where suitable, according to size and techniques.***

We suggest as in the Netherlands, the prohibition of clusters but to introduce as general rule the subdivision into small lots to allow access to SME's and in special technical lots for the technical equipment of the building. The exception on this general rule needs to be motivated.

Abnormally low tenders (art.69) -ALT

The public authority should have the right to exclude the ALT, however the 3 cumulative conditions seem unrealistic in practice.

We support the amendment introduced which lowers condition a) to 20% and would suggest under condition c) the submission of 3 tenders instead of 5.

Brussels, November 2012.