EUROPEAN INTERNATIONAL CONTRACTORS

EUROPEAN CONSTRUCTION INDUSTRY FEDERATION

Position Paper FEBRUARY 2020

FIEC-EIC Position on the International Procurement Instrument

FIEC (European Construction Industry Federation) represents via its 32 national Member Federations in 28 countries (25 EU, Norway, Ukraine 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. Construction accounts for 9% of the GDP and 6,4% of the total employment in the EU.

EIC (European International Contractors) has as its members construction industry trade associations from fifteen European countries and represents the interests of the European construction industry in all questions related to its international construction activities. In 2017, the international turnover of companies associated with EIC's Member Federations amounted to more than 175 billion €.

The following points are based on a joint policy paper by FIEC, the European Dredging Association (EuDA) and the European International Contractors (EIC) which dates from 17/09/2019 and joint voting recommendations to the INTA Committee issued on 21/06/2018.

The proposal for an International Procurement Instrument (IPI) presented by the European Commission in 2016 is one of the possible tools to deal with unfair competition in the EU public procurement market by companies coming from a third country, which is neither party to the WTO Government Procurement Agreement (GPA) nor to a bilateral agreement with the EU on public procurement. The most recent case in Sweden illustrates the necessity to act: A contract for preparatory works for the metro in Stockholm has been awarded to the Swedish subsidiary of a Chinese State-owned enterprise (SOE) offering prices which were strikingly below those proposed by the other European competitors.

However, the IPI as proposed by the European Commission is neither suitable to achieve its main objective, namely reciprocity in access to public procurement markets, nor to establish a level playing field on the internal market. Conversely, its legal interaction with Article 25 of Directive 2014/24/EU is not clear and, therefore, it might de facto open the EU public procurement market for third country bidders.

In order to make the IPI an acceptable tool, the following main issues of concerns must be addressed:

1. **<u>The proposed limitation of restrictive measures to price penalties will be ineffective:</u>**

The proposed text says that :
Article 8(1): *Tenders more than 50 % of the total value of which is made of goods and/or services originating in a third country, may be subject to a price adjustment measure where the third country concerned adopts or maintains restrictive and/or discriminatory procurement measures or practices. Price adjustment measures shall only apply to contracts with an estimated value equal to or above EUR 5.000.000 exclusive of value-added tax.*

Article 8(2) *The price adjustment measure shall specify the penalty of up to 20% to be calculated on the price of the tenders concerned.*

Our position:

- Price penalties of whatever percentage will not restrict the market access for SOEs. Looking at recent cases and the extremely low prices submitted, the tenders of these entities would nevertheless be more "competitive" than those of the European companies even with the application of such a price penalty. This would lead to a de facto secured access for non-GPA members without providing them with an incentive to join the GPA. **It is therefore important to ensure that the possibility of excluding tenders from third countries which apply themselves restrictive measures is included in the IPI.**
- In our view, **sanctions provided for in the IPI should focus on offers from SOEs, which are owned 100% or even to a smaller share by the third country, and the foreign subsidiaries and affiliated companies** of such companies. The reason for linking the IPI sanctions regime to third country SOEs is that such entities and/or their foreign subsidiaries and affiliated companies can be associated with adverse effects on global trade, in particular in the form of state subsidies and dumping prices. In the construction sector, which is particularly sensitive to public procurement regimes, we observe that the bids of third country SOEs are consistently found to be abnormally low, both within the Internal Market and at international level.
- To better cover European subsidiaries of third country SOEs, the restrictive measures contained in the IPI should apply to legal entities established in or controlled by a legal entity based in the third country at stake. Hence, to determine to which entities restrictive measures will apply, an ownership criterion should apply.

2. The provisions of the IPI must not undermine the existing Public Procurement legislation:

The proposed text says that:

Article 1(5): *Member States and their contracting authorities and contracting entities shall not apply restrictive measures in respect of third country economic operators, goods and services beyond those provided for in this Regulation*.

Our position:

- Currently, companies coming from third countries which are neither party to the GPA nor to a bilateral agreement with the EU on public procurement, do not have a secured access to the EU public procurement market. Thus, national contracting authorities can exclude such tenders on the sole reason that the country of origin is not party of the aforementioned agreements. As currently worded, the proposed Article 1(5) would apparently contradict this possibility. **Article 1 Paragraph 5 should thus be deleted**.
- To give clear guidance to national contracting authorities, the IPI should make reference to the recent European Commission's Guidance on the participation of third country bidders and goods in the EU procurement market (C(2019) 5494 final) and contain a provision clarifying that companies coming from third countries which are neither party to the GPA nor to a bilateral agreement with the EU on public procurement do not have a secured access to the EU public procurement market.

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3. **<u>Exceptions for contracting authorities would aggravate the negative effects of the proposal:</u>**

The proposed text says that:
Article 12(1): *Contracting authorities and contracting entities may decide not to apply the price adjustment measures with respect to a procurement or a concession procedure if: (…) the application of the measure would lead to a disproportionate increase in the price or costs of the contract.*

<u>Our position:</u>

- As pointed out previously, price adjustment measures are unsuitable to assure a fair competition on the EU public procurement market. The possibility of being exempt from the application of such measures, would even further weaken the IPI. The proposed provision would give too much room for interpretation, so that even price adjustment measures would not be applied in the end. As we observe the tendency that contacting authorities award contracts based on the price only, it is probable that they would opt for this provision to keep their costs at a low level. This would lead to significant distortions of competition with SOEs not being subject to any restrictive measures at all. We therefore advocate for **deleting this provision**.

Finally, it is important to know that on 23 October 2019, China introduced to the parties to the GPA a revised market access offer in the context of its negotiations to join the agreement. We call for this offer to be published on the WTO website in order to be analysed by stakeholders. It should be kept in mind that past Chinese offers to join the agreement proved to be insufficient due to a limited coverage of services mainly. However, if this offer is accepted and if effectively China would join the GPA, a future IPI would not be (only partially) applicable to Chinese companies as the IPI is only addressed to countries not being member of an international agreement. Given the current status of the WTO and the difficulties in enforcing its legal provisions, the EU would have in practice no tool to deal with unfair competition from China. Against this background, **a future IPI should clarify that countries that are party to an international agreement, but retain market reservations towards European companies, will be subject to restrictive measures.**

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