

EUROPEAN UNION UPDATE

Alliancing and the Law

ECI LOBBIES THE EC ON CONTRACT RULES IN THE PUBLIC & UTILITIES SECTORS

The Partnering in Europe Taskforce has identified significant concerns about the impact of the public and utilities sector procurement directives on alliancing. ECI has written to the EC to support some recent initiatives which would clarify the application of existing laws to facilitate partnering approaches. A precis of my letter to M. Pierre Delsaux of Directorate General XV is set out below.

ECI was formed in 1990 by a group of major clients, contractors and specialists from the construction industry who are dedicated to raising the industry's performance in Europe and equipping it to succeed in the global marketplace through greater competitiveness.

One of our main interests has been in partnering, a procurement technique that has been widely adopted in the US and UK in the past decade, particularly in the process sectors. It aims to replace the adversarialism of traditional contracting with more positive traits such as aligned objectives, teamwork and trust. Research has shown that it generally produces better project outcomes in terms of safety, quality, duration and cost. In some cases the results are remarkable.

ECI is probably the foremost centre in Europe for the study and promotion of partnering and alliancing. Starting with *Partnering - Contracting Without Conflict* which effectively introduced partnering to the UK, we have since produced *Partnering In The Public Sector - A Toolkit* and are currently working on partnering in social housing and a large-scale work to introduce partnering to the European mainland. Accordingly, we feel well qualified to comment on the proposed amendments as they affect partnering.

As part of its work on partnering in Europe, ECI has considered real and perceived barriers to its adoption. This has identified significant concerns about the impact of the public and utilities sector procurement directives.

In particular, the directives are perceived as a block to the formation of partnering relationships beyond a single project. Published research shows that longer-term relationships deliver much greater benefits in terms of time, cost, quality and safety than single project alliances.

We are aware of the initiatives to enhance flexibility and clarify the application of the existing law, in particular:

- the Commission's draft interpretive paper on concessions under Community law on public contracts
- the draft proposals for amendments to 92/50/EEC, 93/36/EEC and 93/37/EEC on framework contracts
- the EU committee initial discussion paper on competitive dialogue.

We very much welcome your commitment to enhanced flexibility. Our thoughts on how this can best facilitate alliancing are set out below.

The interpretative paper on concessions

We consider that there is a distinction to be drawn between forms of concession for which award is subject to the procurement Directives, and those (including some public-private partnerships) which are outside their scope although they are, of course, subject to the principles of the Treaty. If the Treaty requires competitive procurement in every case (which we do not believe is so), this would be an

additional barrier to forming longer-term partnering relationships between public and private sectors and therefore a barrier to improvements in cost, time, quality, safety and innovation in the public sector.

Proposals for Framework Contracts

Framework agreements used in the utilities sector are a helpful basis for partnering. Indeed, similar agreements frequently feature in private sector transactions which the Directives do not control.

We believe the new proposals will facilitate partnering for certain types of construction such as maintenance. However, they should also provide arrangements for more significant projects (such as the construction of several schools) to be tendered among contractors with whom partnering relationships had already been established, supported by framework contracts.

Paper on competitive dialogue

We strongly support the proposal to allow dialogue at all stages during, and after, contract award. Guidelines should be issued with specific examples to illustrate the issues that can arise at each stage. Although the benefits of alliancing are greater on complex, long-term projects they are not confined to such.

Our concern is therefore that the scope of the new procedure should be sufficiently wide (and the guidance on its use so expressed) to genuinely facilitate the application of partnering and alliancing to all projects which might benefit from it.

Manfred Schlösser

ECI NEWS

The European Construction Institute was formed in 1990 and brings together clients, contractors and consultants with the vision of creating and maintaining a strong, globally competitive European construction industry. In doing so the ECI aims to champion a culture motivated to raising performance standards through:

- alignment of objectives throughout the project value chain
- identification and application of world's best practices
- establishing a respected and influential network of competent organisations.

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