

## EFCA Committee on Project Financing

### Activity Report 2007-2008

#### Committee Chair

Panos Panagopoulos has served as acting Chair since October 2005.

In response to the invitation for a new Chair, OICE had proposed the nomination of Marco Villa, economist, and Chief Financial Officer Tecnip Italy.

Following on a one-year transition period to accommodate to the committee's topics, he would fill the Chairmanship as from May 2008.

Unfortunately, Marco Villa is unavailable to chair future committee meetings, and as a consequence he stepped down as committee Chair.

#### Terms of Reference

At its January 2008 meeting, the committee discussed its future agenda, tasks and expected outputs.

All committee initiatives reflect and respond to the national associations' priorities and needs.

The committee considered to elaborate EFCA policies to advise the European Commission on rules governing public private partnerships (PPPs) and to provide information, guidance and promotional tools, which the member associations may use to educate both clients and firms.

The committee will conclude its review of the Terms of Reference (ToR) at the May 2008 meeting.

The ToR will be submitted for approval to the Board of Directors in September 2008.

#### EC communication on the application of public procurement law to institutionalised PPPs

Early 2006, the Commission (DG MARKT) invited EFCA to explain the industry's views on Institutionalised PPPs (IPPPs).

In December 2006, EFCA submitted its policy paper on the set-up of IPPPs to the European Commission.

At the end of June 2007, the EC invited EFCA comments on its Working Paper on possible contents of the EC communication on the application of public procurement law to IPPPs.

In its response, EFCA stated that public procurement rules are applicable to IPPPs and that appropriate consideration should be given to the financial and technical dimension. DG MARKT reacted positively to the EFCA input.

EFCA's major concern relates to the Community rules governing the establishment of IPPPs (i.e. the selection of the private partner).

On 5 February 2008, the EC adopted the 'Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP)'.  
The EC interpretative communication reflects the EFCA views, expressed and raised in manifold contributions.

The guidance explains the Community rules that apply to the choice of private partners for an institutionalised public private partnership (IPPP).

The guidance expresses the Commission's view that under Community law one tendering procedure is sufficient when an IPPP is set up. Community law thus does not require double tendering (one for selecting the private partner to the IPPP and another one for awarding public contracts or concessions to the public private partnership) when an IPPP is established.

The committee will analyse and review the impacts of the actual content of the EC Communication on the engineering consultancy industry at its May 2008 meeting.

#### Competitive dialogue: EFCA policy

The 2004 Public Procurement Directive introduced a new procedure to allow a 'dialogue' between awarding authorities and tenderers to determine contract conditions.

Both awarding authorities and service providers are now examining how the new procedure - the competitive dialogue - is to follow the principles of equal treatment, non-discrimination and transparency, and be workable.

Mid January 2006, the European Commission issued its (non-official) explanatory note on the competitive dialogue to informally assist the member states in the implementation of the Directive.

Both the EFCA Project Financing and the Public Procurement committees formulated the industry's concerns about the use of the procedure in varying project delivery methods, ranging from a traditional procurement process over design-build approaches to public-private partnership schemes, and they examined risks and pitfalls for engineering consultants.

EFCA's major concerns relate to the particularly high costs that the procedure entails for all participants, fair remuneration for all participants in the various phases of the dialogue, and protection of the engineering consultants' role in providing innovation and creative ideas.

In close consultation with the Public Procurement committee, the Project Financing committee developed a Position Paper on the competitive dialogue.

The paper, which was issued in November 2007, is taking into consideration that the use of the procedure is a factual business development, which poses a challenge to our industry.

It presents a balanced view as it advises the national associations to consider the EFCA reservations with regard to the use of the procedure.

The policy paper calls for caution in the introduction of the procedure in national legislation, argues for a commensurate compensation of all participants and the development of EC guidelines, in particular with regard to a structured transfer of ideas to a balanced extent.

The fourth recommendation relates to the involvement of qualified participants and awarding authorities.

Furthermore, the paper explicitly states that awarding authorities cannot use the competitive dialogue as an opportunity for receiving free advice and studies that allow them to specify project specifications.

#### Protection of confidentiality of engineering design: concerns with regard to the 'competitive dialogue'

The industry's concerns relate to the contracting authority's free use of the professionals' expertise and the danger of cherry picking. The European Commission on the other hand, places confidence in the correct application of the procedure.

In March 2007, EFCA requested legal advice on possible statutory protection of engineering design in competitive dialogue procedures.

In its 2007-2008 meetings, the committee exchanged views on various aspects of the matter:

- impacts of a potential disclosure of innovative ideas on the industry's readiness to bring innovative ideas to the client;
- the clients' wish for a flexible procedure, allowing a dialogue in the course of the procedure.  
The competitive dialogue is aimed at permitting the client to choose between the proposed solutions. The competitive dialogue procedure is different from the technical dialogue. The latter entails the risk of exclusion of the firm from participation in the subsequent award procedure;
- the client's statutory right to use any element of the proposed solution or tender (conflict between consent to procedural rules versus protection of confidential information);
- the firm's option for a pragmatic approach in the market place (i.e. business reality versus the federation's case for ideal business conditions).

From its debate, the committee concluded that the Directive provisions do not adequately ensure the confidentiality of the proposed solutions.

Maximising assurance of confidentiality in the procurement process is primarily a contractual matter.

The committee agreed to advise consultants, pursuant to their right to be informed, to review the final designs submitted by the winning candidate in order to ensure that their confidentiality has indeed been observed.

#### EFCA dialogue with the contractors

In cooperation with the Public Procurement committee, the Project Financing committee prepared a debate with FIEC/EIC representatives.

FIEC director general Ulrich Paetzold and EIC representative Roger Fiszelson participated in the September 2007 Committee meeting.

The debate was aimed at exploring possible common positions on PPPs and Design/Build, based on existing parallel views and positions of the professional federations.

### *Institutionalised Public-Private Partnerships (IPPPs)*

The federations discussed the EC Working Paper on possible contents of the EC communication on the application of public procurement law to IPPPs.

Topics included:

- conditions for the application of EU public procurement rules and the principles of the EC Treaty;
- the procedure for the selection of the private partner to the IPPP and the award for public contracts or concessions to the public private partnership (single or double tendering);
- possible changes to the initial scope of the IPPP and conditions for adjustments to certain changes in the economic, legal or technical environment.

### *Competitive dialogue*

Concurrent concerns about the competitive dialogue procedure relate to the contracting authority's potential abuse of the procedure for the definition of project solutions that could be determined by conventional procedures (i.e. the free use of the professionals' expertise), the danger of 'cherry picking' and the change of project requirements and specifications during the dialogue phase.

EFCA particularly welcomed the contractors' assent in principle of the view that ideas and solutions brought forward by the participants during the dialogue must be considered a part of the total project cost. Consequently, the engineering consultants' work for the development and adjustment of proposed solutions should be properly compensated.

As a result of the debate, FIEC agreed to examine the EFCA position and guidance on the competitive dialogue in order to pro-actively address common concerns.

### EFCA guidance 'Engineering PPP projects in Europe'

At the January 2008 committee meeting, Panos Panagopoulos presented the first draft of the EFCA guidance.

The document is designed to convey the EFCA views to EC officials, to support the national associations in their representational work, and to help the firms to understand opportunities and pitfalls of PPP projects.

It draws on the report 'Award Procedures for Public-Private Partnerships (PPPs) for project delivery' and other material (e.g. allocation of risk) that was discussed by the committee to date.

### 8 June 2007 EFCA Conference

Jan Bosschem made a presentation on 'Public Private Partnerships – Opportunity or total loss of control' at the annual EFCA conference.

### FIDIC Policy on PFI/PPPs

At the June 2007 meeting, Enrico Vink presented the draft 'FIDIC Policy on PFI/PPPs' and requested the committee to identify possible contentious elements.

The EFCA Project Financing committee examined the draft FIDIC policy paper and submitted its suggestions for improvement to FIDIC.

### Committee library

Topical background documents and reference material on 'PPPs' are available in the EFCA extranet (see section 'Project Financing committee').