

EIM position on the directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors.

While welcoming the objectives of transparency and efficiency that are driving the revision of the Utilities Directive(2004/17) , Rail European Infrastructure Managers (EIM) urge the European institutions to take due consideration of the particular character of railway infrastructure managers.

EIM has five outstanding concerns with the proposals:

1. More complex, time-consuming contractual procedures are in contradiction with the EU's own objectives for our sector.

European railway infrastructure urgently needs to be developed and modernised to cater to the challenges of both the climate (driving down emissions by 60%) and the economy. In the Transport White Paper, the EC has set the target of tripling the length of the railway network in all Member States, the ultimate goal being to ensure that most medium distance passenger journeys in 2050 take place by rail. More than €500 billion of investment will be necessary across the EU to complete the Trans-European transport networks, the rail network above all, by 2050. Against this backdrop, lengthier contractual procedures, in addition to lengthier project consultations, assessments, authorisation and funding procedures represent a particularly highly sensitive issue and are, to say the very least, in contradiction with the objectives set for our sector by the EU.

2. Exchanges between buyers and suppliers are vital for purchases of high complexity.

These exchanges are vital to ensuring that the goals of controlling and reducing railway costs can be met but this cannot possibly occur in a context of lengthy, complex and inflexible procedures.

Procurement of dedicated supplies such as safety equipment (switchgear, signalling systems) requires close cooperation with industry to obtain the requisite product quality and reliability and meet the highest possible safety standards. This can only be achieved by a process of prior prototyping, testing and type approval to ensure that the resulting products are suitable for network operation.

3. The railway infrastructure managers need to be able to negotiate on equal terms with their suppliers.

The railway infrastructure managers should be able to adopt a reactive approach in their dealings with international-scale industrial suppliers, given the nature and the sums involved in their contracts. But, in practice, the terms are far from equal, since the procedures they have to apply when letting contracts force them to go to enormous extents to ensure that their procedures are legally watertight, which is **hardly compatible with efficient and economically viable procurement.**

4. The resulting extra costs are once again in contradiction with the objectives of the EU lawmakers, who in Directive 2012/34, insist that railway infrastructure managers shall improve their economic performance in the interests of their operator customers.
5. All this excessive red-tape simply goes to serve the interests of the already well-entrenched oligopolies and effectively blocks the way for companies in other Member States trying to break into new markets. In addition, our experience with regard to litigation over contract award procedures shows that procedures are often declared void for procedural reasons, the origin of which lies in involuntary errors ultimately without effect on contract award.

PROPOSALS

- ⇒ As and when the railway infrastructure managers are deemed to fall into the scope of Article 4, they should be explicitly considered as contracting entities, even though they may also meet the criteria for bodies governed by public law as specified in Article 2 (4).

“Article 8

1. [..]

2. [...]

3. **This directive shall apply to railway infrastructure managers falling into the scope of article 4 paragraph 1. When infrastructure managers meet criteria provided for in both article 4 paragraph 1 and article 2 paragraphs 4 and 5, they should qualify as contracting entities**”.

- ⇒ The new “Utilities” Directive shall deliver greater FLEXIBILITY and in particular:
- As to framework agreements (Article 45), allow for 8 year maximum duration, any shorter interval being unreasonably inflexible;
 - As to “substantial” modifications of contracts during their term (Article 82.4), apply the alternative thresholds of Article 12 OR 15% of the initial value of the contract, their cumulative application virtually making any modification substantial.
 - Moreover article 82.4.a should be clarified as to confirm the exclusion of the modifications related to the situations provided for in the same article.
“~~4~~ 4 bis A modification shall not be considered to be substantial within the meaning of ~~paragraph 1~~ article 82 paragraph 4 where the scope of the contract evolves pursuant to: [...]
In all above-mentioned cases paragraph 4 shall not apply”



Contact persons:

Ana Malheiro,

Manager of Legal and Regulatory Affairs
European Rail Infrastructure Managers

Ana.MALHEIRO@eimrail.org

Claire Pardo

Deputy Director, European affairs
Réseau ferré de France

Claire.Pardo@rff.fr