



Photo: Ferrovial

EU DESIGN-BUILD AND OPERATE SCHEMES

October 2016

POLICY CONTEXT

The traditional method of implementing an infrastructure project financed by the European Commission under external action rules is for a Contracting Authority to appoint a consultant for carrying out the detailed design of the project and preparing the bidding documents and to launch subsequently a works tender. The respective Practical Guide to contract procedures for European Union external action (PRAG) stipulates that the tenders must be placed in a single sealed envelope and that the contract shall be awarded to the tenderer submitting the lowest price classified as “technically compliant” during the technical evaluation. The European Commission is currently studying the option to expand the procurement options under the PRAG to Design-Build and Operate (DBO) schemes in order to maximise the impact and value added of EC funds earmarked for EU external actions.

EIC POSITION

Already with the publication of its “EIC Blue Book on Sustainable Procurement” in November 2004, EIC highlighted that the traditional design-bid-build method may be a reliable form of procurement but entails also potential disadvantages. For instance, the know-how of contractors play no role in the design stage although early involvement of such expertise can significantly contribute to the efficiency of the entire process. Furthermore, the traditional method does not provide a mechanism to draw on the private sector’s capabilities to maintain and operate infrastructure facilities. Accordingly, EIC is very supportive of the a paradigm shift towards DBO schemes, which could lead to a more efficient project management and thus deliver more value-for-money for the EU itself, its partner countries and the companies involved in infrastructure delivery.

EIC recommends to award the project on the basis of the “economically most advantageous tender” to be established by using a “two-envelope system” which guarantees that the technical proposals are evaluated first with the effect that the technical solutions that are most attractive to the Contracting Authority can be selected without any bias from the knowledge of the price of that solution. If the financial proposal does not correspond with the available budget, the financial envelope relating to the technical solution deemed “second best” is opened and so forth until a selection is made.



STATUS QUO

In summer 2014, DG DEVCO commissioned a **study concerning the application of DBO methods to EC-financed infrastructure projects in developing countries**. It established **significant advantages of Design-Build and DBO contracts**, when compared to the conventional design-bid-build approach. In this context, DG DEVCO will modify the EU's Practical Guide to Contract Procedures for EU External Actions (PRAG) accordingly.

As regards, **tender awards for Design-Build and Operate projects**, DG DEVCO is currently considering **three options**: either an award based on the technically compliant tender with the lowest price, or, where a technical scoring is foreseen, an award base on the most economically advantageous tender that is technically compliant with the best price-quality ratio, or, where the award is only on the basis of lowest aggregate of costs, an award based on the technically compliant tender with the lowest aggregate of costs.

EIC submitted its comments at various stages of the EU study and, in face-to-face meetings, the EU Commission concurred with EIC's call for a **balanced risk allocation also under Design-Build and Operate schemes**. In particular, the Commission assured EIC that it does not intend to deviate from the conventional risk allocation as laid down in the present version of the General Conditions for Works Contracts financed by the EDF. However, after having scrutinised the draft General Contract Conditions for Design-Build works under the PRAG, **EIC expressed its reservations with regard to the version under review**, as EIC had expected that the Commission, like e.g. the FIDIC 1999 "Yellow Book", is guided by the well-established and time-honoured principle that any standard form of construction contract should be fair and balanced to both parties. However, EIC has identified **a number of articles in the General Conditions for Design-Build with an excessive risk transfer to the Contractor**.

EIC also misses **references to internationally recognised environmental and social standards and policies**, such as ISO 14001, OSHAS 18001 and the ILO core labour standards, in the PRAG in order to establish coherence between the EU PRAG and the EU's general development principles and values in the context of sustainability development and protection of human rights. Whereas the French and German bilateral financing agencies, AFD and KfW, have already incorporated sustainability criteria into their procurement procedures for civil works projects, the PRAG still lacks respective provisions.

WHAT'S NEXT?

EIC has urged the EU Commission to provide for a fair and equitable contractual basis for the execution of Design-Build projects and has reiterated its readiness to liaise with the legal experts in the Commission.

DID YOU KNOW ...

EIC has published a specific "EIC Contractor's Guide" to the FIDIC standard form of contract for Design, Build Operate Projects ("Gold Book"). Whilst we , we respect the attempt of FIDIC to combine the Design-Build and the Operation Service periods in one comprehensive contract with on-going responsibilities and obligations for both Parties, EIC observes that there are important sector specifics and even sub-sector peculiarities. EIC questions whether a "one size fits all approach" will do justice to such differences and also whether the insurance industry will be ready to offer the corresponding products.