

EUROPEAN ECONOMIC AREA  
STANDING COMMITTEE  
OF THE EFTA STATES

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**SUBCOMMITTEE I ON THE FREE MOVEMENT OF GOODS**

**EEA EFTA COMMENTS ON THE GREEN PAPER ON PUBLIC-PRIVATE  
PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND  
CONCESSIONS (COM(2004) 327 FINAL)**

**I EXECUTIVE SUMMARY**

The EEA EFTA States welcome the public consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions. The issues that are raised in the Green Paper are of great importance and the EEA EFTA States provide some of their comments in this paper. The EEA EFTA Comments concern the definition of Public-Private Partnership contracts (II), the transposition of the competitive dialogue procedure into national law (III), the Community legal framework (IV), the desirability of Community initiative (V) and “step-in” clauses (VI).

**II DEFINITION OF PUBLIC-PRIVATE PARTNERSHIP CONTRACTS**

The EEA EFTA States do not have a common legal definition of Public-Private Partnership (PPP) contracts in their national legislation, but have based the PPP on characteristics similar to those described in the Green Paper item 1.1.2. Since the concept of PPP contracts is based upon a plan to constantly improve and find more efficient ways to handle public tasks, the legal framework needs to allow sufficient flexibility with respect to the content and nature of the contracts. Because of this, the EEA EFTA States are of the opinion that a common legal definition of PPP contracts should not be developed. A fixed legal definition may exclude similar contracts that should be dealt with in the same legal framework as a typical PPP. However, the EEA EFTA States welcome further discussions, examples and clarifications concerning the characteristics of PPP contracts.

**III TRANSPOSITION OF THE COMPETITIVE DIALOGUE PROCEDURE INTO NATIONAL LAW**

*In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?*

At this point in time, no contracting authority has legal or practical experience with respect to the new "competitive dialogue" procedure, so predictions are hard to make. However, provided that the interpretation of "particularly complex contracts" is subject to reasonably broad understanding, the EEA EFTA States expect the introduction of this procedure to meet the need for dialogue on complex contracts in general and on several types of PPP contracts. In fact, the experience from the EEA EFTA States indicates that when contracting authorities have awarded PPP contracts, they have conducted the negotiated procedure in a manner similar to that described in the new procedure. This new procedure is, therefore, welcomed and should be regarded as a positive step towards meeting the needs of several types of PPP contracts. However, the competitive dialogue may not fit all types of PPP contracts. The EEA EFTA States still regard the negotiated procedure and current legal framework for work and service concessions to be appropriate for certain PPP contracts. In this respect, the EEA EFTA States welcome further discussions, examples and clarifications concerning the type of contract that may follow the new "competitive dialogue" procedure.

#### **IV THE COMMUNITY LEGAL FRAMEWORK**

*Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?*

With regards to concessions, fundamental principles in the Treaty seem to provide sufficient legal procedures for interested parties. The governments of the EEA EFTA States have not received any complaints concerning minimum requirements (non-discrimination, predictability and public announcement) from potential participants. However, it is possible that the current legal framework for remedies and enforcement in this area do not provide adequate legal basis when authorities fail to respect the principles.

#### **V THE DESIRABILITY OF COMMUNITY INITIATIVE**

*In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?*

Reference is made to the previous paragraph. The EEA EFTA States do not believe that a Community legislative initiative to regulate the procedure for the award of public works concessions is necessary.

For service concessions or concessions in general, a clear EU-wide definition, demarcation and explanation of the term "concession" needs to be established before it is possible to consider the effect and need of such procedures. For example, the real impact on national regulation has proven difficult to identify, since it remains unclear what the term "concessions" covers. Furthermore, as the Commission points out, some important sectors are already subject to specific sector legislation (ex. EEC No 2408/92 and No 3577/92). This makes the need for general rules less imperative.

## VI “STEP-IN” CLAUSES

*Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?*

"Step-in" clauses do represent a challenge with respect to transparency and equality of treatment. However, it is often necessary to include such clauses in order to achieve proper and reasonable financing for the project. When "step-in" clauses are initiated, it is usually as a result of serious financial or management problems that constitute a possible breach of the PPP contract. Under such circumstances, the main objective must be to secure investments for all parties and bring the project back on track. In this context, it is imperative that the Procurement directives allow such capital investments to be handled without obstacles, so that appropriate business solutions can be found. It is the EEA EFTA States' opinion that the risk of financial parties misusing "step-in" clauses, or basing their decisions on non-economical considerations, must be regarded as low.