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Brussels, 31st August 2018

Dear Commissioners,

Following up on the contacts and correspondence FIEC had with Commissioner Bulc since September 2015 regarding European contractors' difficulties on the Polish market, in particular with the unfair conditions used for CEF financed projects, we are contacting you today to ask for your help with an issue linked to the previous one.

In fact, this time our concern is the absence, in Polish public procurement, of a system allowing to deal in a fair and balanced manner with unforeseeable cost increases of key construction materials.

This situation presents existential danger not only for some of the construction companies concerned, but also for the timely and correct execution of the corresponding public works projects of which practically all are considered as being of European interest in recent policy papers published by the Commission¹.

For this reason, we would be grateful if you could encourage the Polish government, with a Commission letter,

1. to ensure the necessary actions are done rapidly and without bureaucratic delay
2. to explain them that they are at liberty, without being in breach of EU procurement directives (which appear to be interpreted narrowly by the Polish government), to accept one of the emergency solutions aimed at ensuring the completion of contracts in execution when such measures are necessary.

¹Commission proposal for 2021-2028 MFF, namely European public goods, COM (2018) 98, p.4.

Examples of cost increase in the construction field

(comparing last quarter 2016 with first quarter 2017):

1. materials: 30%;
2. subcontracts: 20%;
3. labour: 50%.

Such costs' increase has been formally pointed out both by the Polish Chamber of Commerce for Roads (OIGD) and the Polish Association of Construction Employers (PZPB) to the Ministry of Infrastructure.

In the same period, the demand for water and sewage's supply systems have increased by 100%, which puts additional burden on prices.

Absence of price adaptation

Admittedly, Polish public procurement law provides a price adjustment mechanism², but it is limited, without regard to actual market developments, to an increase of 1%. On top, it is construed in a way that it cannot work and the data available at the national statistical office do not represent real market developments.

Consequently, this unforeseeable risk is put, in Polish procurement law, on the shoulders of contractors alone, whereas it is sound business practice that such risks are part of the clients' risks, in order to avoid the integration of important risk margins in the contract sum.

In Poland, there is some ongoing work on these issues, but as long as there is no reliable database with the real developments of material prices, not much change can be expected.

We would be very grateful if you could also contribute to the cost of the establishment of such a database.

The absence, in Polish legislation, of workable methods to compensate such costs, as well as the potential risk that this might occur in any other EU member state, puts the completion of important EU financed projects at serious risk.

In this context, it is interesting to know that, in Poland, some contractors recently refused to sign new contracts awarded to them, because of these unsolved problems.

Public procurement principles

The current EU public procurement directives specifically mention, for the first time in their "history", and allow such price revision clauses under certain conditions (see Directive 2014/24, Art.72). As this fact is regularly contested by the Polish contracting authorities who claim that the EU directives forbid any changes to the existing procedures and contracts, it would be helpful if the Commission could explain to them the meaning of these rules published in the directives.

²according to Vice-Minister Marek Chodkiewicz, in an interview published 5/7/2018
(https://budownictwo.wnp.pl/ministerstwo-infrastruktury-nie-panikuje-ws-drozejacych-materialow-budowlanych,326464_1_0_1.html)

We are afraid that without a change in attitude of the Polish contracting authorities the successful completion of infrastructure projects of general European interest and financed by the European taxpayers, is in danger. Consequently, we consider that the Commission has both a legal and a political/ moral obligation to try to solve this problematic situation.

Synallagma

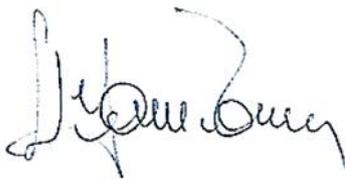
Without a correct price adaptation system, the contractual synallagma no longer exists. In this framework, we would expect the Commission to help contracting authorities to professionalise their procedures and take into consideration the constructive proposals submitted by contractors, evaluating what should be done without hiding behind the erroneous idea that EU law does not allow any changes to existing public procurement contracts.

Europhilia v. Europhobia

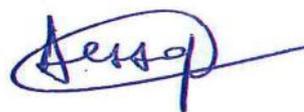
Ultimately, such Commission activity would also be an important step towards the improvement in the functioning of the European Union, an element which we consider necessary and useful in the light of recent political events of an anti-European nature. Good quality infrastructure has always appealed to business and citizens of the EU, whereas the current delay in maintenance of existing and building of new infrastructure is heavily criticised in many countries.

We are at your disposal to explain our thoughts in more detail to you and your colleagues. Please do not hesitate to contact us.

Kind regards



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