

# ACE POLICY POSITION 2016

## QUALITY-BASED PUBLIC PROCUREMENT





## ■ Highlights

- The Procurement Directives<sup>1</sup> provide a framework for procuring services that offers a range of instruments and procedures – not all of which are suitable for architectural services. They allow for transposition and application, at national level, to take account of the specific nature of architectural services.
- ACE has produced a set of Recommendations that focus on the most relevant decisions to be taken during the transposition of the new Directives and the procurement procedure itself.
- ACE's overall priorities are:
  - to facilitate and strongly promote the widest possible access of smaller architectural firms to public contracts;
  - to provide for procedures which are clearly focused on quality with the application of most economically advantageous tender for awarding of contracts.

## ■ ACE position

Following the adoption of the modernised Public Procurement Directives in February 2014, Member States had to amend national legislation by April 2016. The legislator has recognised a lack of real competition on account of the misuse of selection criteria and an undue focus on price instead of quality. The Directive provides a range of options and tools to solve these problems. Member States have an opportunity to amend legislation to the maximum benefit of citizens, economic operators and contracting authorities and to create a basis for more competition and better results.

### • Better access for SMEs

#### • **Accessibility of public contracts – Article 58 (selection criteria)**

Contracting authorities may only impose certain requirements on economic operators for participation. They must be limited to those that are appropriate to ensure that a service provider has the legal and financial capacities and technical abilities to perform the contract – and they must be proportionate to the subject matter of the contract. Generally, selection criteria should never be designed with the sole objective of reducing the number of participants.

Generally, intellectual services such as architects' services, should be chosen on the basis of the best idea/concept. ACE believes that the criteria for choosing an architect should be based on performance and not quantitative selection criteria, like turnover or number of employees. While it might be helpful for securing competition in the construction sector that economic operators be required to have a minimum yearly turnover of at least twice the estimated contract value, this is totally different in the sector of architects' and engineering services. Turnover requirements for architects must be substantially lower. Even when turnover requirements are set at the threshold value for application of the EU Public Procurement Directive (€207,000), this excludes 90% of practices from competition, thereby losing a valuable source of innovation. The situation becomes even worse when the contracting authority avails of the option to double this value, which would lead to an exclusion of around 95% of architects' offices in the EU. This is why selection criteria should be restricted to professional qualifications and the absolute minimum of additional criteria to guarantee genuine competition.

#### • **Definition of the Project – article 46 (Division of contracts into lots)**

The Directive requires contracting authorities to provide reasons for not sub-dividing contracts into lots (e.g. architects' services, engineering services and construction services). Member States could implement this article by rendering it obligatory to award contracts in the form of separate lots, which would be better adapted to the needs of SMEs, in compliance with the *European Code of Best Practice Facilitating Access by SMEs to Public Procurement Contracts*<sup>2</sup>.

Although the Directive leaves the decision to award joint or separate contracts for design and execution of works to the contracting authority, the design and execution of works should be procured separately, not only to promote SME's but also to allow the architect to act as an independent trustee and produce better economic results.

<sup>1</sup> Directive 2014/24/EU of 26 February 2014 on public procurement

<sup>2</sup> European Commission's Staff Working Document of 25 June 2008, *European Code of Best Practice Facilitating Access by SMEs to Public Procurement Contracts*



- **Quality-based procurement procedures**

- **Choice of procedures**

The Directives provides for a range of procedures (open, restricted, negotiated, innovation partnerships) not all of which are well suited to procurement of architectural services.

ACE has concluded that the preferred way of procuring architectural services is the architectural design contest as a quality-based and project orientated procedure, followed by the competitive procedure with negotiation without prior publication.

This provides for best quality because as it engages the market, uses qualified expertise (juries) and optimises the tender in subsequent negotiation. Anonymity avoids corruption or nepotism – and the legislator has sought to optimise the result of procurement in architectural services by opening the negotiated procedure without prior publication for public service contracts, where the contract concerned follows a design contest (cf. article 32, para. 4). Even in the case of Public Private Partnerships, the design contest can provide optimum results in terms of quality and economic advantages. Alternatively, a competitive procedure with negotiation may be used. Procedures requiring participants to submit a tender (especially open procedures, competitive dialogue and innovation partnership) are not suited to architectural services.

- **Procurement instruments and tools**

Electronic auctions are only suitable where contract specifications can be established with precision. Indeed, the Directive states that certain service contracts having intellectual performance as their subject matter (e.g. the design of works) may not be the object of electronic auctions.

Generally, framework agreements are not suitable for architectural services because they determine the terms governing contracts to be awarded for a given period with regard to price; they restrict access to single contracts and prevent competition for each and every building.

Dynamic purchasing systems are designed for commonly used purchases the characteristics of which are widely available on the market. Consequently, the application of these instruments would not be useful or appropriate for the procurement of architectural services.

- **Quality-based awarding decisions**

- **Contract award criteria – Article 67**

The Directives provide that contracting authorities shall base the award of public contracts on the Most Economically Advantageous Tender, which is identified on the basis of the price or cost, using a cost-effectiveness approach such as Life-Cycle Costing and may include the best price-quality ratio assessed on the basis of qualitative, environmental and/or social aspects linked to the subject matter of the contract.

Member States may also provide that contracting authorities may not use price/cost only as the sole award criterion or restrict their use.

Award criteria for architectural services must be based on quality (including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics). Price as the sole criterion should be excluded.

New awarding criteria under the Directive, e.g. the organisation, qualification and experience of staff involved, must not be misused to exclude small firms or young professionals from the market. Groups of economic operators (including temporary associations) must be encouraged to participate in order to comply with exceptionally strict requirements.

As the awarding of contracts for architectural services must focus on the quality of the service and the technical offer, not the price, the architectural design competition is one of the best means to provide solutions which are beneficial for the client; it not only demonstrates the skills of the profession, but also emphasises quality based awarding criteria.

ACE has developed a set of ten essential rules that comply with European procurement law, and a set of Recommendations on how to organise and manage the procedure.



## ■ **Background**

The modernised Public Procurement Directive was adopted in February 2014. Transposition into national law (by April 2016) offers the chance to create more competition and better results. Member States have an opportunity to amend legislation to the maximum benefit of citizens, economic operators and contracting authorities. The legislator has recognised that there is a real lack of competition as a result of the mis-application of selection criteria e.g. turnover, number of employees and a focus on price instead of quality. ACE has developed best practice recommendations for the procurement of architectural services, including design competitions.

## ■ **Annexes**

- *European Public Procurement Legislation and Architects' Services – Recommendations and Guidelines for Transposition into National Law – April 2014*
- *Recommendations for Design Contests – April 2014*

# OTHER ACE POLICY POSITIONS 2016

- THE ROLE OF ARCHITECTURE IN ENERGY EFFICIENT CONSTRUCTION
- URBAN REGENERATION: RENOVATING THE EXISTING BUILDING STOCK
- THE IMPORTANCE OF LIFE-LONG LEARNING AND THE ROLE OF THE PROFESSION IN DELIVERING CONTINUING PROFESSIONAL DEVELOPMENT
- DISSEMINATION OF ARCHITECTURAL CULTURE
- OPTIMISING PROFESSIONAL MOBILITY
- REGULATION OF ARCHITECTS
- SUPPORT FOR THE NEGOTIATION OF BINDING MUTUAL RECOGNITION AGREEMENTS

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