



Practice of the Profession

Proposal for a Directive of the European Parliament and the Council on Public Procurement

ACE Draft Amendments

Final

The full text of the proposal is available at the following address:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0896:FIN:EN:PDF>

Article 2 **Definitions**

Article 2

Article 2 paragraph 24 (new)

Suggested Amendment

(24) Intellectual services are services which require a high-level qualification and which are carried out in the interest of the client and the public.

Justification

Need for clarification. The Definition is based on Recital (43) of the Professional Qualifications Directive and ECJ Decision C-267/99 (39).

Article 5 **Methods for calculating the estimated value of procurement**

Commission proposal

Suggested Amendment

Article 5 item 6

With regard to public works, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities provided that they are necessary for executing the works.

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With regard to public works, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities provided that they are necessary for executing the works.

With regard to public services contracts, calculation of the estimated value to be taken into consideration does not include works and supplies. Planning and conception of buildings/constructions can be divided into architectural and engineering services.

Justification

Under Article 1 of the draft Directive, paragraph 2, sub-paragraph 2, “an entirety of works, supplies and/or services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.”

Whereas (4) explains that (...) “the concept of single procurement encompasses all supplies, works and services needed to carry out a particular project, for instance a works project or an entirety of works, supplies and/or services. Indications for the existence of one single project can for instance consist in overall prior planning and conception by the contracting authority, the fact that the different elements purchased fulfill a single economic and technical function or that they are otherwise logically interlinked and carried out in a narrow time frame.”

Article 5 prescribes the methods for calculating the estimated value of procurement. Under paragraph 2, “the choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A single procurement shall therefore not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.” (...)

Unless it is not intended to reduce the thresholds for architectural and engineering services substantially – which would certainly conflict with the Subsidiarity Principle – it has to be clarified that planning services can be divided into architectural and engineering services, as in accordance with the current interpretation of Directives 2004/17/EC and 2004/18/EC. Under the proposed new wording of the Directive it is not even clear whether construction works have to be considered, which would mean to reduce the threshold to around 10 per cent of the current thresholds. In this case, it would furthermore not be clear which thresholds apply – the thresholds for services or for works because in the case of buildings and constructions planning services and works always fulfill a single economic and technical function (see Whereas (4)). The latter interpretation – to always apply the thresholds for works – would have the opposite effect and more than double the current thresholds which is certainly not intended as well.

Article 24 **Choice of procedures** **(Design contests)**

Commission proposal

Suggested Amendment

Article 24 para 1

In awarding their public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 30, a call for competition has been published in accordance with this Directive.

Article 24 para 1(Addendum)

In awarding their public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 30, a call for competition has been published in accordance with this Directive. **In the case of intellectual services in design and construction, contracting authorities use the Competitive procedure with negotiation and/or the Design contest.**

Justification

ACE suggests including the design contest as appropriate together with standard negotiated procedures for the procurement of architectural services in the directive. Experience throughout Europe has shown that architectural projects procured through design contests are fully project orientated and can guarantee the best quality and cost-effectiveness. So with a view to the principles of economy, cost-effectiveness and utility that are mandatory for public procuring authorities in most countries it would be important to establish the design contest, followed by a negotiated procedure with the winner as a standard procurement procedure for architectural services projects of significant public interest.

Article 24
Choice of procedures

Commission proposal

Suggested Amendment

Article 24.1 d)

d) In the event of irregular or unacceptable tenders within the meaning of Article 30(2)(a) in response to an open or restricted procedure.

Proposed insertion of new Article 24.1 d)

In the case of intellectual services, such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures.

d) becomes e) – re-numbering

e) becomes f) – re-numbering

Justification

In awarding their public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with the Directive, provided that, without prejudice to Article 30, a call for competition has been published in accordance with the Directive. Under Article 30, the cases justifying use of the negotiated procedure with prior publication of a contract notice have been modified in a way which make it unclear whether intellectual services like architectural and engineering services open up the scope of the negotiated procedure. This necessary clarification has been removed from the text and must be taken back from the current Directives into the text of the Draft Directive.

Article 30

Use of the negotiated procedure without prior publication

Article 30 paragraph 4

The negotiated procedure without prior publication may be foreseen for public service contracts, where the contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the applicable rules, to the winner or one of the winners of the design contest; in the latter case, all winners must be invited to participate in the negotiations.

Article 30 paragraph 4 (Addendum)

The negotiated procedure without prior publication may be foreseen for public service contracts, where the contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the applicable rules, to the winner or one of the winners of the design contest; in the latter case, all winners must be invited to participate in the negotiations.

In the case of architectural/engineering services, contracting authorities are encouraged to hold a Design contest appropriate to the scale and significance of the project in the public interest.

CHAPTER II

Techniques and instruments for electronic and aggregated procurement

Commission proposal

Suggested Amendment

Before Article 31 insert

The provisions of this Chapter do not apply to intellectual services

Justification

There is a need for further incentives aimed at disaggregation in the field of intellectual services. Especially centralized procurement as well as the use of framework agreements for architectural services and bundling of smaller projects effectively excludes SME's and young professionals from the market. This has detrimental effects on competition and the aim to widen the market and create jobs. Exploitation of innovative ideas is widely restricted, which will further threaten the competitiveness of the EU.

Article 33

Electronic Auctions

Commission proposal

Article 33, paragraph 1

Contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

For this purpose, contracting authorities shall use a repetitive electronic process (electronic auction), which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

Suggested Amendment

Article 33, paragraph 1, sub-paragraph 3 (new)

Contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

For this purpose, contracting authorities shall use a repetitive electronic process (electronic auction), which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

Electronic Auctions may be used when tender specifications can be established with precision. Consequently, certain service contracts having as their subject-matter intellectual services such as the design of works, shall not be the object of electronic auctions

Justification

In Article 33 paragraph 2 it is prescribed that "in open, restricted or competitive procedures with negotiation, the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the tender specifications can be established with precision." The proposed clarification was removed from the text (former Whereas 14 of Directive 2004/18/EC), but is necessary to prevent inappropriate use of the electronic auction.

Article 56 **Selection Criteria**

Commission proposal

Article 56 para 3, sub-para 2

The minimum yearly turnover shall not exceed three times the estimated contract value, except in duly justified circumstances relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate such exceptional circumstances in the procurement documents.

Suggested Amendment

Article 56 para 3, sub-para 2

~~The minimum yearly turnover shall not exceed three times the estimated contract value, except in duly justified circumstances relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate such exceptional circumstances in the procurement documents.~~
Conditions for participation in procedures concerning intellectual services should be restricted to non-quantitative criteria.

Justification

ACE would like to express strong concerns that the – certainly well intentioned - regulation of Art. 56 paragraph 3, sub-paragraph 2 limiting the minimum turnover requirement to three times the estimated contract value could in many areas of professional services become a huge problem for SMEs. Although the situation is of course different in the different EU Member States it can altogether be said that for architectural projects this limit is much too high.

Furthermore, turnover is assessed annually whilst construction contracts in particular may typically run for 3 to 4 years. When a limit on annual turnover is set directly against a contract's value at a multiple of 3, it practically means that over a 4- year contract period this amounts to a multiple of 12 in relation to the annually earned professional fee.

Such a regulation would most probably lead to the negative effect that even those procuring authorities that now demand an appropriate and project related lower turnover will start to orientate themselves on this new limit. With regard to the many architectural design contests throughout Europe this would completely limit the competition as the access to and pre-qualification for such contracts would practically exclude a huge number of architects, who are otherwise perfectly capable of undertaking projects of that size.

This fact can be supported with statistical data about the yearly turnover in architectural firms in the EU: The ACE study "The Architectural Profession in Europe 2010" has demonstrated that two thirds of architectural practices are small or micro- enterprises as one- person firms and a further 29 per cent employ between 2 and 5 architectural staff. Only 2 per cent of architectural firms employ more than 10 architectural staff. Applying the proposed turnover requirements would practically exclude more than 90 per cent of service providers- architects in the EU altogether (see annexed excerpt of the Study).

The ACE is of the opinion that it is not possible to find a limit that is equally appropriate for all procurement procedures and all areas of professional services. Therefore the ACE strongly suggests deleting the limitation in order to avoid negative effects.

If the legislator persists in the opinion that there should be a quantification laid down in the directive, the required minimum of yearly turnover for architectural services providers should not exceed the estimated contract value.

More emphasis should be put on qualitative selection criteria based on the widely proclaimed principles

of sustainable development. The Directive shall encourage procuring authorities – in procedures in which this is appropriate – to use rather qualitative than quantitative selection criteria. In architectural design contests, for example, the number of participants can be cut down in the first stage of a two-stage competition, on the basis of an outline solution, instead of setting barriers such as turnover, number of permanent staff etc.

This approach would not only improve the participation of SMEs in procurement procedures but would also enhance quality-based decisions where necessary and appropriate. Therefore, an additional point on qualitative selection criteria especially in view of design contests should be added in article 56.

Article 66 **Contract award criteria**

Commission proposal

Article 66 para 2

The most economically advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the public contract in questions such as: (a) quality, including technical merit, aesthetic and functional characteristic, accessibility, design for all users, environmental characteristics and innovative character; etc

Suggested Amendment

Article 66 para 2

The most economically advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. ~~i.e. These criteria shall include, in addition to the price or costs referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the public contract in questions such as:~~
(a) response to the brief in terms of quality, accessibility and design for all users, level of innovation and technical merit, life-cycle cost/value, aesthetic and functional characteristics contextual and environmental attributes and other characteristics; etc

Justification

Article 66 paragraph 2 of the directive proposal of 20 December 2011 provides that the economically most advantageous tender (MEAT) is defined based on criteria related to the subject of the public tendering. Those criteria include “in addition to the price or the costs other criteria related to the subject of public tendering concerned, i.e.: quality (...)”.

This formulation differs from the existing one in article 53 of the directive 2004/18 of 31 March 2004 which cites the example of a certain number of possible criteria (including quality, price, technical value, aesthetical features etc....) without mandatory price criterion.

The general understanding in the EU Member States is that contracting authorities are free to choose among the awarding criteria listed in the definition of the economically most advantageous tender. For example, the Belgian State council (Conseil d'Etat belge) has always considered that both the European directives and the Belgian legislation give free choice to the adjudicating powers for the allocation criteria in the call for tender procedure or the negotiated procedure with advertising (e.g. project competition). The adjudicating powers do not have to retain the "price" criterion as an allocation criterion, of course outside the case of adjudication (State council no. 158.316 of 4 May 2006 and no. 192.128 of 1 April

2009). The French State council has a similar jurisprudence (French State council (Conseil d'Etat français), 28 April 2008, Municipality of Toulouse, no. 280.197).

The project text (art. 66.2) actually considers the price criterion as primary (i.e. for architecture service tenders, fees). That therefore is a step backwards compared with former directives. Furthermore, this means that the system established by some Belgian adjudicative powers (and advised by various authorities: French community, Brussels Master architect), where the fees are fixed as standard in the documents of the tender, would no longer be possible.

As everyone knows, the price (of fees) appears to be the worst allocation criterion, because it privileges that which plans the least time dedicated to study of the project whereas the interest of the adjudicative power is not to choose the cheapest architect but to appoint the one who will bring the most added value and achieve the work within the best 'overall quality/overall cost' ratio. The detrimental effects of awarding contracts on the basis of the cheapest price have thus stimulated legal provisions under which, as a general obligation, it is prescribed to only use the MEAT for the awarding of contracts (see for example the German public procurement legislation, "Gesetz gegen Wettbewerbsbeschränkungen", § 97 (5)).

Article 66 **Contract award criteria**

Commission proposal **Article 66 para 3**

Member States may provide that the award of certain types of contract shall be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.

Suggested Amendment **Article 66 para 3**

Member States ~~may~~ shall provide that the award of ~~certain~~ types of contract ~~other than those for highly standardised works, supplies or services~~ shall be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.

Justification

The European Commission's approach to substitute the wording „lowest price“ with „lowest cost“ in Art. 66 paragraph 1. (a) is positive but as the procuring authority is unfortunately still completely free to base the award on cost or price it will have no big effect.

The ACE would like to stress that for architectural services - being intellectual services which are non-standardized services - only decisions based on lowest cost / economically most advantageous tender can be appropriate.

Therefore the ACE asks to go a step further in the wording of Art 66 and make the use of the economically most advantageous tender approach mandatory for intellectual services and prohibit the use of lowest price as the sole criterion. The current and future importance of sustainability criteria, from our point of view, override any provision where the price is the only criterion for awarding contracts except in very specific and well –justified exemptions.

ACE welcomes the fact that life-cycle costs have found the way into the awarding criteria. But, the chosen approach (see Art. 66, 67) is far too sophisticated to be applied in practice for the time being. The consideration of life-cycle costs should rather be defined as a basic principle, applied also in the initial stages of design processes.

ANNEX XIV
Means of proof of selection criteria

Commission proposal
Part II: Technical ability

A (ii) "(...) Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account"

Suggested Amendment
Part II: Technical ability

A (ii) "(...) Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account. **A longer period is for instance plausible in the selection process of an architect/engineer**

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