

**European Public Procurement Legislation and Architects' Services:  
Recommendations and Guidelines for Transposition into National Law**

**2014**

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## I. Introduction

The Architects' Council of Europe (ACE) is an organisation, based in Brussels, whose Membership consists of the professional representative organisations of the European Union Member States plus Switzerland and Norway. There are also several national associations / chambers of Architects from third countries with observer status.

ACE represents the interests of about 550,000 architects in Europe. Public Procurement is, from the point of view of the profession, an important tool to open up the EU market for architects' services and should set a legal framework which promotes the quality of the built environment by ensuring genuine competition and providing for best value for money.

In February 2014, the legislative package simplifying and modernising the Public Procurement Directives and adapting them to modern administrative needs was adopted by the EU's Council of Ministers following approval by the European Parliament one month earlier. The amended directives will lead to substantial changes in national public procurement law and its provisions have to be transposed into national law within two years.

Member States should use this opportunity to amend national public procurement legislation to the maximum benefit of citizens, economic operators and contracting authorities. The ACE regards supporting this goal, especially in the area of procurement of architects' services, as an important objective. This best practice paper contains recommendations for the transposition of the new directives into national law in the field of architects' services.

Firstly, the guidelines contain recommendations on best practice set out chronologically in relation to the procurement procedure. Secondly, recommendations are given on the application of European provisions for design contests (*architects' competitions* in colloquial language) under Title III, Chapter II of the Directive 2014/24/EU of the European Parliament and of the Council on public procurement repealing Directive 2004/18/EC.

This paper also evaluates the practice of public procurement in Member States. Particular attention has been paid to good practice as well as malpractice in procurement procedures at national level. Such experiences have to be taken into account so as to eliminate procurement practices which undermine the principles of transparency, competition and non-discrimination. ACE would welcome the extensive use of these guidelines in the Member States.

Attention has to be drawn to the fact that the Legislator, especially the European Parliament and the European Commission, has recognized the most important problems in procuring architects' services: the lack of real competition as a result of the misuse of selection criteria as for example, turnover and number of employees and, last but not least, to focus the awarding decision on price and not on quality. The transposition of the new directives is an opportunity to create a basis for more competition and better

results. The publication of these recommendations aims at helping to open up the market for young professionals and small offices as well as to shift from the one-dimensional price perspective to a holistic one which includes factors such as sustainability and environment, in general, and quality and life-cycle costs, in particular.

These recommendations were adopted by the ACE General Assembly, representing professional Architects' organisations in the Member States of the European Union, on 24 April 2014, in Padua, Italy

## **II. Recommendations for the transposition of the Legislative Package into national law / Best Practice Guidelines for the application of EU public procurement law at national level**

The Procurement Directives offer a framework for procuring a wide range of services, supplies, goods and works. They necessarily contain a wide range of instruments and procedures, some of which are not suitable for the procurement of architects' services. But, the directives allow for a transposition of the Directives at national level which takes into account the specific nature of architects' services.

Therefore, the ACE recommends a tailor-made transposition and application of the Directive, taking into account the particularities of architects' services. The recommendations focus on the most relevant decisions to be taken during the procurement procedure and they follow the chronology of the process.

### **1. Definition of the project**

**Legal framework (most relevant provisions):**

#### **Article 2 (Definitions)**

Under Article 2, point 9 of Directive 2014/24/EU 'public service contracts' means public contracts having as their object the provision of services other than those referred to in point 6 (in this point, 'public works contracts' are defined as public contracts having as their object (among others) the execution, or both the design and execution, of a work).

#### **Article 46 (Division of contracts into lots)**

Under Article 46 paragraph 1, contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots. Contracting authorities shall, except in respect of contracts whose division has been made mandatory pursuant to paragraph 4 of this Article, provide an indication of the main reasons for their decision not to subdivide into lots, which shall be included in the procurement documents or the individual report referred to in Article 84.

Under paragraph 4, Member States may implement the second subparagraph of paragraph 1 by rendering it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for EU law.

#### **ACE Recommendations**

- *Planning is the basis for the subsequent execution of the works. To guarantee a performance not orientated on pure financial benefit of the contractor, the architect must be put into a position to act as an independent trustee of the contracting authority. Thus, design and execution of work should be procured separately.*
- *The brief should be developed on the basis of the result of a design contest.*

#### **Explanations**

The definition of the project is the first step in the procurement procedure. It is a critical phase, especially as the contracting authority has to make initial decisions which will be of considerable importance for the overall procurement process. The project is defined in the brief either using the contracting authorities' own resources or with the assistance of experts (architects). The quality of the brief is vital for the results of the procedure in functional and economic terms.

A crucial moment in setting the course for the project is the decision on whether to award design and execution of work separately or jointly. The European legislator has decided to leave the decision for joint or separate contract awards to the contracting authority (see Whereas 8: "However, in view of the diversity of public works contracts, contracting authorities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. This Directive is not intended to prescribe either joint or separate contract awards." On the other hand, the legislator has taken the decision to set the division of contracts into lots as a principle. Under Article 46, there is an obligation to provide an indication of the main reasons for their decision not to subdivide into lots. In Whereas 78 it is clearly stated that "where the contracting authority decides that it would not be appropriate to divide the contract into lots, the individual report or the procurement documents should contain an indication of the main reasons for the contracting authority's choice. Such reasons could for instance be that the contracting authority finds that such division could risk restricting competition, or risk rendering the execution of the contract excessively technically difficult or expensive, or that the need to coordinate the different contractors for the lots could seriously risk undermining the proper execution of the contract."

Furthermore, it is stated that "public procurement should be adapted to the needs of SMEs. Contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled 'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts', providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation. To that end and to enhance competition, contracting authorities should in particular be encouraged to divide large contracts into lots. Such division could be done on a quantitative basis, making the size of the individual contracts better correspond to the capacity of SMEs, or on a qualitative basis, in accordance with the different trades and specializations involved, to adapt the content of the individual contracts more closely to the specialized sectors of SMEs or in accordance with different subsequent project phases."

In addition to that, the legislator has permitted that Member States may even render it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law.

ACE strongly supports this SME-friendly approach and underlines its' view that the separation of the design and execution of works is the best option. In this context, it should be noted that this recommendation is also based on several research projects in the Member States, including several extensive studies undertaken by the courts of auditors which have shown that, in general, a separate procurement of planning services and works guarantees better economic results<sup>1</sup>.

The design contest (see detailed explanations under 3 and 5), followed by a negotiated procedure, is a tool which has proved itself to be most beneficial for the quality of public construction works.

## **2. Accessibility of public contracts – selection criteria**

**Legal framework (most relevant provisions):**

### **Article 58 (Selection criteria)**

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<sup>1</sup> See for example „Finanzamt Ludwigburg – Umbau und Neubau“, published by the Ministry of Finance, Baden-Württemberg Juni 1999; Hochbau des Bundes Wirtschaftlichkeit bei Baumaßnahmen, Empfehlungen für das wirtschaftliche Planen und Ausführen von Hochbaumaßnahmen des Bundes, Hrsg.;; Die Präsidentin des Bundesrechnungshofes (Federal Court of Auditors) als Bundesbeauftragte für Wirtschaftlichkeit in der Verwaltung, Bonn März 2001, S 63; Jahresbericht 2000 des Landesrechnungshofes Rheinland-Pfalz (Court of Auditors) Tz. 26

Under Article 58, paragraph 1, selection criteria may relate to:

- (a) suitability to pursue the professional activity;
- (b) economic and financial standing;
- (c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities, and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject-matter of the contract.

Under paragraph 3, with regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance.

The minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value, except in duly justified cases such as (those) relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate the main reasons for such a requirement in the procurement documents or the individual report referred to in Article 84.

The ratio, for instance, between assets and liabilities may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents. Such methods and criteria shall be transparent, objective and non-discriminatory.

### **ACE Recommendations**

- *Intellectual services, such as architects' services, should be chosen on the basis of the best idea and concept; quantitative criteria like turnover and number of employees are no appropriate means of selection.*
- *In general, selection criteria should be restricted to the professional qualification and the absolute minimum of additional criteria to guarantee genuine competition.*

### **Explanations**

As a general principle, the criteria for choosing an architect defined by the contracting authority should be based on the performance and not on (often mainly quantitative) selection criteria. Particularly complex projects may, on occasion, require the use of specific selection criteria (specific experience, references and additional special qualifications such as acoustic engineering etc.) which exclude generally qualified economic operators wishing to participate in a procedure on their own. In such cases, the contracting authority should accept the participation of groups of economic operators.

Selection criteria should never be designed with the sole objective of reducing the number of participants. In a considerable number of official Journal Notices, ACE has noted the abuse of selection criteria listed by the European directives. For example, candidates or tenderers may be asked to prove their suitability by providing information on turnover during the past three fiscal years, the number of the persons employed on average each year for the past three years, the technical personnel intended for managerial and supervisory functions etc. Such criteria generally do not relate to the quality of the service which can be expected of a candidate in the field of architects' services. Consequently, such criteria should not be used as a technical means of limiting the number of participants. The number of potential participants must be seen as a valuable resource for our economy which offers significant potential for innovative

ideas and concepts. The 2012 ACE Sector Study<sup>2</sup> has revealed that a turnover requirement in the amount of the threshold value for the application of the EU Public Procurement Directive (207.000 Euro) excludes around 90% of EU practices from competition. This is totally contrary to the need of promoting quality and innovation in the interest of the contacting authority and the society. Moreover, this is absolutely inconsistent with the necessity to promote SME's.

ACE wishes to point out that the text of the proposed Directive does not contradict national legislation which restricts possibilities for the misuse of selection criteria as a means of reducing the number of participants in a specific procedure, causing the collateral damage by renouncing the benefits which competition brings, such as economic success, innovation and cultural merits.

### **Article 58 paragraph 4, sub-paragraph 2**

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

### **Annex XII, Part II: Technical ability**

Means providing evidence of the economic operators' technical abilities, as referred to in Article 58:

(a) the following lists:

(i) a list of the works carried out over at the most the past five years, accompanied by certificates of satisfactory execution and outcome for the most important works; where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant works carried out more than five years before will be taken into account;

(ii) a list of the principal deliveries effected or the main services provided over at the most the past three years, with the sums, dates and recipients, whether public or private, involved. 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;

### **ACE Recommendations**

*References for architects' services / projects should be taken into account for a minimum period of 5 to 10 years. Nevertheless, it should be carefully considered that any requirement concerning references necessarily excludes newcomers and young professionals. For this reason it should be considered to use another approach to select architects on the basis of quality. This can be achieved by holding a design contest (see below, II.3. and III.).*

### **Explanations**

Architectural projects falling within the scope of the Directive take in many cases more than five years from initiation to completion. Restrictions concerning evidence of services performed in the past should be appropriate, aiming at achieving a sufficient level of competition. Furthermore, it must be taken into consideration that the financial crisis in the EU has led to serious gaps in the CV's of architects in the last years. Continuing a practice which was established under Directive 2004/18/EC - accepting references for

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<sup>2</sup> The Architects' Profession in Europe 2012- A Sector Study Commissioned by the Architects' Council of Europe, Chapter III



services performed in the past only from a period of three years – would exclude a high proportion of architects in the EU. On the other hand, the requirement of references itself is an obstacle for participation of newcomers and young professionals. This is why it should be considered to make a selection among architects not on the basis of previous projects, but on the specific proposal for a solution of the current project by holding a design contest.

### **3. Procedures**

#### **Legal framework (most relevant provisions):**

##### **Article 26 (Choice of procedures)**

1. When awarding public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 32, a call for competition has been published in accordance with this Directive.
2. Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive.
3. Member States shall provide that contracting authorities may apply innovation partnerships as regulated in this Directive.
4. Member States shall provide that contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations:  
(...)  
(ii) they include design or innovative solutions;  
(...)
6. In the specific cases and circumstances referred to expressly in Article 32, Member States may provide that contracting authorities may apply a negotiated procedure without prior publication of a call for competition. Member States shall not allow the application of that procedure in any other cases than those referred to in Article 32.

##### **Article 29 (Competitive Procedure with Negotiation)**

1. In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition containing the information set out in Annex V parts B and C by providing the information for qualitative selection that is requested by the contracting authority.

In the procurement documents, contracting authorities shall identify the subject-matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services to be procured and specify the contract award criteria. They shall also indicate which elements of the description define the minimum requirements to be met by all tenders.

(...)

3. Unless otherwise provided for in paragraph 4, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tenders within the meaning of paragraph 7, to improve the content thereof. The minimum requirements and the award criteria shall not be subject to negotiations.

(...)

##### **Article 32 (Use of the Negotiated Procedure without prior publication)**

(...)

4. The negotiated procedure without prior publication may be used 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 rules provided for in the design contest, 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 2 (Definitions)**

(21) 'design contests' means those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes;

**Article 27 (Open procedure), Article 28 (Restricted procedure), Article 30 (Competitive dialogue), Article 31 (Innovation partnership)**  
(...)

**Title III, Chapter II (Rules governing design contests)**  
(...)

### ***ACE Recommendations***

- *Architects' services should be procured by using a design contest organised as part of a negotiated procedure leading to the award of a public service contract (this is the preferred method).*
- *Alternatively a competitive procedure with negotiation may be used.*
- *Procedures which require participants to submit a tender (especially open procedures), the competitive dialogue and the innovation partnership are not suited to the procurement of architects' services.*

### **Explanations**

The Public Procurement Directives provide a range of public procurement procedures which can be adopted and applied to specific procurement types, allowing the appropriate application of European provisions to the procurement of architects' services, which are of a specific nature. Therefore existing procurement procedures have not always been the most effective for achieving the best quality in this field.

For this reason, in 2000 ACE developed its general recommendations on the public procurement of architects' services which evaluate the important task of the architect not only in the cultural dimension, but also in sustainability, innovation and the environment. The conclusions drawn in those recommendations were:

- The award of contracts for architects' services must focus on the quality of the service and of the technical offer and not on the price of the service.
- Architects' design contests (architectural competitions) are the best method of achieving quality.

These findings are still applicable today and have been even strengthened by the experiences gained in the years after the last revision of the public procurement directives in 2004. The evaluation of different national procurement models for architects' services has shown a considerable similarity in the use of certain instruments aimed at achieving a high quality service of the architectural solution to the problem. However, procurement procedures used in this field have not always proved being beneficial.

### **The favoured approach: the Design Contest followed by a Negotiated Procedure**

As a result of an evaluation of the results and suitability of different national procedures, ACE has come to the conclusion that the most advantageous way to procure architects' services is the (two-stage) design contest followed by a negotiated procedure without prior publication.

This approach provides for the best results because of its extensive exploitation of the market, its use of qualified expertise (juries) and the possibilities it offers to optimise the tender in a subsequent negotiation process. Besides, the anonymity principle serves well as a bulwark against corruption and nepotism.

The design contest has always been an instrument tailored by the legislator especially to the procurement of architectural services. The benefits of using this instrument should, as the legislator has pointed out, even have been used in other fields, aiming also to promote SME's (see Whereas 120: "Design contests have traditionally mostly been used in the fields of town and country planning, architecture and engineering or data processing, It should, however, be recalled that these flexible instruments could be used also for other purposes, such as to obtain plans for financial engineering that would optimise SME support in the context of the Joint European Resources for Micro to Medium Enterprises (JEREMIE) or other Union SME support programs in a given Member State. (...)").

The legislator has adapted the Directive to specific needs to optimise results in the procurement of architects' services by opening the negotiated procedure without prior publication for public service contracts, where the contract concerned follows a design contest (see Article 32, paragraph 4).

ACE draws attention to the fact that architects' competitions (design contests) can be made obligatory at national level without being in conflict with European procurement legislation. Even in the case of Public Private Partnerships, the Design Contest can provide optimum results in terms of quality and economic advantages (for details see under: recommendations for architects' competitions) and guarantees the quality of the outcome for the public partner.

### **The Competitive Procedure with Negotiation**

As an alternative, the Competitive Procedure with Negotiation might be an option. Other procedures do not seem propitious to the procurement of architects' services.

The advantage of being able to negotiate tenders by using an adequate procedure has been underlined by the legislator in Whereas 42 and 43 of the Directive:

"(42) There is a great need for contracting authorities to have additional flexibility to choose a procurement procedure which provides for negotiations. A greater use of those procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders. Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. It should be recalled that use of the competitive dialogue has significantly increased in terms of contract values over the past years. It has shown itself to be of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing.

Where relevant, contracting authorities should be encouraged to appoint a project leader to ensure good cooperation between the economic operators and the contracting authority during the award procedure.

(43) For works contracts, such situations include works that are not standard buildings or where works includes design or innovative solutions. For services or supplies that require adaptation or design efforts, the use of a competitive procedure with negotiation or competitive dialogue is likely to be of value. Such adaptation or design efforts are particularly necessary in the case of complex purchases such as sophisticated products, intellectual services, for example some consultancy services, architects' services or engineering services, or major information and communications technology (ICT) projects. In those cases, negotiations may be necessary to guarantee that the supply or service in question corresponds to

the needs of the contracting authority. In respect of off-the-shelf services or supplies that can be provided by many different operators on the market, the competitive procedure with negotiation and competitive dialogue should not be used.”

### **Other procedures**

Compared to the Competitive Procedure with Negotiation, the Competitive Dialogue is a much more bureaucratic and complicated procedure which might be useful for the procurement of large PPP projects. Furthermore, the problem of the protection of intellectual property has still not been solved in an appropriate way.

ACE has specifically evaluated the advantages and disadvantages of open (and as well in the restricted) procedures (including the “two envelope system” consisting of two separate parts of a (fixed!) tender, the technical and the financial tender, which are evaluated in subsequent steps). In principle the concept of evaluating technical bids and price bids in consecutive phases makes sense. On the other hand, this leads to an unnecessary waste of economic resources as all the participants have to develop proposals up to a detailed level to allow the price to be decided.

The Innovation Partnership is clearly tailored for other situations, especially for research & development projects.

## **4. Procurement Instruments and Tools**

### **Legal framework (most relevant provisions)**

**Articles 33, 34, 35**  
(...)

#### ***ACE Recommendations:***

- *The Electronic Auction, Framework Agreements and Dynamic Purchasing Systems are not suited to the procurement of architects' services*

### **Explanations**

#### **Electronic Auctions**

Electronic auctions are suitable mechanisms in cases when the contract specifications can be established with precision. Under the definition of this procedure, the Directive has clarified that certain service contracts and certain works contracts having intellectual performance as their subject matter, such as th

design of works, may not be the object of electronic auctions. See Article 35, paragraph 1, and Whereas 67). However, the electronic auction makes sense for the procurement of homogenous and standardised goods or services.

The nature of architects' services excludes them from the scope of application of the electronic auction. In this case, there is no obligation to transpose the procedure into national law. If Member States do so, it must be made clear that architects' services are excluded.

## **2.1 Framework Agreements**

Framework Agreements under Article 33 are generally not suitable for architects' services. The purpose of Framework Agreements is to establish the terms governing contracts to be awarded during a given period with regard to price and, where appropriate, the quantity envisaged. Every single project should be open to competition, as every building deserves a specific quality approach.

The awarding decision must be based on qualitative criteria. Architects' services are not measured by price and quantity. Secondly, Framework Agreements – even with the time limit of four years – restrict access to single contracts.

## **2.2 Dynamic Purchasing Systems**

The Dynamic Purchasing System is designed for commonly used purchases, the characteristics of which, being commonly available on the market, meet the requirements of the contracting authority (see Article 34, paragraph 1). Consequently, this is not a useful or appropriate instrument for the procurement of architects' services.

# **5. Award Criteria**

## **Legal framework (most relevant provisions)**

### **Article 67 (Contract award criteria)**

1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.
2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the

basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. Such criteria may comprise, for instance:

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

(...)

## **ACE Recommendations**

- *The awarding criteria for architects' services must be based on quality. This includes sustainability aspects.*

- *Price (or price / time) as the sole criterion for the awarding of contracts for architects' services should be excluded by the Member States.*
- *Awarding criteria, such as the organisation, qualification and experience of staff assigned to performing the contract, must not be misused to exclude small firms and young professionals from the market.*
- *Groups of economic operators, including temporary associations must be permitted to participate in order to comply with exceptionally strict requirements concerning organisation, qualification and experience.*

## **Explanations**

Award criteria must be suitable for the identification of the Most Economically Advantageous Tender (MEAT). Consequently, the criteria should relate specifically to the particular project. Award criteria for architects' services must give primary importance to the quality of the technical offer. Such criteria include aesthetic, economic, functional and environmental characteristics, operating and life cycle costs, cost effectiveness and integration into the built environment including social and infrastructural aspects. These criteria can be most effectively evaluated in a design contest. Therefore, awarding criteria for architects' services must be based on the MEAT and not on the price of the architects' service only. A low offer leads to a low standard in the final product. The award criteria offer a wide range of possibilities and opportunities for criteria which guarantee the best results for public planning and building.

Special attention must be drawn to the fact that the legislator has decided to include certain award criteria that are already covered by the selection criteria. In Whereas 94, the Directive points out the following explanation for this decision:

*“Wherever the quality of the staff employed is relevant to the level of performance of the contract, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this can affect the quality of contract performance and, as a result, the economic value of the tender. This might be the case, for example, in contracts for intellectual services such as consultancy or architects' services. Contracting authorities which make use of this possibility should ensure, by appropriate contractual means, that the staff assigned to contract performance effectively fulfil the specified quality standards and that such staff can only be replaced with the consent of the contracting authority which verifies that the replacement staff affords an equivalent level of quality.”*

On the other hand, it has been underlined that

*“ the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council<sup>1</sup> and Directive 2004/18/EC of the European Parliament and of the Council should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement (...), see Whereas 2, and that*

*“Public procurement should be adapted to the needs of SMEs. Contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled 'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts', providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation.(...)”, see Whereas 78, and*

*“In order to make procedures faster and more efficient, time limits for participation in procurement procedures should be kept as short as possible without creating undue barriers to access for economic operators from across the internal market and in particular SMEs.(...), see Whereas 80, and*

“Given the potential of SMEs for job creation, growth and innovation it is important to encourage their participation in public procurement, both through appropriate provisions in this Directive as well as through initiatives at the national level. The new provisions provided for in this Directive should contribute towards an improvement of the level of success, by which is understood the share of SMEs in the total value of contracts awarded. It is not appropriate to impose obligatory shares of success, however, the national initiatives to enhance SME participation should be closely monitored given its importance.”, see Whereas 124.

In conclusion, there is a need to weigh up the necessity of letting SME's, including young professionals, participate in public procurement procedures, against that of guaranteeing that a specific standard of organisation, qualification and experience is assigned to the performance of the contract. This problem must be solved if there is a special need for a consideration of such criteria in the awarding phase for a second time, by accepting Groups of economic operators, including temporary associations, as provided for in Article 19 paragraph 2.

### **III. Recommendations for Design Contests**

The awarding of contracts for architects' services must focus on the quality of the service and of the technical offer and not on the price of the service. The architects' design competition is one of the best means to provide for quality. It demonstrates the skills of the profession and emphasizes quality based awarding criteria.

In view of the great intellectual and economic investment by all parties involved in such procedures, the ACE has established the following rules which comply with European public procurement law.

#### **Legal framework (most relevant provisions)**

##### **Art. 2 (Definitions), Whereas (21):**

**“ ‘design contests’ means those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes;”**

##### **Art. 32 (Use of the negotiated procedure without prior publication), Paragraph 4:**

**“The negotiated procedure without prior publication may be used 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 rules provided for in the design contest, 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 78 (Scope):**

**“This Chapter shall apply to:**

- (a) design contests organised as part of a procedure leading to the award of a public service contract;**
- (b) design contests with prizes or payments to participants.”**

##### **Article 80 (Rules on the organisation of design contests and the selection of participants):**

**“1. When organising design contests, contracting authorities shall apply procedures which are adapted to the provisions of Title I and this Chapter.**

**2. The admission of participants to design contests shall not be limited:**

- (a) by reference to the territory or part of the territory of a Member State;**
- (b) on the grounds that, under the law of the Member State in which the contest is organised, they would be required to be either natural or legal persons.**

**3. Where design contests are restricted to a limited number of participants, the contracting authorities shall lay down clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.”**

##### **(Article 65 (Reduction of the number of otherwise qualified candidates to be invited to participate):**

**In the restricted procedure the minimum number of candidates shall be five. In the competitive procedure with negotiation, in the competitive dialogue procedure and in the innovation partnership the minimum number of candidates shall be three. In any event the number of candidates invited shall be sufficient to ensure genuine competition.)**

##### **Article 81 (Composition of the jury):**

**“The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required from participants in a contest, at least a third of the members of the jury shall have that qualification or an equivalent qualification.”**



### **Article 82 (Decisions of the jury):**

- “1. The jury shall be autonomous in its decisions or opinions.**
- 2. The jury shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.**
- 3. The jury shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points that may need clarification.**
- 4. Anonymity shall be observed until the jury has reached its opinion or decision.**
- 5. Candidates may be invited, if need be, to answer questions that the jury has recorded in the minutes to clarify any aspect of the projects.**
- 6. Complete minutes shall be drawn up of the dialogue between jury members and candidates.”**

The following set of rules and recommendations is divided into 3 parts:

1. 10 rules, which are essential to respect in every procedure called an architects' competition.
2. Recommendations on how to organise and manage the procedure.
3. Master Brief

### **10 rules, which are essential to respect in every procedure called an architects' competition**

#### **1. Definition of an architects' competition (design contest):**

Architects' competition means a Design Contest to evaluate the ideas of architects, landscape architects and urbanists in a formalised procedure with a defined program and defined criteria, anonymously assessed by an independent Jury. There are different kinds of competition:

- The project competition and
- The idea competition.

which can be held separately or combined in different stages.

Idea competition:

Idea competitions aim to gather numerous solutions without the intention of realizing the task. An idea competition may in particular serve as for the preparation of further planning steps or for the preparation of a project competitions. It may also serve as for finding participants for a limited competition.

Project competition:

Realisation competitions should, based on a detailed program and certain performance requirements, show the conceptual options for the intended realization of a project.

In the case of a two-stage competition the jury has to be the same in both stages and the procedure is anonymous until the jury's final decision.

#### **2. Equal chances for all participants, Transparency of the procedure**

- Same level of information provided to all participants at the same time
- No individual exchange of information between participants and jury members
- Persons excluded from participation:  
the representatives, partners or employees of the promoter or of any jury member, or any person who has been involved in the preparation of the competition, will not be eligible to compete or to assist competitors
- Questions about the brief are answered to all participants simultaneously.
- The summary of the jury's discussion and the decision making process has to be drawn up in a report.
- A jury report shall be published or distributed to the participants and the public.
- There shall be an exhibition of all entries.
- 

#### **3. Independent jury**

- The jury shall be autonomous in its decisions or opinions.

- Where a particular professional qualification is required from participants, at least a third of the members of the jury shall hold that qualification at a high standard, and must be independent from the client.
- The jury shall examine the proposals submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.
- It shall record its ranking of projects in a report, signed by its members. This report shall contain the merits of the projects and a clear recommendation on how to proceed with the result of the competition.

#### 4. The brief

- The competition brief must be clear and unambiguous. Competition requirements must be clearly specified. There must be a clear distinction of requirements and non-binding guidelines. Requirements shall be restricted to the necessary minimum. Only proposals meeting the requirements are taken into consideration. Excluded proposals may be subject to purchases.
- The evaluation criteria must be stated in the brief.
- The brief has to be accepted by the jury before launching the competition.
- Submissions of participants shall be limited to the minimum required for a qualified decision of the jury.

#### 5. Anonymity

- Anonymity must be observed until the jury has reached its opinion or decision.

#### 6. Prize money and remuneration

- The prize money or remuneration has to be fixed and announced in the competition brief. For the calculation of the prize money or the remuneration, there must be an adequate relationship between the required performance of the participants and the honoraria normally calculated for that task.
- In the second stage of a competition, a remuneration, which is a part of the total prize money, is paid to each participant in that stage.

#### 7. Consequences of the jury's decision

- There must be a fair and adequate compensation for **the participants in form of prizes and possibly purchases**. There must be a declaration of the client to award a contract including a sufficient scope of work to the prize winner or to one or the prize winners in a project competition. The awarding authority negotiates with the prize winner on the terms of the contract. In the exceptional case of a serious failure of negotiations, the awarding authority negotiates with the subsequent prize winners in descendent order (sequence). If an ideas competition is not followed by a project competition an adequate **remuneration** in the form of higher prize money has to be fixed.
- If the results of an ideas competition are used as a basis for the execution of a project, this has to be done in agreement with the author.

#### 8. Copyright

- The author's rights for a competition entry remain with the author.
- The promoter is entitled to make use of the winning entries under the conditions that are laid down in the brief or agreed between the parties.

#### 9. Dispute resolution

- Any disputes concerning competition procedures **shall be examined by** the relevant national professional organisation **before any legal procedures**.

#### 10. Participation of citizens

The public may be integrated into the preparation of design contests, especially in the field of town planning and urban development (giving input as concerns the needs, discussing alternatives, collaborating in the (general) definition of the program, ).

### **Recommendations on how to organise and manage the procedure**

Should it be recommended to involve the architects professional organisations in the preparation of the design contest? This could be as well a sub-paragraph in the “10 rules”.

Should there be proposals concerning the remuneration for that (e.g., as proposed by Regine, free assistance in open design contests but fees for the organization of restricted procedures?

Should the jury be obliged to present its results immediately after its decision to the public?

(This part is under revision of the PP/ADC Working group. These recommendations are not directly linked to the question on how to transpose the new Public procurement directive into national law. A proposal for this specific recommendation will be tabled on the second General Assembly in 2014).

**End**