



Strategic Priority 2: Practice

Contracts below thresholds

ACE WG Public Procurement and Architectural Design Contests - GA2/16

Date: 13/10/2016 - Ref: 208/16/GP-TM

Introduction

Architects' contracts below the thresholds comprise more than 90% of the total amount of contracts awarded by public entities in the EU. The value of these contracts is about 50% of the total value of contracts awarded by public entities in the EU. These contracts present significant opportunities for businesses in the Internal Market, particularly for SMEs and start-up companies. Yet, in certain Member states, such contracts are still in many instances directly awarded to local providers without any competition.

The European Court of Justice (ECJ) has confirmed in its case-law that the Internal Market rules of the EC Treaty apply also to contracts outside the scope of the Public Procurement (PP) Directives. The European Commission has published a Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the PP Directives which is currently applicable, even if it was published in 2006¹.

Already, some member States have regulated or plan to regulate the awarding of such architects' contracts in the near future. ACE has, in its PP Guidelines (European Public Procurement Legislation and Architectural Services - Recommendations and Guidelines for Transposition to National Law), only covered the „big“ contracts falling within the scope of the European PP Directives. There are, up to now, no adopted recommendations nor even proposals for appropriate solutions on Member State level.

Mandate of the ACE ADC/PP working group

The ACE General Assembly has entrusted the ADC/PP working group with the task of drafting recommendations for rules and regulations for the awarding of contracts by the public sector not falling within the scope of the PP Directives. These recommendations concern two points:

- a) the rules and regulations for public procurement procedures not covered by the PP Directives;
- b) remedies (access to justice) not covered by the Remedies Directives.

In this paper, the European legal framework for such rules and regulations is summarised and initial discussion points subsequently proposed.

European legal framework

Under EU law, there is no obligation to regulate this field, but contracting authorities have to award such contracts in a way which conforms to primary EU law (concerning, first and foremost, the fundamental freedoms laid down in the Treaties). This is why

¹ (2006/C 179/02)



some Member States have chosen the option to extend the scope of their national laws transposing the European public procurement directives to contracts below the thresholds. Others have established less complex systems, with more flexibility and simplified procedures, while some have only established general legal principles which have to be obeyed to, sometimes supplemented by administrative rules.

Another aspect of the legal system for contracts below the thresholds is access to justice in cases of infringements of legal obligations which have to be applied for those contracts. Here again, some Member states have extended the scope of the Remedies system which originates from the EU Remedies Directives, a parallel instrument of European legislation aimed at making the Public Procurement Directives more effective.

Main legal aspects

Consistent with long-standing EU case-law, the ECJ has developed a set of basic standards for the award of public contracts which are derived directly from the rules and principles of the EC Treaty.²

The relevant paragraphs outline the following:

“It should be noted, however, that the award of contracts which, in view of their value, do not fall within the scope of that directive is none the less subject to the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts have a certain cross-border interest in the light of certain objective criteria.

As regards the objective criteria that may indicate the existence of certain cross-border interest, the Court has already held that such criteria may be, in particular, that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract. The referring court may, in its overall assessment of the existence of certain cross-border interest also take account of the existence of complaints brought by operators situated in other Member States, provided that it is determined that those complaints are real and not.”

Initial questions to be discussed (open list: further proposals are welcome!)

1. National public procurement rules and regulations
 - 1.1 What would be a “minimum“ transposition of the binding fundamental rules and general principles? (for example: clear restriction of national rules and regulations to cases with cross-border relevance; definition of minimum requirements of advertising, from publication on local level up to the use of TED)
 - 1.2 Should national legislation go beyond a “minimum“ transposition?

² See only the latest decisions C-278/14 of 16 April 2015 and C-159/11 of 19 December 2012.



1.3 How can we promote the use of procedures especially suited for architects' services like the design contest?

2. Remedies

2.1 Should the remedies systems for contracts falling into the scope of the PP Directives be opened up for "small" contracts?

2.2 Should there be a simpler and faster system?