



Strategic Priority 2: Practice

Revision of the Remedies Directive: ACE Policy

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

Date: 18/10/2016 - Ref: 215/16/CA

Revision of the Remedies Directive: ACE policy

Background

In 2015, the ACE ADC/PP Working Group decided to take a position in the on-going revision process of the EU Remedies Directive. It was pointed out that there are virtually no cases where an architect has succeeded in obtaining a contract as a result of a successfully pursuing a complaint under the Remedies Directive; instead there was a high risk of being blacklisted.

Consequently, ACE recommended two modifications to the Remedies Directive:

1. Establishment of a right of action / to institute proceedings (complaints competence) for the professional organisations of architects (chambers and associations).
2. Establishment of appropriate sanctions (penalties) for contracting authorities infringing public procurement provisions.

The revision of the Remedies Directive (last amended in 2007) is due and the European Commission has taken several steps in preparation of legislative proceedings. In 2015, under the REFIT programme, a public consultation took place in response to which ACE communicated informally its proposals.

REFIT stands for the „Regulatory Fitness and Performance Programme“, which is part of the smart regulation agenda. It is one of the tools used by the European Commission to ensure that EU action is effective. The assessment of the impact of European legislation goes through different stages: planning, implementation and review. Before the EU takes action, the Commission publishes roadmaps describing planned initiatives and Commission impact assessments examine potential economic, social and environmental consequences. Following implementation, initiatives are evaluated to check their performance. REFIT is used at this stage.

The Remedies Directive was included in the transposition of the REFIT Programme in 2015. The scope of the exercise included the evaluation of the Directives (Council Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC) with regard to improving the effectiveness of review procedures concerning the award of public contracts. In May 2015 the status of this initiative was defined as “on-going” and expected to be finalised by the end of 2015 (see Commission Staff Working Document SWD(2015) final of 19.5.2015).

Nevertheless, the European Commission did not resolve to take legislative action afterwards. Instead, it published a “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions” in October 2015 (COM(2015) 550 final in which they announce several measures “to improve the effectiveness, efficiency and transparency of the procurement remedies system under the Remedies Directives”. They announced specifically that they will encourage first instance review bodies to cooperate and network to improve the exchange of information and best practice, that particular attention will be paid to the strengthening of specialised first instance administrative review bodies and that they will also improve the monitoring of effectiveness of the national review systems through regular assessment (...).

Finally, the Commission announced that “this will be complemented by a REFIT evaluation report of the Remedies Directives” (see page 14 of the Communication).



Conclusions

What does that mean for an ACE initiative towards a modification of the Remedies Directive? It can be concluded that the preparation of the EU's expected legislative activities has not yet been finished. Only after the finalisation of the REFIT evaluation report will the Commission start the formal revision process, usually in form of a Green Book. This means the project is still at a pre-legislative stage and lobbying activities are advisable.

ACE policy – what's to be done?

ACE was quite successful in getting contents into the Green Book published before the last revision of the Procurement Directives. Important aspects were then taken up in the further legislative process. This concept should be followed as well regarding the future revision of the Remedies Directive.

As the Commission is the only EU institution currently involved in the project, it is necessary to continue lobbying within the Commission for the two main proposals of ACE. However, it always makes sense to sensitise the European Parliament at the same time.

To be decided:

ACE addresses to the Commission and the Parliament and lobbies for the issues enumerated above:

1. Establishment of a right of action / to institute proceedings (complaint competence) for the professional representations (chambers and associations) of architects;
2. Establishment of appropriate sanctions (penalties) for contracting authorities infringing public procurement provisions.