**Area 2 - Practice of the Profession**

Public Procurement & Architectural Design Contests WG

Minutes of the meeting held on 5 February 2016

Date: 10 February 2016

**Participants**

Georg Pendl, BAIK, Chairman, EB Member
Thomas Maibaum, Chairman
Georg-Christopher Broich, BAK, Germany
Sibylle Bucher, CSA, Switzerland
Michal Fišer, CCA, Czech Republic
Andrew Forth, RIBA, UK
Paula Huotelin, SAFA, Finland, EB Member
Filipe Borges de Macedo, OA, Portugal
Emanuele Maratta, CNAPPC, Italy
Indrek Naak, EAA, Estonia
Pierre Obajtek, ACE Policy Officer

1. **Welcome and apologies for absence**

   Apologies were received from:
   - Gergely SÁNDOR, MEK, Hungary
   - Preben DAHL, DA, Denmark
   - Anette Søby BAKKER, ACA, Norway
   - Dietrich KAPPLER, BDB, Germany
   - Rafael PELLICER, CSCAE, Spain

2. **Adoption of the notes of the previous meeting**

   The notes of the meeting held in Budapest on 11 September 2015 were agreed as a true record.

3. **Report of the chairmen on recent developments in EU Public Procurement legislation and policy**

   - **Action Plan on Public Procurement**

     In December 2015, DG GROW and DG REGIO presented a joint Public Procurement Action Plan\(^1\), including 14 actions – some of them already completed, others still on-going or not yet started.

     - Under Action 13 the Commission plans a “Scoping of the potential for database of irregularities in public procurement”, with the objective “to improve the general quality of data in MS, linking procurement data and data on EU projects, support the usage of data analysis in MS, support contract registers in MS. Such a database should cover information available from existing databases at National and EU level, and also from structured audit reports, national remedy systems, complaints, infringements and courts”.

     - Under the Action 14, the Commissions plans “actions to increase the quality of procurement processes, to achieve more value for money through overall procurement processes, planning of e.g. of timelines for preparation of bids and evaluation, procurement

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strategy, market research”. These actions will take the form of guidelines, dissemination of good practices and specific recommendation to MS. Doing so, the Commission intends to help “Contracting Authority to obtain from the market, through efficient and well run competition, the best bidder having the required expertise and with best economic offer, in order to implement in good conditions (time, quality and budget) the procured project”.

T. Maibaum believes that ACE should take the opportunity of this action to advance its ADC/PP Recommendations, in a form adapted to the project – ACE should try to make its positions reflected in the Commission’s guidelines.

PO pointed out that, in the framework of this Action Plan, the Commission already published in October 2015 a Public Procurement Guidance for Practitioners on the avoidance of the most common errors in projects funded by the EU Structural and Investment Funds.

- Remedies Directive

The EU Remedies Directive establishes a system which enables architects to take legal action against breaches of PP rules, as for example requiring submission of references that are strictly congruent with the subject-matter of the contract (Ex: To participate in a procurement procedure for designing a school, the participant has to prove that s/he has already planned a school). However, there are virtually no cases where an architect has succeeded in obtaining a contract as a result of a procedure under the Remedies Directives; instead there is a high risk of being blacklisted. ACE recommends two modifications to the Remedies Directive:

1. Establish a right of action (complaint competence) for the professional representations of architects
2. Establish appropriate sanctions (penalties) for contracting authorities infringing public procurement provisions.

The EU Commission ran last year a public consultation – however, outcomes have not yet been published. The Commission is expected to launch further actions in this matter, in the framework of the Single Market Strategy.

T. Maibaum recalled that ACE needs to collect concrete examples of:
- misuse of selection criteria in public procurement (non-respect of the principle of proportionality);
- non-respect of the general principles of transparency and non-discrimination in contracts below the thresholds;
- outstanding results and good procedures;
- successes by small offices.

PO reported on two other recent initiatives of the Commission:

- European Single procurement Document (ESPD)

The EU Commission adopted in January 2016 a Regulation establishing the European Single Procurement Document (ESPD), in order to further simplify the tender process and further encourage SMEs to participate in PP. The ESPD will allow all businesses to electronically self-declare that they meet the necessary regulatory criteria or commercial capability requirements. Only the winning company will need to submit all the documentation proving that it qualifies for the contract. To facilitate its use, a free, web-based system is being developed for MS and businesses.

T. Maibaum said that the ESPD is a positive development and recalled that ACE had started lobbying for this instrument more than ten years ago


\[Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document\]
• **International Procurement Market**

End of January 2016, the EU Commission presented a revised proposal for an International Procurement Instrument⁴ - a tool to promote open access to public procurement markets around the world. The new Instrument would allow the Commission to initiate public investigations in cases of alleged discrimination of EU companies in procurement markets. In case such an investigation would find discriminatory restrictions vis-à-vis EU goods, services and/or suppliers, the Commission will invite the country concerned to consult on the opening of its procurement market.

This new tool is in line with the ACE position, which advocates for strict reciprocity in international procurement agreements.

4. **ACE Questionnaire on PP and ADC – Review of the responses**

The ACE Secretariat circulated in December 2015 a questionnaire in order to collect examples of mis-application of PP criteria, ADC that have produced outstanding results, data regarding the use of ADC as well as examples of small offices that have won competitions.

To date, responses have been received from: France, Norway, Hungary, Bulgaria (UAB + CAB), Netherlands, Czech Republic, Denmark, Germany, Italy, Portugal, Italy, Finland, Slovakia, Slovenia, Sweden, Switzerland.

Interesting points from the responses:

- Professional organisations can make claims in 7 countries: NL, DK, FR, PT, HU, BG, UK. There are differences between these States concerning the deadlines for using the remedies and concerning the organisation of the remedy system. In the UK there is a possibility to raise concerns anonymously about potentially poor public sector procurement practice, leading to investigations by a state body (see the more detailed report under 8. of the Minutes).
- NL: “The real issue in the Netherlands are track record requirements (…) The aggregation of formal requirements (size, type of client, legal terms of 3 and 5 years) and very specific competences lead to situations in which very few architects are able to qualify for the award phase”. However, NL seems to be a good example regarding access of young architects to the market. TM recommend to take the example submitted by NL in the ACE booklet / brochure.
- DK: one example of success of a small office which won a competition + several examples of outstanding results with ADC.
- FR: statistics sent by CNOA show a significant drop in the number of competitions between 2006 and 2014 – why? (question sent to I. Moreau by PO)
- PT: good ADC example: the Museu do Coa, both in terms of financial effectiveness architecture result. F.B de Macedo is asked to provide more documentation about this project.

P. Huotelin underlined that it is important to define what we mean by *good* example: good in term of quality of architecture? jobs creation? access to market? costs? procedure? The WG agrees that quality of the architecture would stand first, but other aspects should of course be considered as well.

ACE Secretariat is asked to send reminder to PL, ES, UK, IE, BE.

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⁴ Commission’s proposal for a Regulation on the access of third-country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries
5. **Booklet Recommendations for Design Contests**

It was agreed to say clearly how the “proportionality principle” must be understood, on the basis of a judgment of the European Court of Justice of October 2012 – Extract from the decision:

Under the second subparagraph of Article 44(2) of Directive 2004/18 a minimum capacity level must be related and proportionate to the subject-matter of the contract. It follows that the aspect or aspects of the balance sheet chosen by a contracting authority to establish a minimum level of economic and financial standing must be objectively such as to provide information on such standing of an economic operator and that the threshold thus fixed must be adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose.

T. Maibaum agreed to prepare a short explanation of the ECJ decision and how it can be useful at national level.

It was agreed to modify the point 3 on “Independent jury”, recommending that the jury shall be nominated and announced before the launch of the competition and cannot be changed in course of the competition.

6. **Development of a Library of arguments for ADC’s**

Michal Fišer (CCA) presented several examples of ADC, highlighting the difference between the estimated construction costs and the final costs of the projects. Slides presenting the projects will be circulated to the WG.

7. **Presentation by E. Maratta on the latest developments in Italy in the field of PP**

Following the adoption of the first PPD, the IT Government promulgated a Decree (also called Procurement Codex), which establishes the system of award of contracts. Procurements for Architecture and Engineering Services are divided into two main groups:

1. **Ordinary Procedures**
   - If the estimated budget is less than 100,000 EUR, a negotiated procedure can be used;
   - If the estimated budget is over 100,000 EUR an open procedure must be held;
   - For buildings with special architectural, historical, artistic, environmental characters, ADC or Ideas Competition is mandatory.

2. **Economy Award Procedures**
   - If the estimated budget is less than 40,000 EUR, direct award to traders
   - If the estimated budget is between 40,000 EUR and the Community threshold (207,000 EUR), a negotiated procedure can be used

CNAPPC, through a network of technical professions, reported problems in PP to the Italian National Anti-Corruption Authority (ANAC), in particular:

1. Too much discretion of contracting authorities in calculating the budget in the tender
2. Excessive rebates, especially when the criterion of the lowest price is chosen
3. Exclusion of young professionals because of technical and economic requirements
4. Exclusion of professionals because of technical and organisational requirements

ANAC published *Guidelines for the Award of Architecture and Engineering Services*, which solves those 4 problems:

- **Problem 1** (above): As Professional fee scales were abolished in 2006 in Italy, any mandatory reference concerning the budget to be placed in the tender, has disappeared,

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5 Judgment of the Court of 18 October 2012 – Case C-218/11 - Édukövízig and Hochtief Construction
resulting often in underestimated budget. In October 2013, a Decree set back Professional Fees. The parameters fixed by this Decree could be taken as a reference by contracting authorities for the calculation of the estimated budget. ANAC Guidelines state the obligation for contracting authorities 1) to calculate the budget to be put out to tender by strictly applying 2013 fees; 2) to explicit in the contract documents or in the invitation letter the calculations carried out for the determination of the aforesaid compensation.

- Problem 2: ANAC suggests to 1) restrict the use of the criterion of the lowest price to awards with an amount less than 100.000 EUR, provided that they have the character of simplicity; 2) force contracting authorities to well motivate the use of that criterion in the letter of invitation. Mechanisms are also introduced by which, for example, in the formation of the average of rebates, the highest and the lowest rebate are excluded when more than ten economic operators are invited to participate.

- Problem 3: The Procurement Codex provides the requirements for access to tender with an estimated budget above the threshold of 100.000 EUR. In that case, economic operators must prove that they have already carried out services for works similar to the service to be contracted over the last 10 years. What "similar work" means is however not clear. ANAC Guidelines specifies that similar work means that the degree of complexity is at least equal to that of the services to be contracted.

Other requirement: turnover must be from 2 to 4 times the estimated budget. ANAC Guidelines recommends to the contracting authorities to 1) adequately motivate the possible use of the turnover requirement; 2) not exceed the minimum value (2 times) of the range provided for by the existing rules.

Other requirement: the number of workers must be equal from 2 to 3 times the number of units estimated in the call. This tends to exclude young professionals and small offices, resulting in a reduction of the market to a very small number of operators. ANAC Guidelines states that 1) it is possible to reach the estimated number of units set out in the call through the institution of a Temporary Group of Professionals; 2) the estimated number of units must not be overestimated by contracting authorities but commensurate with the nature of the service to be given.

- Problem 4: ANAC Guidelines states that in order to ensure maximum participation, the contracting authorities 1) must adopt only qualitative evaluation criteria specifically related to the project; 2) may not require elements of technical, organisational and/or economic nature in the pre-qualification phase. Such elements may be acquired later, after the award stage of the competition or in the next phase of detailed design.

ANAC also recalls that in the presence of building of special architectural, historical, artistic, environmental characters, professional services are exclusive competence of Architects.

The new PPD 2014/24/EU will result in the issuance of a new Contracts Codex and Rule Book. The CNAPPC has drafted a new Joint Document, which was approved by the Network of Technical Professions and incorporated into a draft law, to be adopted in the coming months. The main objectives (still to be developped in the law) are:

- Streamlining procurement procedures and verification requirements
- Significant limitation with regard to the award criterion of the lowest price
- Promotion of design competition as the best instrument of award
- Reduction of the use of integrated contract for cases in which the technological element characterises 70% of the work
- Stop to contracts awarded in house: dealers must entrust 100% of works and services (including Architecture and Engineering services) to third parties
- Promote the Project Financing Tool.
8. Transposition of Directive 2014/24/EU – Developments since last time

- **Austria**
The transposition law is expected by the end of the year - BAIK has communicated its position to the government.

- **Portugal**
Nothing new since the last meeting. The transposition law is expected in the coming months. Two interesting initiatives:
  - On-going exhibition about projects built through ADC
  - A new governmental online portal, which gives access to all Portuguese public procurements (contract object, contract value, contracting authority, contracted entity). This portal is seen as a positive tool to fight corruption in public procurement.

- **United-Kingdom**
A. Forth (RIBA) reported about the *Mystery Shopper Service*, which allows government suppliers and potential government suppliers to raise concerns anonymously about potentially poor public sector procurement practice. The service was launched in February 2011 as part of a range of measures to build the commercial capability of contracting authorities through their adoption of good procurement policy and practice and to ensure that public procurements do not impose unnecessary barriers to small businesses when bidding for public contracts. A detailed presentation of the service will be circulated to the WG.

- **Finland**
The transposition of the PPD is now expected by the end of summer. Main topics of discussion: less administrative burden; electronic procedures; shortened deadlines; better access for SMEs. Thresholds shall be increased, but will remain at a low level.

- **Italy**
See above item 7.

- **Switzerland**
There was nothing new to report – The April deadline is not applicable to CH.

- **Estonia**
There were recently two litigation cases in PP procedures (bus station in a major city). Some improvements are expected in the new PP regulation, notably regarding turnover requirements.

- **Czech Republic**
The new PP regulation will come into force in April. The Czech Chamber has been successful in its negotiation with the Ministry. However, no improvement is expected regarding quality-based criteria.

- **Germany**
A law was adopted in December 2015, which will enter into force in April 2016. Another regulation complementing the law is also in preparation, and should be in principle be adopted by April. Among other things, the BAK has tried to influence the method to calculate the estimated value of procurement, in collaboration with other architects and engineers associations.

9. Any other business

9.1 Articulation between BIM and ADC

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6 www.base.gov.pt
The general feeling was that it is not desirable and feasible to make BIM mandatory in ADC (mainly for costs/time reasons), especially in early stages of ADC.

Further discussion need to be based on concrete examples. It was agreed to ask the BIM WG to provide real case examples (brief and entries) of ADC procured with BIM. S. Bucher (CSA) agreed to provide one example for an urban project.

TM: ACE Recommendations for Design Contests simply indicates that “requirements shall be restricted to the necessary minimum”. He thinks that the level of information to be included in a competition brief should be further specified. It was underlined that a position on BIM needs to be added to the general AD/PP Recommendations and Guidelines. T. Maibaum recalled that the IT industry had lobbied for making use of BIM mandatory in public procurement. A. Forth explained that this is the case in the UK now, which will certainly exclude most competitors from other EU Member States.

7.4 ADC in Austria

G. Pendl showed statistics about engineers’ and architects’ participation in competitions, notably regarding participation rate, time investment, participation costs, number of competitions, number of competitions in and outside Austria.

In 2013, 13% of engineers participated in a competition against 55% of architects. Slides will be circulated to the WG.

GP presented a BAIK online portal giving access to open ADC in Austria, award decisions and final projects.

8. Date of the next meeting

The next meeting of the WG will take place on Friday 13 May in Brussels, in ACE offices.

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7 www.architekturwettbewerbe.at