



Expert Task Force PP

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Public Procurement statement

Introduction:

The quality of the built environment has a tremendous impact on the quality of life of citizens. More than half of mankind lives in cities, spending more than 90% of time indoors. Not only buildings, but also space planning, traffic schemes and solutions, infrastructure, landscape planning, urbanism, design of public spaces – in other words, the planning of the entire built environment is of public interest (see Work Programme for Culture 2019-2022).

The above-mentioned work programme states that the high quality of the built environment is a necessity which is of public interest. It also appears as a core issue in the development of the NEB. A high-quality built environment influences the everyday life of citizens through its high-quality design and has to solve urgent needs concerning climate change, sustainability, circular economy, life cycle costs and optional re-use as well as holistic, integrative and cooperative planning principles.

The rules of the Public Procurement Directive define the framework for the contracting authorities. The public procurer has a strong impact on our built environment - when choosing the procurement procedure, s/he decides on the quality of the outcome. S/he must act as a spearhead by developing examples and best practise for all developments mentioned above.

What is the specific character of planning services as intellectual services, which in some languages are called creative services?

The common dominator is the fact that the result of such services cannot be described beforehand. One can define needs, set economic, local, functional and other conditions defining the framework of a project, but the actual solution shall be found through the work itself. In this respect intellectual service differs fundamentally from the purchase of goods, where the quality of the final product can be described in detail and in advance. In this respect, we find impossible to justify the procurement of intellectual services solely on the basis of price - which is still possible according to the current Directive.

Another argument is the need for innovation, especially if we may want to foster new qualities in the building processes. Innovative solutions are never to be found by commissioning the cheapest offer but can only be found by seeking the qualitative best solution.

The current Directive mentions intellectual services only in the Recital (43) and offers certain procedures for such services. There is a need for intellectual services to be treated differently in the Directive, best expressed by a special, dedicated chapter. This can make it possible to take better care of the different kind and quality of intellectual services in relation to other services.

We fully support the idea of “Making the renovation wave a cultural project”. **But a cultural project cannot be procured like the purchase of bricks. A cultural project needs special treatment in the procurement process.**



1. Better recognition of the specificity of intellectual services

Intellectual services are based on several specificities:

- the service provider adapts its service offer to each business opportunity;
- services are tailor-made to meet the specific needs of each client;
- the results of the services are not palpable and their consistency and costs may change depending on these results.

The purchase of these intellectual performances, complex by nature, deserves to be treated differently from the purchase of standard services. The process of evaluating the capacities and offers of providers requires a great deal of professionalism.

Therefore, the purchasing rules that apply should be separate. Based on a clear definition of intellectual services, a specific chapter would allow for certain issues to be handled differently:

- for the thresholds and eligibility, a framework more suited to the economic structuring of intellectual service providers;
- a more quality-oriented choice of procedure;
- a special regime to allow teaming-up more easily during procedures;
- preference for quality-based criteria and exclusion of solely quantitative or economic criteria which are not appropriate for the selection of intellectual service providers;
- following the model of the jury in design competitions, introduction of an evaluation body for all procedures where quality, innovation or future orientated sustainable solutions are needed.

Desired changes in the next Public Procurement Directive

- Dedicate a special chapter to intellectual services within the particular procurement regimes
- At the very least, insert a definition of intellectual services
- make quality-based selection obligatory for intellectual services

2. Ensure quality-orientated procurement procedures

It seems fundamental to include a general quality objective in the rules governing the purchase of intellectual services. Architectural and engineering (*planning*) services are fully focused on quality and cannot be measured or estimated by quantitative economic criteria. Therefore, procedures leading to quality-based decisions should be favoured. The current Directive theoretically allows this objective to be implemented. But in practice, contracting authorities are not using quality-based procurement options sufficiently. They also use the lowest price too often as the sole criterion of choice.

By their very nature, design competitions are the best way to procure intellectual Services. They are quality-based and project orientated selection procedures: quality based, as selection of the best solution is based solely on quality criteria (aesthetic, functional, economic, environmental) and the decision is based on the solution for the very project/task given.

Public Procurement regulations should be amended so as to incentivise public buyers and promote quality criteria. Both for the choice of procedures and for the evaluation of candidates/tenderers, procurers are required to become more professional or to seek the assistance of an evaluation body.



Desired changes in the next Public Procurement Directive

- forbid the use of lowest price as the sole criterion of choice for intellectual services;
- forbid quantitative criteria as requirements for offering intellectual services;
- encourage Architectural Design Contests as the best way to find suitable solutions to architectural tasks / require ADCs for all new buildings and refurbishments of a certain importance in public procurement;
- require an evaluation body for any procedure involving intellectual services (*design/planning services*);
- forbid the use of competitive dialogue when only intellectual services are purchased;
- favour overall, holistic evaluation for intellectual services tenders / abolish point systems for evaluation of planning services as they do not correspond to the complexity of the tasks.

3. Improve access to procurement for SME's and new entrants

Eligibility/Selection criteria should be revised for intellectual services. The difficulty for SMEs and emerging practices to access the market could be directly linked to the inadequate use of selection criteria by public authorities.

Furthermore, the current Directive favours the division of contracts into lots; but in order to have a truly positive effect on SME access in all Member States, it should be made mandatory.

When procuring intellectual services, many contracting authorities ask economic operators to provide work in support of their tenders. The ADC should be the only procedure where this requirement is possible. At the very least, the rules should impose an appropriate payment when work is required from tenderers. If no payment is foreseen, this disadvantages the access of small practices, which cannot absorb the cost of the procedure.

In general, the contractual relationship between public buyers and economic operators is too imbalanced. This can prevent small businesses from applying for public contracts.

[Also, administrative complexity is detrimental to access for new entrants and small firms that do not have the right structure to simply submit a candidature. Efforts to simplify and harmonise the information required must be continued]

Desired changes in the next Public Procurement Directive

- reduce eligibility criteria in any application phase for intellectual services
- allow for references covering a 10-year period
- make division of contracts into lots compulsory
- focus solely on quality criteria for selection procedures
- forbid requirements to carry out work without payment
- introduce new arrangements regarding contract performances



Directive 2014/24/EU	Object	Suggested improvements
Article 2	Definitions	<i>Intellectual services are services which rely mainly on activities of the mind, require a high-level qualification, can generate intellectual property rights and are carried out in the interest of the client and the public.</i>
Article 19 Article 72	Group of economic operators	<i>For intellectual services, the composition of a group of economic operators may change until the contract is awarded. The composition of a group of economic operators can change by application of a review clause during the performance of a contract, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the Directive</i>
Article 30	Competitive dialogue	7. Based on the prior opinion of a jury , contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document. 8. Contracting authorities shall specify prizes or payments to the participants in the dialogue.
Article 46	Division of contracts into lots	Contracting authorities may decide to award a shall divide the contract in the form of separate lots and may determine the size and subject-matter of such lots.
Article 58	Selection criteria	<i>For intellectual services, contracting authorities shall not use quantitative requirements for participation & criteria selection</i>
Article 67	Contract award criteria	<i>Contracting authorities shall not use price only or cost only as the sole award criterion for intellectual services</i>
Article 82	Decisions of the jury	1. The jury shall be autonomous in its decisions or opinions. 4. Anonymity shall be observed until the jury has reached its opinion or decision.
Annex XII Part II	Technical ability	<i>Means providing evidence of the economic operators' technical abilities, as referred to in Article 58: (a) the following lists: ... (ii) a list of the principal deliveries effected or the main services provided over at the most the past three years ten 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 ten three-years before will be taken into account;</i>