

MINISTRY OF CULTURE AND COMMUNICATIONS
(Architecture and Heritage Division)

MISSION FOR QUALITY IN PUBLIC CONSTRUCTION

THE ATTRIBUTION OF PUBLIC CONTRACTS TO PROJECT CONSULTANTS IN EUROPE

**(Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal,
Spain, United Kingdom)**

Véronique BIAU

With the assistance of :
Sylvie WEIL, MIQCP

Correspondents :
Niels ALBERTSEN, Denmark
Marie DEGY, Lisa DIEDRICH et Gilles DUHEM, Germany
Carlos GOTLIEB, Spain
Sophie SZPIRGLAS, France
Antonella TUFANO, Italy
Lupicino RODRIGUES, Portugal

Translation :
Nick Hargreaves

October 2002

CENTRE DE RECHERCHE SUR L'HABITAT (LOUEST, UMR n°7544, CNRS)
École d'Architecture de Paris-Val de Seine
41 Allée Le Corbusier 92 023 NANTERRE cedex
Tel. 01 47 76 52 52. Fax. 01 47 76 52 00

FOREWORD

From the beginning of 1998, with the transcription into French law of European Directive 92/50 dated 18 June 1992 regarding the coordination of procedures for entering into public services contracts, and the discussions resulting from this transposition, it seemed necessary to have precise details pertaining to the ways that architectural and town planning project consultancy contracts were attributed in other European Union countries. The ongoing discussions concerning the “legislative package” and its tendency to simplify and unify the public contract directives clearly demonstrate the continuing importance of this comparative analysis.

This led to an initial survey being carried out for the Architecture and Heritage Department (Direction de l'Architecture et du Patrimoine - DAPA) by the Mission for Quality in Public Construction (Mission pour la Qualité des Constructions Publiques - MIQCP). The survey was limited to an analysis of design competition practices in nine European countries and the conditions governing the introduction of anonymity. The report submitted in December 1998 revealed the specificity of French policy concerning architectural competitions.

It was therefore necessary to open the field covered by the surveys to understand the processes used by public clients in the main European countries to choose their private project consultants for the construction of a new project (building or infrastructure), the rehabilitation-reuse of an existing building or an urban development.

Over and above the discussions and questions raised specific to each country, the intention of this new series of surveys, carried out between 2000 and 2002 is to highlight the issues being examined by all the concerned countries: the motivations of the client when seeking its partner or partners, and the choice of procedure to be adopted; the repercussions of this choice on the way the project is organised and on the completed result, the criteria adopted for choosing the successful tenderer. More generally, the survey concentrates on the relations built up between clients and the project consultants within the framework of the public commission and the resulting forms of negotiation and cooperation.

In addition, based on the experiences noted during the meetings between European public clients that had earlier been carried out with the assistance of the MIQCP, this survey also permits an evaluation of the developments resulting from the changes in the economic and statutory context over the past decade within institutional public client structures and professional project consultancy organisations. In fact, over and above a strictly comparative analysis of the way that the directive texts are applied, it is the culture particular to each country and its application in the development of quality solutions to meet social expectations that is specifically revealed by this approach.

The Architecture and Heritage Department and the Mission for Quality in Public Construction would like to thank all the partners that participated in the preparation of this study and, in particular, the Economic Expansion Posts, all professionals from the private and public sectors met in each country for their availability and welcome, as well as Véronique Biau's team at the Centre de Recherche sur l'Habitat (Housing Research Centre) at the École d'Architecture de Paris-Val de Seine for its remarkable analysis and synthesis work.

WANDA DIEBOLT
Director of the Architecture and Heritage
Department
Ministry of Culture and Communications

JACQUES CABANIEU
General Secretary, MIQCP

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INTRODUCTION

The move towards the Europeanisation of services contracts is now well underway, at least in regulatory terms. In the field of architecture, the founding documents were published ten or even fifteen years ago. These include Directive 85/384/EEC dated 10 June 1985 “aiming to assure the mutual recognition of diplomas, certificates and other titles in the field of architecture and comprising measures intended to facilitate the effective exercise of the right to set up business and provide services within all member countries” known as the Architecture Directive, as well as Directive 92/50/EEC dated 18 June 1992 concerning the coordination of procedures for entering into public services contracts, known as the “Services Directive”.

However, there has been a certain delay between the publication of the legal and statutory regulations, their real incorporation into the practices of all concerned parties and, a fortiori, the information available in each of the Member States concerning practices in other States. It is clear that there is a need for a better understanding of how public commissions for project consultants are entered into in the main European countries. This has become particularly important within the context of the French presidency of the European Union and, simultaneously, the setting up of the European Architectural Policy Forum. Working in partnership with Finland which at that time was presiding over the European Union, France organised the 1999 European Architectural Encounters. These were held in Paris on 23 and 24 September 1999, bringing together representatives of professionals and administrations responsible for architecture in the fifteen member States and in Norway. A growing interest was shown in the creation of a European Architectural Policy Forum, an informal inter-governmental body meeting on a regular basis. During its presidency, France programmed the first meeting of this Forum which took place on 10 and 11 July 2000 in Paris. The purpose of these encounters is to encourage a better understanding of the practices in each country and to increase the level of coordinated measures.

In strictly legal and statutory terms, public contracts are currently very much in the news, both on a national level with the reform of the Public Contracts Code which was completed after several years of work and negotiation in March 2001, and on a European level with further discussions concerning the “Legislative package”. It should not be forgotten that the three public contract Directives (Services, Works and Supplies) were merged into a single Directive n° 97/52/ EC dated 13 October 1997 with the dual aim of simplifying the presentation (removal of around half the number of articles, use of a simpler language, harmonisation of thresholds expressed in Euros, etc.) and adapting them to contextual changes (particularly to take account of changes in information technologies). Further discussions taking place concerning this “legislative package”, given impetus by the “Public contracts in the European Union : guidelines for the future” Green Paper published in 1996 by the Commission, aim to ensure the coherence of a certain number of earlier measures included in the three Directives concerning public contracts and to suggest modifications covering, among others, complex

contracts (which can include project consultant contracts), the criteria used for attribution and selection, the thresholds, the shared vocabulary used, etc. These further discussions raise a series of questions concerning the application of the requirements imposed by these three Directives in the various member States and what form that the envisaged modifications might take given the very different situations existing in these countries.

It is within this context and the framework of the discussions accompanying it that this study concerning the attribution of public contracts to project consultants in Europe has been undertaken. It was undertaken by Jacques Cabanieu and Sylvie Weil, of the MIQCP, and was made possible by financing provided by DAPA to CRH-CRESSAC (Paris-Val de Seine School of Architecture)¹.

A. PROJECT CONSULTANT COMPETITIONS

In 1998, an initial study was carried out for DAPA by the same team concerning project consultant competitions in Europe². On request from the DAPA department responsible for the profession and public commissions (Carole Veyrat, Françoise Blaison), its intention was to provide a better understanding of competition procedures in Europe : their frequency, their goal, their methods (open or restricted competitions, whether or not remunerated, etc.), as well as giving voice to opinions concerning the anonymity requirement and its real application conditions. However, it is important to remember the context : one of consultation concerning the transposition of the Services Directive into French law. As from 27 February 1998, the date on which the Directive transposition decrees were published, an intense debate developed concerning the anonymity obligation in architectural competitions imposed by article 13, paragraph 6 of this Directive.

A study of the legal regulations applicable to competitions in each of the studied countries³, an analysis of the debates and the issues raised by competitions through the professional press and a survey carried out through written questionnaires, completed by telephone interviews, provided a number of clearly expressed points of view concerning the application of competitions in other European countries and, more specifically, on the question of the anonymity of candidates entering project consultant competitions in these countries.

The main conclusion of this study on competitions was that the use of anonymity led to very few problems in the other European countries. There were several reasons for this :

- because, in nearly all cases, competitions are not obligatory. Clients that do not totally subscribe to the clauses laid down by the Directive and, where applicable, national laws applicable to competitions, are completely free to use other procedures, particularly that of restricted procedures which can be quite similar to competitions,

- because, in many of the countries, competitions are very rare and limited to operations that are exceptional due to their significance or size,

¹ Centre de Recherche sur l'Habitat – Centre de Recherche sur les Sciences et les Savoirs de l'Architecture et de la Conception, laboratoire de l'École d'Architecture de Paris-Val de Seine, member of UMR 7544 LOUEST (Laboratoire Organisations Urbaines, Espaces, Sociétés, Temporalités) section of CNRS.

² This study can be fully consulted and downloaded in PDF format from the RAMAU network web site, (<http://ramau.archi.fr>), "lire" heading.

³ Being Germany, the United Kingdom, Ireland, Belgium, the Netherlands, Denmark, Spain, Portugal and Italy.

- and finally, where they exist, competitions are traditionally open, resulting in the jury being confronted with several dozen or even several hundred proposals. Anonymity is therefore not only easy to implement, but above all meets the logic dictating the equality of treatment of candidatures and is much appreciated, both by organisers and candidates. It was also seen that, depending on the country, competitions are less a method of selecting a successful candidate for a design contract than a process used to publicly discuss development or intervention hypotheses, ideas, etc. In this latter case, they are often not carried through.

However, during this study, we became aware of the large number of problems raised by the adoption of the trans-national legal framework as set out by the Services Directive in national professional environments which in many ways are very different from one another. These include the reticence of professionals to see project consultancy treated as a service without any specificity; the lack of enthusiasm of public clients to have their service supplier selection procedures opened onto a European level with all the additional complications that this presupposes; the abandoning of the practice of working with a small local circle of service providers with whom a relationship of confidence has been established; the problem of having to compete on the basis of fees; etc.

The present study extends this first comparative European analysis, and completes it with regard to all points resulting from the choice of project consultant for the attribution of a public service contract entering the framework of the Services Directive where there is no project competition. It should be remembered that among the different measures aiming to harmonise the methods for entering into public services contracts in the different member States of the European Community, Services Directive 92/50/EEC, dated 18 June 1992, defines four procedures for entering into public services contracts :

- the open procedure,
- the limited procedure,
- the negotiated procedure,
- the project competition.

We shall concentrate on the first three of these.

B. THE AIMS OF THE STUDY

At the beginning of the survey, the idea had been to better understand the processes used by public clients in the main European countries to choose their private project consultants in view of building a new structure (building or infrastructure), rehabilitating or reusing an existing building, or carrying out an urban development. What impact has the Services Directive had on the implementation of public contract attribution procedures for project consultants in each of the European countries, particularly given the regulations and practices existing prior to the Directive ?

The four main questions were as follows :

1. What advantages and what inconveniences are presented by the three usable procedures (open procedure, restricted procedure and the negotiated procedure) when

compared with one another from the client's point of view : speed, simplicity, level of control, flexibility in case of problems, etc.?

How, depending on its own potential, the nature of the operation to be carried out, the type of response that it expects from the project consultant, and other contextual elements, does the client decide which procedure to use ? At what point in the preliminary preparations (whether or not defined as a programme) and on what bases is the procedure begun ? Does the client undertake to see the chosen proposal through to its construction ?

2. What is the detailed chronological sequence of each of these procedures ? In other words, what methods are used, what parties are involved at the different moments of the procedure during : 1) the preparation of the call for tenders, 2) the definition of selection or pre-selection criteria, 3) the pre-selection of tenders obtained after a public call for tenders (in the case of a limited procedure), 4) the definition of attribution criteria, 5) the choice of the candidate awarded the contract, 6) the definition of his remuneration, 7) the contracting ?

3. What selection criteria are adopted : skills, references, means, financial bid, geographical location, etc.? Does the choice of procedure have an influence on their relative importance ? Are there any official policies or informal measures that favour certain practitioners (students, newly qualified architects, architects from other member States, women , etc.) ? If yes, how are they applied ?

4. What is the nature and the framework of negotiations between the client and the project manager(s) in each of the three procedures ? Firstly, what is the field of application for the negotiated procedure in each of the studied countries ? In this procedure and, where applicable, in the two others, how does the negotiation take place and what does it concern ? At what moment(s) does it intervene ? Is it a negotiation concerning the subject of the contract, the fees, the project consultant partners, on the basis of a design sketch or a declaration of intent ? What assignments are given to the architect or project consultant and how is the latter's commitment defined ? Can the negotiation lead to a breakdown into several contracts concerning partial objects ?

On the basis of these four questions, we have, on the one hand, tried to ascertain the national specificities and, on the other, the convergences that could be built up between the various member States on the theme of the relations (forms of cooperation and negotiation) developed between public clients and their project consultants.

This theme calls for a particularly clear understanding of the context in which public commissions are exercised in each of the countries. The context is expressed by the structuring of the project consultancy (training, distribution of competences and profiles), the regulatory professional protection (titles, exercise, remunerations), as well as by the structure of the public client (the commission's level of decentralisation, size and competences of the contracting bodies, presence of a public project consultant within these bodies, importance and means of access to private financing for the building of works in the public interest, etc), the particularities of the institutional and legal framework (legal organisation, particularly administrative, national inspection, recourse and dispute settlement authorities) and, finally, elements harder to grasp because they are more "cultural", being constantly changing variables within a country. These latter represent the power relationship between those involved, the definition of client expectations in terms of the architectural service, the role of the countervailing power exercised by citizens and/or users, etc. This long list, which is

probably incomplete, clearly reveals the difficulties involved in trying to make an international comparison within a limited time period, even when it concerns a theme as well-defined as the one examined here. It goes without saying that the survey was not intended to cover all these themes. Fortunately, we were able to obtain highly useful reports and documents to gather part of the information necessary for this understanding of national contexts : the report on public commissions prepared by D. Brésard and C. Fradin for MIQCP, the report by C. Nourrissat on the introduction of the Architecture Directive, publications resulting from the PUCA Euroconception and Eurorex programmes, and the works by G. Tapie, P. Godier and O. Chadoin on Spain and that by B. Haumont on project consultancy organisation in Europe¹. It is also worth noting the concerned initiatives taken by the Catalonian College of Architects and the Italian Order of Architects to make a series of fairly complete informative files on the situation of architects in the various countries of the European Union² available to the public.

C. COUNTRIES STUDIED AND METHODS

Eight of the nine countries that had previously been investigated during the competitions study were chosen for this study. Ireland was not included because of its small size and the large number of similarities between it and the United Kingdom. Germany, United Kingdom, Belgium, the Netherlands, Denmark and Portugal were subject to a first series of surveys during the winter of 2000-2001. Spain and Italy had been excluded from this first series of surveys because their situation regarding public contracts for project consultants was unclear at that time. They were subsequently taken into consideration and surveyed in spring 2002. Finally, to give the most complete comparison possible and to make the situation clearer for our European colleagues, it was decided to include a section on France. This latter is treated in the same way as the previously studied countries on the basis of a survey carried out in spring 2002. The information on each of these countries took three complementary forms :

1. A questionnaire was written in French and then translated into English, German, Portuguese, Spanish and Italian, and sent by letter to a panel of public figures chosen in each country for their highly specific competences in the field of public architecture contracts. The following were contacted in each country : 1) the main public client bodies on a national and local level, 2) the professional organisations (Orders, chambers, professional associations), 3) legal consultants responsible for the problem of public services contracts (project consultant only or not, in Responsible Ministries or on the European Commission consultative committee for public contracts). Certain Economic Expansion Posts also assisted us, either by presenting a global assessment of the country's situation in the building sector, by providing us with contacts, or by helping to physically organise our interviews³. A hundred questionnaires were sent out. Around forty answers were received.

The treatment of the questionnaires also led to the highlighting of points that had remained unclear either from a legal point of view, or in terms of the real practices used by those involved in attributing public architectural contracts. These points were listed for further

¹ See bibliographical references of these works in the appendix.

² See corresponding web site addresses in the appendix.

³ See the appended list of persons met.

development during the interviews (field of action of the public project consultant when this person exists, composition of the selection committees, use of fee scales, the nature of administrative control over the procedures and the bodies carrying this out, etc.).

2. Interviews were held in each of the countries to go further into qualitative themes for which the questionnaire method was insufficient.

During these 74 interviews, each lasting approximately 1h30, we particularly sought to understand the motivations accompanying the choice of a project consultant(s) selection procedure by the clients. How does the client minimise the risk being run during this choice? What type of guarantees are taken (experience of a previous collaboration, a large team, indisputable skills, attractive references, an organisation assuring a close level of cooperation between project consultants and the client, a strict control over the missions carried out, a public consultation, etc.)?

Two aspects of the inter-professional relations resulting from the attribution of public contracts were more specifically discussed during the interviews: 1) negotiations between the client and the project consultant collective: what is the importance of dialogue and negotiation for each of the parties; when do they occur and what form do they take? 2) the forms of cooperation between project consultants: are they contractual partners or are subcontracts used? How are these teams put together and for what period?

More generally, we paid particular attention to the way in which the recent European Directives have been introduced into traditional client practices and the adaptations that have been needed. We sought to clearly understand the debates raised by these legal and practical changes in client environments, among concerned professionals and in administrative sectors responsible for architecture and public contracts.

3. Documents concerning this theme have been collected and analysed.

On the one hand, they concern reports prepared for and, occasionally, by the French administration. The Economic Expansion Posts in the studied countries sent us a number of notes produced by their departments concerning “the public-private partnership” in the United Kingdom, “the architects” and “the legal framework for public contracts in the Netherlands”, “the guide to public contracts in Belgium”, etc. These reports provide an assessment, often very up to dated, of the main characteristics of the building environments in the studied countries with, depending on the country, a greater or lesser degree of applicability to the specific problem covered by our study.

The documents also include a certain number of academic reports concerning our subject. These are, for example, legal reports such as that by Philippe Flamme on “Architecture and public commissions; the impact of the new regulations”, concerning Belgium, or management and political science reports such as those by Marie-Anne Skaates on the internationalisation of architectural practices in Denmark.

Our contacts from professional organisations also provided us with various statutory and informative reports and brochures concerning public contracts as well as charters and documents reflecting the positions taken by professionals with regard to them. The administrations responsible for contracts provided us with the main legislative and statutory documents governing the attribution of public contracts to project consultants.

Finally, and this point is particularly important, we were able to use information available on the Internet, accessible either through official French and foreign sites concerning public contracts, or from within the sites of Ministries and other organisations concerned with architecture and town planning which, in most cases, are also the bodies to which our contacts belong.

The definition of the contents of the study was jointly broached by MIQCP and the members of the management committee¹ in June 2000. The distribution of the first series of questionnaires began in summer 2000 and the surveys in the first six countries took place between November 2000 and January 2001. Subsequently, a second series of questionnaires was distributed during winter 2001-2002, followed by surveys in Italy, Spain and France at the end of winter and during spring 2002. Despite major constraints resulting from this tight schedule, a large amount of information was collected, thanks in particular to the high level of involvement of MIQCP² and the members of the management committee who met together a great many times. However, the reader's attention should be drawn to certain limits in the analyses presented below.

. Firstly, our approach was focused on the clients. It is essentially their point of view that is expressed here concerning the choice of project consultants in the attribution of public commissions, even though this has been completed here and there by discussions with representatives of professional organisations. A more detailed understanding that covered, in particular, the problems linked to contract negotiations, would have required additional interviews with practitioners in the concerned countries or even with French practitioners having had experience of public commissions in these countries.

. In addition, given the small number of clients that we were able to contact and interview, we have a better description of State public commissions than those provided by local authorities which are often far more disparate in their operational methodology than the State. This largely but not exclusively depends on the size of the client services and the competences that they represent.

. We also had the problem of the absence or the almost generalised lack of reliable statistics permitting an evaluation of the relative importance of the different elements characteristic of national situations : global volume of public commissions, the allocation of State public commissions and decentralised public commissions, the allocation between project consultant contracts resulting from the Directive and contracts below the threshold, the level of concession-type, promotion-build and design-build operations applied in the building of public interest operations, the breakdown of the methods used to choose project consultants according to the type of procedure used, etc.

. Finally, it is possible that, despite a generally very warm reception, our contacts may have somewhat sweetened their description of the situation when being interviewed because they were worried as to how the survey might be used. Similarly, there is the concern that we too, due to the short period in which the survey was carried out, might have been led towards archetypes that were potentially caricatures of national situations. For example, we all too often heard the terms “Dutch consensus”, “British pragmatism” and “Danish protestant

¹ The implementation of the study was marked by a certain number of management committee meetings that included MIQCP, DAPA and CNOA. The authors would particularly like to thank Isabelle Moreau, of the National Council of the Order of Architects, and Jean-Jacques Tissier, of DAPA, who allowed them to profit from their contacts and provided them with a great deal of invaluable information.

² Particularly Sylvie Weil who supervised all the stages of the survey, participated in all the meetings carried out in the countries studied and who very carefully and competently read all the texts written within the framework of the report. We take this opportunity to thank her for all her efforts.

rectitude". There is no doubt that a greater internal understanding of these cultures is necessary to appreciate to what degree these designations are well-founded.

D. STRUCTURE OF THE REPORT

The following report is structured into two main parts :

- the first organises the information collected country by country in the form of monographs written as homogeneously as possible on the basis of a plan that first explains the statutory and national operational context (structure of the public client; main characteristics of the project consultant; the rules governing public contracts before and since the Directive; methods for recommending, controlling and ratifying the respect of the regulations), then outlines of the practices used to attribute contracts (most used procedures; selection criteria and stages at which choices are made; the moments when negotiations take place, the form they take and their content, etc.).

- the second part is transversal and proposes a comparative analysis of situations observed on a national level. The successively studied themes permit the organisation of thinking concerning, on the one hand, international convergences (procedure and positions found in a virtually similar manner in all or some of the countries studied) and, on the other, on the permanence of strong national particularities, especially in the interpretation of the Services Directive. Consequently, this second part will successively examine :

- . The public client in the main European countries : national structures and global development trends.

- . The regulations governing public contracts open to project consultants : national traditions and European regulations.

- . Procedures specific to a given member State.

- . Client practices

PART ONE

MONOGRAPHS

GERMANY

By Marie DEGY
(April 2001)

A. THE NATIONAL STATUTORY AND OPERATIONAL CONTEXT

1. The nature of public building works, the public client structure

The administrative and institutional structure

Germany covers an area of 356,910 km² and has a population of 82.16 million inhabitants, approximately a third of whom from the old Democratic Republic. It has a decentralised federal structure. The regional and municipal levels are largely autonomous. The law and the fundamental rule for political and administrative organisation in Germany is based on the principle of subsidiarity¹. The Federal Republic is organised around the following administrative and institutional levels :

- the federal State, the *Bund* has a parliament, *Bundestag* and a government, *Bundesregierung*. It defines framework laws with which regional and local laws must be compatible.

- the 16 regional States comprise 11 old *Länder* (Bavaria with 12 million inhabitants, Rhineland-Westphalia with 18 millions, the towns of Bremen, Hamburg and Berlin with 3.4 million inhabitants) and five new States resulting from reunification (the Brandenburg *Land* with 3 million inhabitants).

The regional State is the most important level, given that it has its own constitution, parliament, government, jurisdictions and a specific administrative structure resulting from the particularities of its history. It has different types of local authorities², each having administrations with regional and local competences. The smallest administrative level is that of the municipality or *Gemeinde*. The *Land* draws up its own building code (LBO) on the basis of a code jointly drawn up by all the *Länder* and the *Bund*. It defines the town planning documents (development plans, etc.) while respecting the outline laws decreed by the *Bund*. The drawing up of town planning documents similar to the French POS (land use plans) or the attribution of permits take place locally on the municipality or district level.

These different administrative and institutional levels have specific fields of competences. The Federal State is competent in terms of defence and foreign policy, the Regional States hold wide-ranging competences in all fields, including culture and higher education, and which, depending on their aim and scale, are placed in the hands of a large number of local

¹ All that has not been placed in the hands of the senior administrative level and does not depend on its competence, can enter into the hands of the lower level.

² The *Regierung* with its breakdown into *Regierungsbezirke*, the *Landkreis* with the *Bezirke* and its administration, the *Landratsamt*, the *Kreisfreie Stadt*, the municipalities or *Gemeinde* (16000) etc...

authorities. The towns are competent for primary education and the day-care centres, sports amenities, roadways and networks, etc.

Public construction contracts

The volume of building and civil works (*Hoch- und Tiefbau*) contracts in Germany in 1999 represented 264 billion Euros. Public contracts represented 42 billion Euros.¹

State aid (*Bund and Länder*) for housing, amenities and infrastructures increased in the years following reunification (1990). Depending on the regions, this trend then stabilised or reversed following the need to reduce budgetary deficits and re-evaluate the demand level.

This context led to the development of a strong and widespread privatisation of the public sector, undoubtedly accelerated by the introduction of fiscal devices to encourage private investment. “This leads to public contracts only being attributed for public amenities”.²

Over the last five years, the proportion of public contracts has fallen when compared with private contracts. Public contracts represented 25% of the global building volume in the middle of the 1990s (IFO München - Euroconstruct)³. In 1999, they only represented 16% (BAK), even though these figures vary greatly according to the regions⁴ and towns. In the Brandenburg *Land*, public contracts represent 11% of construction, buildings and infrastructures⁵.

Where works contracts are concerned, public contracts open to project consultants do not represent a large volume. Among these project consultant contracts, those concerned by the Services Directive (above 200,000 Euros) seem to vary from one *Land* to another : for example, 20% in Brandenburg, around forty contracts a year for Munich. In Berlin, and at a local district level, these contracts are attributed through the use of competitions, although it should be noted that they represent a very small percentage of all public contracts open to project consultants.

The public client

There are two main public client⁶ families :

- “Classic” public clients with the Federal State, the *Länder*, and the local authorities : municipalities, *Kreise...*, their administrations (ministries, local services, departments, offices, etc.) of which there are a great many on the regional and municipal level.

- Public clients as a result of their functions under private or public law which do not have an “industrial” nature and whose general interest missions are controlled or financed by public authorities (*Bund, Länder and Regierungsbezirke, Kreise, Gemeind, etc. local authorities*). For example and on condition that they are based on public law, these are professional associations and sickness insurance funds or, if they are based on private law, hospitals, cultural, social and sports amenities, institutions responsible for building housing, etc.

¹ *Institut der deutschen Wirtschaft*, Köln.

² Interview with Th. Maibaum, legal consultant to the Federal chamber of architects and T. Prinz, legal consultant to the *BDA*, an association of German architects.

³ *Architectural Practice in Europe, Germany*, 158 p. Royal Institute of British Architects, 1992.

⁴ Northern Germany is undergoing change and even recession, while the south continues to benefit from growth, including the new eastern German *Länder*.

⁵ Interview with Iris Andrea Stelzig, director of the department responsible for the basic legal principles underlying contracts concerning public buildings within the Ministry of Finance in the Brandenburg Land.

⁶ The German postal system and railways have been privatised or restructured.

The client categories that build the most are the local authorities (an average of 50%, buildings and infrastructures).

The financing of projects is often mixed, with varying levels of participation percentages. Depending on the available competences, the various administrative levels assure remunerated services for one another. They delegate the client role. The *Länder* are responsible for Federal State projects in their region and the municipalities do the same thing (example : the Bavaria *Land* finances 85% of a hospital and has it built by the town of Munich).

Organisation, competences and missions of public clients

Conventional clients traditionally have integrated departments responsible for urban development (*Stadtentwicklung* ..) which are separate from those responsible for building¹ (the building department within the ministry of transport, building and housing, the *Oberste Baubehörde* upper administration of the *Länder* and their local representatives, the *Baureferat* in the towns, etc.). The departments responsible for building and town planning can, as in Berlin, exceptionally be grouped together within a single administrative entity.

The town planning departments are responsible for drawing up town planning documents and preparing the resulting administrative authorisations. The building departments are competent to act as client for all buildings at their particular level : federal, regional or local.

Each client, depending on its policy choices, develops an organisation and the specific competences within the building departments. Generally speaking, there is a breakdown into different sectors : buildings (*Hochbau*), infrastructures (*Tiefbau*) and housing financing (on the level of the *Bund* and the *Land*). These clients (such as the *Länder*) have a decentralised organisation that matches the administrative breakdown within their region. There are dozens if not hundreds of offices or departments (*Bauämter*) locally authorised to attribute public contracts open to project consultants (*Vergabestelle*).

In order to reduce government spending, the administrations have been obliged to progressively reduce or freeze their staff levels since the middle of the 1990s. To increase efficiency, they are held to define the contents and the costs of their activities². Although to different degrees across the country, Germany is seeing a reduction and ageing of its government employees in building departments who, in the past, were responsible for client and project consultant missions. These public administrations have developed different strategies to have the necessary competences while trying to retain their quality requirements. The general trend is to make use of external service providers (architectural practices, design offices, private companies, semi-public companies, publicly-owned companies operating under private law, etc.) for all or part of project consultant and client missions. This general trend is not uniform. The size and culture of the client have a direct influence on the nature and the volume of the “externalised” services. Certain *Länder*³ (*Bayern, Baden-Württemberg, Brandenburg*) have chosen to maintain a minimum project consultancy competence, having decided that this is a necessary condition to assure their public client missions in a satisfactory manner. They attribute between 10 and 30% of the least complex project consultant contracts to their building department, with the remainder going to external service providers.

Because the towns have less important means, virtually none have an integrated project consultant (example : Munich). The partially conserved missions are mainly those of project

¹ The term "architecture" is absent from the names of all German administrations. Only the term "building" is to be found.

² Interview with M. Teicher, *Baureferat München, Verwaltung und Recht*.

³ The distribution of public contracts open to project consultants between building departments and private service providers is subject to an annual vote by the regional parliaments

management/supervision¹. For these architectural or town planning project management services, and particularly when these projects are technically complex or integrate obligatory social facets (social treatment of long-term unemployment, women's access to the job market, etc.), use is made of external professionals or companies². These service providers can thus become responsible for the procedures used to attribute public contracts open to project consultants.

Other *Länder*³ have developed more radical solutions and have privatised their building departments. They can create publicly-owned companies governed by private law (limited liability or joint stock companies) majority-owned by the State⁴. In this case, these companies assume the missions of the building departments. The *Land* votes a law assuring the transfer of certain of the competences of these departments to the companies which can find themselves attributed all or part of the public contracts open to project consultants for a given period (the *Nordrhein Westfalen Land*). These publicly-owned companies governed by private law are criticised⁵ as they benefit from captive public contracts and tend to distort competition by practicing prices that are too low given the services provided. For public contracts, they are held to respect the rules in force when it comes to the choice of project consultant and contractors. The creation of this type of company is also practiced by the federal State for specific projects (creation of the *BBB* to act as client for the new federal government district in Berlin).

This trend towards privatisation is expressed in the very form of the commission. The government foregoes its client role. Certain local authorities have chosen the lease contract solution by placing the building and financing of their project in the hands of one or more competing private operators⁶ (example : banks associated with contractors and project consultants). German law on public contracts permits this solution which is nonetheless criticised by professional organisations.

But the system is tending to spread for a large number of reasons : the absence of short-term public debts, the low level of skills available from the client, or the fear of having to organise a building competition⁷ that requires the formal respect of the procedure and having to organise an avalanche of German candidatures. The Audit Offices are very critical of this approach as the public partner commits itself financially for ten years without any real possibility of stopping the project.

2. Main characteristics of the project consultancy

There is no equivalent to the term “project consultant” in German. Martina Bollmann and Joël Vincent, in their document *Construction en pratiques, l'exemple de la France et de*

¹ Mission defined in the *HOAI*, the fee scales for architects and engineers (project supervision / *Projektsteuerung §31, Teil III : Zusätzliche Leistungen*)

² (The Berlin city-*Land* which signed a contract with the *DSK* company. This company provides services in the field of town and country planning and local development (*Entwicklungsträger*). Its project management services call on technical, financial and legal competences but never includes town planning, architectural or engineering services.

³ The Rhineland Palatinat *Länder* and the town of Bremen.

⁴ A public client can, if it retains the responsibility for financing, transfer its client prerogatives to a semi-public or private company.

⁵ Interview with T. Prinz, legal consultant to BDA, an association of German architects, and Th. Maibaum, legal consultant to BAK, the federal chamber of German architects.

⁶ Case of the « *Investorenwettbewerb* » or investor competitions

⁷ German texts differentiate between building competitions and ideas competitions.

*l'Allemagne*¹, gave the following definition : “all intellectual professions contributing to the design of a building” or “those participating in the architectural and technical design, being architects, consultant engineers, quantity surveyors, contractor design offices, etc.”. They also translate it by the word “*Bauleitung*” which literally means “works manager”, thereby confirming the importance of this aspect of the project in the approach taken to building in Germany. But, in practical terms, it would seem that the work “*Planung*”, meaning “design” is closer. This therefore raises the need to establish a shared definition of what is meant by a “project consultant” service.

Both German and French “project consultant” professions operate within fairly similar statutory frameworks. The status of architect and engineer are protected and the exercise of these professions is governed by laws defined on the level of each *Land* (*Architektengesetz* and *Ingenieurgesetz*). To have this status, these professionals must hold a diploma from a technical university or a technical college, provide proof of having at least two years professional experience for architects and three years for engineers, and be registered on the lists of the regional professional committees. They may only practice in the *Land* where they are registered. French and German architectural project consultant missions are fairly similar to one another². For the time being, architects and engineers benefit from a virtual design and project signature monopoly due to the legal requirements resulting from the regional *LBO* (*LandesBauOrdnung*) regulations.

“From the point of view of public law, the two project consultant categories intervening in the building process are the author of the project, the *Planverfasser*, and the resident engineer, the *Bauleiter*, and both have clear-cut responsibilities. The author of the project is responsible for ensuring that the project complies with town planning and building requirements. The resident engineer³ must ensure that it complies with current accepted practice and standards”⁴.

The project consultants are listed in the *HOAI*⁵ in accordance with the following professions :

- architects *Hochbauarchitekten*, landscape architects *Landschaftarchitekten* and interior designers, *Innenarchitekten*, represented by regional chambers of architects (*Landesarchitektenkammer*), the federal chamber (*Bundesarchitektenkammer*), and the BDA (Bund Deutscher Architekten).

- the structure and infrastructure, fluids, acoustics engineers, etc., the land surveyors, the quantity surveyors, represented by, among others, the *Bundesingenieurkammer* federal chamber of engineers, the *VDI Verband Deutscher Ingenieure*, the *VUBI*, etc.

The German architects that can be compared with the French definition are the *Hochbauarchitekten*. They also provide town planning services. The number of architects was estimated at approximately 80,000⁶ in 1995. On 1 January 2000, the BAK evaluated them at nearly 90,000 working architects registered with the regional chambers. They represent one of the greatest professional densities in Europe, and there are nearly three times as many as there are in France. By introducing competition without any geographical limitations, the Services Directive has had an initial effect of reinforcing the level of competition between architects from the different *Länder*. Their distribution by status / activity is as follows :

¹ Bollmann Martina and Joël Vincent. *Construction en pratiques, l'exemple de la France et de l'Allemagne / Bauen in der Praxis, das Beispiel Frankreichs und Deutschlands* , 267 p., Eurorex-PCA, 1993.

² See chapter : Methods for establishing the amount of fees.

³ The German and French definitions do not cover the same areas of work.

⁴ Nadia Rochette-Arab. in *L'élaboration des projets architecturaux et urbains en Europe* , volume 4 : *Les maîtrises d'ouvrage en Europe : évolutions et tendances*, collection « Recherches » PUCA, 1998.

⁵ *HOAI*, the fee scale for architects and engineers.

⁶ Carl Steckeweh, *Architektur, Informationen für Studienanfänger* (architecture, information for new students) Bund Deutscher Architekten, 1996. These figures only concern architects registered in regional chambers..

<i>Hochbaurchitekten</i> /architects	<i>Stadtplaner</i> / “town planners” :
Self-employed : 46,601	Self-employed : 2,871
Employees : 34,913	Employees : 1,157
Civil servants : 4,982	Civil servants : 314
Architect-builders : 3189	Other status : 13

Table 1 : Types of architects and town planners in Germany

These figures show that half the architects are employed by administrations and private companies. They illustrate the low level of permanent staff working in building administrations and the progressive disappearance of the civil servant status in Germany. On the other hand, the proportion of salaried architects working in construction firms is tending to increase¹.

Whether architects or engineers, most self-employed project consultant specialists are organised into small specialist structures (70 to 80% have less than five employees). There are a few large structures with practices in the various *Länder*. There continue to be few generalist design offices in the building sector. There are more in the development sector. Small specialised structures occasionally associate with one another on projects in order to have the required skills. Multi-disciplinary partnerships are widespread and considered as being more flexible and able to adapt to the diversity of commission conditions.

Currently, there are virtually no limited liability companies or joint stock companies, but this situation is now changing. In the past, self-employed professionals were not authorised to work via this type of structure as they were obliged to provide services in their own name for reasons of professional liability and guarantees. To overcome these difficulties, a specific type of company was created : the partnership company² (*Partnerschaftsgesellschaft*) which is only applicable to self-employed professionals. To be awarded project consultant contracts and have the status of “architectural company”, 50% of this company must be held by architects in certain *Länder* and 70 % in others. Partnership companies are generally the legal formalisation of pre-existing working relationships.

The status and the nature of project consultant contracts vary according to the organisational arrangement chosen by the client. When this latter calls on external service providers, there are two possible organisational arrangements in which the general contractor plays an increasingly important role (*G.U / Generalunternehmer*). This trend is more marked in private contracts :

1- The client has the possibility of separately signing works contracts and project consultant contracts. Direct contractual ties thus exist between the architect and the client, and jointly or separately with the engineers. For rehabilitation contracts, the client generally has separate contracts with the various contractors and chooses its architect for all or part of the missions. For new building works, the client tends to work with a general contractor. In this increasingly widespread case, the project consultant contract can only concern the design, while the works supervision is incorporated into the works contract. Consequently, this particular mission is taken out of the hands of the architect.

¹ Carl Steckeweh, Opus cit.

² Interview with Th Maibaum, legal consultant to the Federal Chamber of Architects.

2- The client can sign a works contract with the general contractor that incorporates a project consultant contract¹. In this case, the architect intervenes as contractor employee or subcontractor. The result is that the contractor is the client's only contact.

The client can choose a general project consultant² (*Generalplaner*) for the different project consultant contracts. This, for example, can be the architect who will then propose the technical design offices of his choice to the client. This latter can also sign separate contracts with each of the project consultants. According to the requirements of the *Länder* Audit Offices, the project consultant contracts are separately attributed to the different service providers working on a same project. This is in order to control costs and the quality of the works, a desire to ensure that commissions are better spread and to fight against corruption. The German Order of Architects has asked the *Länder* Audit Offices to check the economic reliability of these approaches (rent-purchase, single works contract with a general contractor). The results obtained up to now indicate that the rent-purchase contract solution or the use of works contracts incorporating project consultant services are much more expensive for the client than those that separate works contracts from project consultant contracts.

The appropriation of project consultant contracts by the banks and general contractors can also be seen through the attempts being made to diversify competitions. The regional competition rules (GRW 95) contain two procedures said to be exceptions³, being investor competitions (*Investorenwettbewerb*) and combined competitions (*Kombinierter Wettbewerb*). The aim of the former is to favour site development or construction with regard to town planning constraints. Three to five investors and their project consultants associate with one another, each proposing a project in view of selling or transferring a site and in order to test the potentialities. No guarantee is given to the designer as to what use will be made of his work. This procedure can be used to meet the requirements of local authorities prior to the signing of a rent-purchase contract. The aim of the two-phase open or limited combined competition is to provide a greater control over building costs. The designer associates himself with a contractor to propose his candidature. This contractor undertakes to provide the work on the basis of the designer's priced project. The projects of the chosen designers (max. 7) are judged independently from the tenders submitted by the contractors. This procedure endangers the principle of maintaining a separation between design and building.

The result is that project consultants and architects in particular lose a proportion of the contract. They are confronted both with the increasing complexity of projects for which they are poorly prepared, and with a redistribution of roles and missions that benefits the contractor and the new professionals, the *Projektsteuerer* or *Projektmanager*⁴, who, according to clients, represent the best guarantee that a project is well managed.

3. Regulatory control of public contracts before and since the Services Directive

The main federal and regional regulations integrating or linked to the transposition of the Services Directive for project consultant services are :

¹ Th. Maibaum : « the trend is towards an increasing use of these works contracts that include design services. We are seeing an increasing level of conflict with clients concerning this, and architectural practices are complaining that they can no longer directly access design contracts »

² IFEM, *La maîtrise d'œuvre en Europe dans le bâtiment. La République Fédérale d'Allemagne*.

³ Certain *Länder*, including Bavaria, have not included these types of competitions in their *GRW*.

⁴ Depending on the projects and the size of the missions confided in them. Young architects also carry out these missions which incidentally are less well defined in the HOAI and unevenly remunerated.

- the *GWB Gesetz gegen Wettbewerbsbeschränkungen*, the law against limitation of competition / part 4, dated 26 August 1998,
- the *VgV Vergabeverordnung*, order for the attribution of contracts dated 22 February 1994, modified 29 September 1997 and 9 January 2001.
- the *VOF Verdingungsordnung für freiberufliche Leistungen*, requirements for the attribution of services contracts for professionals (including project consultants) published 12 May 1997,
- the *VOL Verdingungsordnung für Leistungen*, requirements for the attribution of services contracts, excluding professional services,
- the *GRW 95 Grundsätze und Richtlinien für Wettbewerbe auf den Gebieten der Raumplanung, des Städtebaues und des Bauwesens*, the principles and directives for competitions in the field of land-use management, town planning and construction, dated 1 January 1996,
- the *HOAI* and the *DIN 276* standard, to which direct reference is made by the *VOF* and the *GRW 95*.

These regulations (*VOL, VOF, VOB, etc.*) are then adapted and incorporated into the body of local requirements or into brochures internal to the building departments of public authorities and concerning the building process, such as the *A. BAU / Allgemeine Anweisung für die Vorbereitung und Durchführung von Bauaufgabe Berlins*, an indispensable aid to building in Berlin that represents approximately 1,500 pages.

Prior to the European Works, Supplies and Services Directives, statutory regulations existed concerning the attribution of contracts. They were based on legislative budgetary management regulations (*Haushaltsgrundsatzesgesetzes* dated 19 August 1996) but there was no equivalent to the French Public Contracts Code. There was no specific regulation concerning service provision contracts prior to the Directive 92 /50. Its transposition led to the drafting of compilations of service provision requirements, the *VOL* and, more specifically for professionals, the *VOF*.

For the transposition of the European directives, the Federal Ministry of the Economy and Technology¹ is responsible for the definition of all the founding principles underlying the regulations and acts as the coordinator between all the other ministries. In this particular field, it is the German State's representative before the European Commission. Within this framework, the Federal Ministry of Finance also participates in the PPPP (*Pilot Project on Public Procurement*) whose aim is to ensure cooperation between a certain number of European administrations in order to resolve problems concerning public contracts.

The *VOF (Verdingungsordnung für Freiberufliche)* is therefore the transposition of the Services Directive for intellectual project consultant services. The concern was to be able to differentiate between the provision of services by certain professionals from the provision of other services. The choice of the applicable *VOF* or *VOL* regulation depends on the contents of the contract. If the nature of the service to be provided is such that contract specifications can be clearly and exhaustively drawn up and are therefore “describable”, the applicable

¹ Interview with Frau A. Arlt, Referat IB3 -*öffentliche Aufträge/* Public contracts. *Bundesministerium für Wirtschaft und Technologie* / Federal Ministry of Economy and Technology ; the Ministry of Finance has a coordination function for the Services Directive or the Works Directive and works within specialised commissions for the drafting of regulations (*DVA / Deutschen Verdingungsausschüsse*) associated with the *DIN*. This work takes place in consultation with all administrations (the *Bund*, the *Länder*) and with other concerned entities representing certain branches of industry, the professions, etc.

regulation is the *VOL (Verdingungsordnung für Leistungen)*. It permits the contract attribution by selecting the best offer made within the framework of open, limited or, potentially, negotiated procedures.

For example, it concerns works supervision (*Bauleitung*) or the services of technical engineers not linked to construction works (*nicht gestalterisch*). If the nature of the service is such that the contract specifications are not “describable” in detail, the *VOF* framework is used (*Verdingungsordnung für freiberufliche Leistungen*). This concerns all services provided by self-employed persons, including the services provided by project consultants listed in the *HOAI*. In this case, there is only one possible procedure: the negotiated procedure (*Verhandlungsverfahren*)¹ referenced in §11, paragraph 2 c) of the Services Directive. The *VOF* has two chapters: the first concerns general requirements for all professional services and particularly the rules governing the negotiated procedure. The second chapter concerns requirements specific to architects and engineers when competitions are used. The *VOF* refers to the *HOAI* and the *GRW 95*. These three regulations are interconnected with one another.

The transposition of the Services Directive has considerably modified German law concerning project consultant contracts. It has made it complicated. To enter into a contract, a client is first presented with two problems: the definition of the nature and the status of his contract(s) in order to know what procedures to apply and then, where applicable, the calculation of the total amount represented by project consultant contracts. If project consultant services are included in a works contract, they depend on the Works Directive transposed into the *VOB*; if the services correspond to works supervision or “*Ausführung*” (phases 6 to 9 of the *HOAI*²), they can depend on the *VOL*; if the services correspond to design phases or “*Planung*” (1 to 5 of the *HOAI*) they depend on the *VOF*, etc. The calculation of the total amount of the project consultant contract, given in articles §3³ and §22 of the *VOF* and linked to the *HOAI*, is equally complex. According to § 3 Abs. 3 of the *VOF*, the threshold concerns the total amount of fees for services of the same nature, whether or not carried out by a same service provider. However, the design phases (*Planung*)⁴ are considered to be different from those concerning works supervision (*Ausführung*). Consequently, for a same project comprising these two types of services, the total amount of the project consultant contract (*Planung*) is not added to that for the works supervision⁵. The possibility of being able to separate contracts, the recommendations of certain *Länder* to favour the attribution of contracts in separate lots for reasons of cost control and distribution of the commission have, without any doubt, led to an increase in the number of contracts lying below the 200,000 Euros threshold⁶. Clients also criticise the *VOF* for its administrative awkwardness, the extended time periods and costs

¹ Interview with Michael Teicher, - *Abteilungsleiter Landeshauptstadt München, Baureferat, Hauptabteilung Verwaltung und Recht* / Director of the administrative and legal section of the Munich building department,

² See chapter: Methods for establishing the amount of fees.

In the *HOAI*, there is no obligation imposed on the client concerning the number of phases in a contract and it is very rare that it gives all nine phases to a same service provider. The contract is often split between design and works supervision.

³ §3 of the *VOF* is the transposition of § 7, paragraph 4 of the Services Directive.

⁴ See glossary.

⁵ Boesen, Maibaum, Noebel, *Die Vergabe öffentlicher Aufträge./ 2.2.6. Die Berechnung des Auftragswertes*. München Berlin Rehm, 1999.

⁶ Interview with Werner Hoffmann, Bavaria *Land* « Following investigations by its Audit Office, the Bavaria *Land* required that works contracts and project consultancy contracts necessarily be attributed separately and that this take place even within the project consultancy between the architects and the specialised engineers. However, this is an exception to the rule»

resulting from its application given that very few Europeans answer public calls for candidatures.

The implementation of the *VOF* therefore obliges project consultants and clients to make considerable changes to their previous habits. Until 1997, the date that the transposition of the Services Directive came into force, the dominant practice for the attribution of project consultant services was by private agreement ¹ for the choice of candidate or project, on the basis of lists of architects in the public and private sectors. The *VOF* articles are legally binding when they are a direct transposition of the Directive. Clients systematically apply all *VOF* requirements and thus only use the negotiated procedure ². This provides them with a wide margin of manoeuvre in choosing their project consultants despite the formalism of the procedure.

The main principles of the Directive, such as making contract attribution procedures as transparent as possible, are favourably received both by the administrations who want to encourage quality and fight against corruption, and elected representatives who, above all, want to avoid all bad publicity. However, it would seem that under 200,000 Euros, private agreement remains the practice most used by local authorities.

To assist local client building services, the legal departments of the *Länder* and certain large towns have specialised legal departments³ that are knowledgeable in matters concerning the transposition of the Services Directive regulations (for example, within the Ministry of the Economy and the Ministry of Finance of the Brandenburg *Land* or within the senatorial administration of the Berlin *Land* responsible for town planning). These departments have developed field tools in order to translate the basic principles of the regulations into practice as faithfully as possible. Despite their lack of means, these legal departments are trying to develop educational tools in order to fight against legal insecurity and avoid claims. However, given their vast number and variety, local client services⁴ are confronted with the problem of training (600 *Vergabestelle* or administrations able to attribute contracts in Berlin, dozens if not hundreds on the level of the local administrations of the Regional States and, a fortiori, on the federal level).

4. Methods to ensure the legality of procedures and contracts. Recourse for project consultants and contractors who believe themselves wronged. Recommendations, penalties.

Due to its federal structure and the splintering of services able to attribute project consultant contracts, monitoring the introduction of *VOF* and *VOL* requirements is physically difficult.

¹ Interview with M. Teicher, Munich.

Cf. Emmanuel Moulin, "*Le quartier du gouvernement à Berlin, organisation et commandes dans un grand projet public en Allemagne*". Acts of the second PCA prospective research seminar (Euro-conception, European) « Development of architectural and town planning projects in Europe : What action systems ? Paris 1997.

² Article 5 of the *VOF*, « contracts for professional services must be attributed through a negotiated procedure on the basis of an appraisal ... ».

³ See the list of contacts made in the different departments during this study : *Grundsatzfragen der Verdingungsordnung für freiberufliche Leistungen Umsetzung der Dienstleistungsrichtlinie 92/50 der EU in nationales Recht* or *Grundsatzfragen des Vergaberechts* in the Brandenburg *Land* or *Bauliche Grundsatzangelegenheiten* in the Berlin *Land*.

⁴ Extract from the questionnaire. Th. Maibaum, legal consultant to the Federal Chamber of Architects : "Concerning the attribution of public contracts, German law has become so complex that clients everywhere are having to organise educational seminars on how to prepare public contracts".

Given this problem, the legal departments responsible for public contracts are developing internal tools for the application of the regulations : guides, mementos, matrices to handle the selection criteria, etc., for civil servants responsible for attributing contracts. These persons find it difficult to transfer the main principles of the directive into practice, to fight against established habits and even corruption¹. There is no method to systematically check the legality of procedures and contracts, simply a “self-checking²” for the contracting authority, being the potential client. The only check systematically carried out is that by the Audit Office in each *Land*. This Office carries out an à posteriori check of the economic viability of the contracts but does not have the power to cancel them. It essentially plays an educational role for politicians who fear the negative effects of their management being criticised. The chambers of architects in the *Länder* use this means of pressure to fight against the practice of *leasing* and encourage clients to make use of negotiated procedures or competitions to attribute project consultant contracts. The Federal Chamber of Architects provides project consultants and clients with a complete document³ on the procedures used to attribute public contracts in accordance with the *VOF* and the *GRW*. This theme has been well covered in the professional press since 1992.

Candidates seeking the attribution of a project consultant contract have a right of recourse⁴ since a new law concerning public contracts came into force on 1.01.1999 : the *GWB (Gesetz gegen Wettbewerbsbeschränkungen Teil 4, §97 bis §129⁵)* following the transposition of the European directives. This law has been tied to all legal regulations covering restraint on competition. Above the 200,000 Euros threshold, “all contractors have the right to require that the legal provisions concerning the contract attribution procedure be respected”. The recourse to or the filing of a complaint by a candidate is only possible prior to the attribution of the contract. The prerequisite to any action is a motivated and well-founded demand⁶ made by the “contractor” candidate or by an administration. This demand is to be made as early as possible.

There are two possible administrative contacts : the contract attribution verification office, *die Vergabeprüfstelle* and the contract attribution chamber, *die Vergabekammer*.

The verification office has an advisory and arbitration role. It generally sits on a federal and regional level within the administrations assuring the legal control. The checking process is not formalised and the office services are free of charge. When the checking process is being carried out, the office has no power to prevent the potential client continuing his procedure. If the requesting contractor does not agree with the verification office’s decision, it can submit a recourse before the contract attribution chamber. This independent administration exists on a federal level for Federal State contracts and on a regional level for other contracts. Having ensured that the recourse is well-founded, it is then transmitted to the concerned contracting authority. The transmission of the recourse has the effect of immediately suspending the procedure. If the contracting authority turns a blind eye and attributes the contract, this latter is declared void. To ensure transparency, the requesting party and all candidates take part in the checking procedure.

¹ Interviews with Messrs. Teicher (Munich), Groth and Meinhardt (Berlin).

² Interview with Th. Maibaum, legal consultant to the *BAK* and T Prinz, legal consultant to the *BDA*.

³ Boesen, Maibaum, Noebel, *Die Vergabe öffentlicher Aufträge*.323 p. Munich Berlin Rehm, 1999.

⁴ *Die Vergabe öffentlicher Aufträge* p 83 to 87 and 135, 160 to 173 and other interviews with Messrs. Teicher (Munich), Hoffmann (Bavaria Land), Groth (Berlin), Meinhardt (Berlin).

⁵ Law against the limitation of competition, part 4, chapters 97 to 129.

⁶ The non-respect of the procedure must have resulted in the contractor suffering prejudice.

The decision of the contract attribution chamber is an administrative act. The contractor or the contracting authority can decide not to accept the chamber's decision. In this case, the contractor must register a complaint with a regional jurisdiction, *der Vergabesenat beim Oberlandesgericht*. The checking procedure made by this authority extends the suspensive effect. If the *Vergabesenat* accepts the soundness of the complaint, the concerned contracting authority has ten days in which to "correct" its procedure on pain of it being declared invalid. For economic or other reasons, the *Vergabesenat* can authorise the contracting authority to attribute its contract. The *Vergabesenat's* decision is without appeal. The wronged parties can sue to obtain pecuniary damages. Calling on the *Vergabekammer* verification chamber and the *Vergabesenat* costs the *Vergabekammer* between 2,500 and 25,000 Euros. The cost of the procedure before the *Vergabesenat* represents 10% of the contract amount. In Munich, the number¹ of recourses is approximately one per thousand. In the Brandenburg *Land*, recourses generally take place on the level of the local authorities. The legal insecurity generated by the use of procedures resulting from the transposition of the directive is one of the arguments used by clients to try and attribute contracts that fall below the threshold².

5. Methods for establishing the amount of fees

Within the framework of public and private contracts, all services provided by architects and engineers and their remuneration in the form of fees are based on a statutory federal regulation dating back to 1976 : the *HOAI Honorarordnung für Architekten und Ingenieure*³. Its application is obligatory for public and private contracts. These professionals consider it to be one of the mainstays of their work. However, certain clients are highly critical and believe that the "protective envelope" represented by the *HOAI* will be unable to resist the increasing economic pressure that at least partially results from the Services Directive⁴.

In the *HOAI*, the project consultant services are broken down into phases which are given a detailed description in 13 chapters. Half concern architectural, landscaping and town planning services, while the others concern engineering services. These services concern buildings, external areas, interior fitting out and civil constructions for the design, works supervision and other expertise missions. They cover new buildings, rehabilitation, renovation and maintenance. Each chapter includes a fee scale.

For example, the mission elements described in chapter II⁵ of the *HOAI* are divided into two main sections and, in overall terms, repeat the contents of the basic missions provided for by the MOP law⁶ : design services⁷ corresponding to phases 1 to 4 of the *HOAI* and services linked to the carrying out of the works⁸ corresponding to phases 5 to 9. All of these nine phases correspond to basic services (*Grundleistungen*). Each of them can be completed by other specific services (*Besondere Leistungen*). Phase 1 includes a redefinition of the project programme which will then be used as a contractual base. Project control (*Projektsteuerung*) is included in chapter III "additional services", without a fee scale. Surveys or feasibility

¹ M. Teicher, (Munich).

² Interview with members of the *IABG* company.

³ The latest version dates back to 1 January 1996.

⁴ Interviews with M. Teicher, *Recht und Verwaltung, Baureferat, München* and J. Behrens. Technical planning within the *TLG*

⁵ This chapter concerns architectural projects for buildings, external areas, and interior fitting out.

⁶ In Germany, the preparation of working drawings forms part of the services linked to the execution of the works. This differs from the « design and works » section of the MOP law concerning Public Clients.

⁷ *Planungsleistung*.

⁸ *Ausführungsleistung*.

studies and services in the town planning sector are to be found in other separate chapters with specific fee scales.

The client is free to sign a contract with the project consultant(s) for the number of phases that it has chosen. In the case of an architectural project, there is no “basic mission” such as covered by the MOP law for all phases¹ and German clients rarely attribute complete missions. The system allows contracts to be split between different service providers (architects, engineers, site engineer, contractor, etc.) in accordance with the requirements of the project and the skills of the client, and to provide for optional phases. This practice is very widespread² and allows for a project to be halted at any moment without having to compensate the project consultants. Consequently, these latter have no guarantee that their contract will be carried through. They occasionally find themselves with mission fragments whose remuneration is not defined in the *HOAI*.

The following table indicates the distribution of fees for the basic services in accordance with the *HOAI* phases :

Phases / basic missions	Buildings	External areas	Interior fitting out
1. <i>Grundlagenermittlung</i> / Definition of contract bases and design sketch	3	3	3
2. <i>Vorplanung</i> / outline proposals with cost estimate	7	10	7
3. <i>Entwurfplanung</i> / scheme design with cost estimate,	11	15	14
4. <i>Genehmigungsplanung</i> / project study for submission of building permit	6	6	2
5. <i>Ausführungsplanung</i> / construction design	25	24	30
6. <i>Vorbereitung der Vergabe</i> / preparation of written documents for the signing of works contracts	10	7	7
7. <i>Mitwirkung bei der Vergabe</i> / assistance for the signing of works contracts, with cost control	4	3	3
8. <i>Objektüberwachung und Bauoberleitung</i> / supervision of works and their compliance with all written documents and drawings	31	29	31
9. <i>Objektbetreuung und Dokumentation</i> / checking the compliance of completed works prior to the expiry of guarantees, as-built documents and drawings.	3	3	3

Table 2 : Evaluation of fee percentages in Germany, in accordance with design and construction phases

It should be noted that the design phases / *Planungsleistungen* (1 to 4), being the ones mostly confided in architects, represent (without construction design) only just over a third of the global amount of fees. The construction design (phase 5) and the site supervision (phase 8), which very often go to the contractors, represent 3/5 of the fees. Part of the remaining missions can be attributed to the *Projektsteuerer*. Where project consultants are given missions for one or two phases, the *HOAI* provides for a negotiable increase in fees. However, in the real world of negotiations, this is a delicate point, especially if part of the project consultant missions has been attributed via a works contract with a contractor. The

¹ Interview with *Frau Iris Andrea STELZIG, Referat 51 - Baufachlicher Grundsatz und Baujustitiariat Land Brandenburg - Ministerium der Finanzen.*

² Interviews with Klaus Groth and Detlelf Meinhardt / Berlin Land, by Iris Andrea Stelzig / Brandenburg Land and Thomas Maibaum, federal chamber of architects.

occasionally extreme fragmentation of the missions makes the fee scales inoperative as they give a global amount for all the phases. Making use of the *HOAI* is that much more difficult when the architect is subcontracted by the contractor. For engineering missions, the distribution varies according to the engineers' specialist fields, but in overall terms and unlike the services provided by architects, the design phases are better remunerated than the works supervision phases.

Contracts where the estimated amount of works is greater than 50,000 DM (approximately 25 000 Euros) and lower than 50 million DM (approximately 25 million Euros) are held to respect the fee scales. In other cases, negotiations concerning the amount of fees is not subject to control. For all basic services, the calculation of fees is carried out in accordance with the global cost of the object / *Anrechenbare Kosten* (whose evaluation is specified over the various design phases in accordance with the DIN 276 standard) and its complexity in accordance with the *Honorarzone*. For specific services, fees are calculated according to an hourly rate determined according to an evaluation of the mission and the qualifications of the persons necessary to carry it out. The number of hours necessary to carry out these services is established by the contractual parties (example : project management, surveys, certain town planning studies, complements to the basic missions cited in the table above, etc.).

6. A policy aimed at distributing public commissions and supporting the profession ?

As well as being faced with a reduction in public contracts¹ and the problems associated with their financing, clients are also having to deal with an increase in the project consultant services offer. On the one hand, the Directive has had the effect of eliminating the frontiers between the *Länder*, allowing project consultant professionals to have access to the entire German market². On the other, the level of references in the selection criteria stated in the *VOF* (articles 12, 13³ and 16⁴) do not make it easy for young practices to have access to commissions, despite article 4 Abs 5 of the *VOF* concerning equal opportunity for candidates. In concrete terms, clients are not at all obliged to give these candidates a share of the contracts. Certain clients judge these *VOF* articles to be contradictory.

To react to this situation, there does not seem to be either a specific commission distribution policy nor any support to the weaker parts of the profession on the federal level. The Regional States and large towns wish to protect their fabric of small and medium sized companies and privilege the attribution of separate contracts. They are free to operate specific policies in this field, but economic and financial pressure, or the existence of a local group of seasoned professionals, does not incite them to innovate or take risks with service providers that they do not know or which are unfamiliar to them.

These policies can be translated by a more pronounced use of the negotiated procedure or of competitions. The organisation of open competitions is believed to be a means that allows

¹ See chapter A.1 Nature of public building works and the structure of the public client.

² « In the past, candidatures were regionally limited. We now have candidates from throughout Germany. The European Directive seeks contract openness, but we have a very small percentage of candidates from the European Union. » Interview with Mr. Hoffmann, *Ministerialrat* ministerial consultant for building in the Bavaria *Land*.

³ §13. of the *VOF*, the aptitude of candidates « The capacity of candidates to provide services can be evaluated in terms of their know-how, efficiency, experience, and reliability ... »

⁴ §16 of the *VOF* : signing a contract « the contracting authority signs the contract with the candidate who, on the basis of conditions negotiated for this contract, can provide the best service».

young professionals access to public commissions, but they are few and far between (town of Munich and the Bavaria *Land*). Clients consider that they are very expensive to organise, both for themselves and for the project consultants given the number of participants (often several hundred)¹. The city-Land of Berlin has developed a different position. For over ten years, it has participated in the experimental use of very different types of competitions². The most commonly now used is the limited invitation-only competition which only gives young teams a very limited access to commissions given the heavy concentration of project consultation professionals in Berlin.

By using the negotiated procedure, the client (*Bund, Land, Gemeinde, etc.*) can use selection criteria to favour young architects, women or professionals from the new *Länder* (example : the Brandenburg *Land*) or place emphasis on experienced practices. These latter, better represented in professional institutions, do not encourage the client to carry out any particular measures in this sector.

B. PROJECT CONSULTANCY CONTRACT ATTRIBUTION PRACTICES

1. Most used procedures for choosing project consultants.

Depending on its needs and its project, the client is free to choose the type of contract it wishes. This decision then leads on to the procedure used to choose the project consultant. This framework will define the nature of the relations between the client and the project consultant³. The Table 3 provides a summary by simplifying the different possible options.

Clients complain that it is difficult to identify the nature of the services and thus the applicable regulations and procedures to attribute their contract. In particular, there is a lack of clarity between intellectual services based on the VOF (“not describable and creative”) and those based on the VOL (“describable”).

If the necessary competences are not present, the client will seek a unique contact, either through a service provider or a general contractor. This simplifies its client obligations but in this case, it has little or no influence on the choice of project consultant. Single works contracts are being increasingly used, especially for new building works⁴. For rehabilitation contracts, often less controllable, clients prefer to attribute separate project consultant contracts and works contracts. In this case they must necessarily choose their project consultant through an architectural competition⁵ or by the direct use of a negotiated procedure.

¹ Interview with M. Teicher, building department, Munich.

² Cooperative procedure / *Kooperatives Verfahren*, investor competitions / *Investorenwettbewerbe*, combined competitions / *kombinierte Wettbewerbe*.

³ See preceding chapters A.2 and A.3.

⁴ According to Th. Maibaum, legal consultant to the Federal Chamber of Architects, “the trend is towards an increase of these works contracts, including design contracts, and we are seeing a greater number of conflicts with clients as a result. Architectural practices are complaining that they can no longer directly access design contracts”

⁵ We do not specifically look at architectural competitions as these have already been subject to a study :

V. Biau with the collaboration of M. Degy and L. Rodrigues , *Les concours de maîtrise d'oeuvre dans l'Union Européenne*, Centre de Recherche sur l'Habitat (LOUEST, UMR n°7544 du CNRS), study carried out for the Ministry of Culture and Communications, Architecture and Heritage Division, 1998.

Competitions are used when a project is complex and requires more thought, public consultation or incorporates important political issues¹.

Nature of project consultant contracts	Applicable regulation	Open procedure	Restricted procedure	Negotiated procedure	Design contest	Status of project consultants
Project consultant contract ² included in a works contract	VOB ³	Yes	Yes	Yes, exceptional and substantiated		Architect or engineer, Subcontractor or contractor employee
Global project consultant contract : design and works supervision	VOF			Yes, Obligatory	Yes	Self-employed, architect chosen by the client or a service provider
Partial project consultancy : design (Max. 1 to 5 HOAI)	VOF			Yes, Obligatory	Yes	Self-employed, architect chosen by the client
Partial project consultancy excluding design : ex : works supervision, project control	VOL or VOF ?	Yes	Yes	Yes exceptional and substantiated		Self-employed, architects and engineers
Project consultant : Specialised engineering	VOL or VOF ?	Yes	Yes	Yes exceptional and substantiated		Self-employed (structures, fluids, etc. engineer)

Table 3 : Regulations and procedures applicable in Germany according to the types of contracts

The more economical directly negotiated procedure is generally the rule above the threshold⁴ and competitions tend to be the exception. The negotiated procedure clearly aims to choose a service provider rather than a project. But they become similar to limited invitation-only competitions if the client requires design sketches from the chosen candidates⁵. Below the threshold, the procedure used to choose project consultants is one of private agreement on the basis of a list of local architects, given that in this case a competition would be too expensive (3 to 4 % of the amount of the works). In order to formally respect the contents of the Services Directive when it comes to the choice of procedures, clients are held to state the specific nature of their requirements each time that a consultant project presents itself, in order to justify the exclusive use of the negotiated procedure.

The specifications and the notice are drawn up by the client's technical services and the departments issuing the demand. The *Länder* and large towns have built on their experience and certain, where they have still have a sufficient number of qualified personnel, assert their professionalism in this field. Depending on the complexity of the project, when clients do not have the available competences, they call on external companies⁶ or project consultants. In

¹ According to Mr. Ostendorff, manager of the "town planning and project" department within the senatorial administration for urban development, the city of Berlin prefers to organise limited invitation-only competitions as it considers that they provide a better quality project.

² This forms part of European legislation and has been transposed into German law.

³ VOB requirement for the attribution of works contracts, transposition of the Works Directive.

⁴ According to M. Teicher, Munich building department : "It's less expensive than organising a competition which, both for the client and the architects, represents an exorbitant cost".

⁵ These sketches are necessarily remunerated in accordance with the HOAI fee scales.

⁶ Example : DSK for the Berlin Land.

most cases, there is no programming work as carried out by French professionals and the definition of the project bases prior to the signature of the contract is deemed to be insufficiently developed¹. In the case of contracts that depend on the *HOAI*, the first remunerated phase² comprises the definition of the project bases, this being similar to the feasibility phase. The development of the functional programme is defined as a specific service forming part of the initial design phase.

For this phase 1, the project consultant must make proposals to the client up until the moment that the basic principles of the project are established. The proposal accepted by the client is the basis of its service and cannot be modified without a reappraisal of its contract with the project consultant. This commission formulation phase can be carried out internally (Brandenburg *Land*).

The choice of candidatures is a difficult phase given the large number of candidates (often between 50 and 100 for architects). For large projects, in order to ensure that their choice is as transparent and efficient as possible, clients or their service provider use multi-criteria matrix systems to find the best service provider and to ensure transparency. Certain service providers³ have annually updated lists of professionals from which they can choose. For small projects⁴, given the splintered client structure, this transparency is sought after by the client departments but is difficult to introduce.

Candidate interviews seem to be used in most cases, both for the negotiated procedure (*VOF*) and for open or restricted procedures (*VOL*). The intention is to find the most competent service provider able to resolve the given problem.

2. Dominant criteria in the choice of project consultant(s)

The client (via its civil servants or service providers) have a certain degree of freedom in choosing candidatures. It can complete the list of criteria according to its specific requirements resulting from the project. These latter must be listed in the published notice or at the beginning of negotiations. The transparency of candidature choice criteria and the attribution of the contract depends on the way that civil servants apply the regulations. However, there is no systematic checking procedure⁵.

The competitive bidding procedure is based on the qualifications of the service provider and not on the fees (article 16 *VOF*). The dominant criteria are : skill, with emphasis placed on built references, and the establishing of a relationship of trust between the client and the project consultant.

¹ Discussion with members of the *IABG* service provider assisting the client

² Phase 1 of the *HOAI* for a building : Search through the *Grundlagenermittlung* bases that include a clarification of the given problem, advice for the definition of all required services, decision assistance for the choice of additional service providers, etc.

³ The *IABG Industrieanlagen-betriebsgesellschaft mbH*, company which proposes assistance services to the public client, with drawing up of specifications, assistance during the contract signature procedures, etc. and which has a list of specialised engineers which is regularly updated.

⁴ Project leader of « *Amt* »(ex *Landesbauamt* / local Regional State office or delegation for building matters) who chooses the architect.

⁵ Interviews with P. Ostendorff, *Referat II D, Auswahlverfahren, Wettbewerbe, Kunst im Stadtraum* and K. Groth and D. Meinhardt, *Referat VI A Bauliche Grundsatzangelegenheiten, Bauwirtschaft* of the Berlin senatorial administration.

The *VOF* uses the text from the directive that differentiates the candidature selection criteria (art. 10 to 13 : aptitude of candidates) from the contract attribution criteria (art. 16). The first step in selecting candidatures consists in verifying the reliability of the service provider by checking its administrative compliance and its economic and financial capacities (assessment of activities over the last three years, etc. *VOF* art. 12). A subsequent step will see its professional qualifications (*VOF* art. 13) being checked according to quantitative criteria such as the size of the practice, the capacities and profiles of the professionals in the practice, its subcontractors, and according to qualitative criteria with references in terms of projects built in the concerned field (*VOF* art. 24).

This dominant practice gives an advantage to seasoned practices and young architects complain that they are not able to cross the hurdle represented by this first selection. If the client wants to favour young architects, he can in theory reduce the importance of built references and favour the design sketch or scenario solution, but this possibility is rarely used. Above all, clients are looking to find professionalism and are less inclined to seek innovative ideas.

Following the publication of a notice and to simplify the procedure, certain clients or their representatives can make use of a list of professionals whose skills are known to them. To be chosen, internally proposed candidatures must be certified by various administrative levels.

Given that the number of candidatures remains too high, clients have invented tools to justify their choice while still respecting the principles of the directive. The use of matrices¹ is fairly widespread, particularly for complex contracts. In this type of context, and especially for engineering firms, the ISO 9000 qualification is considered as guaranteeing the quality of company management competences.

The contract attribution criteria are stated in the three paragraphs of article 16 of the *VOF* : "1. the contracting authority attributes the contract to the candidate who, on the basis of the conditions negotiated within this framework, can provide the best service; 2. the contracting authority takes into consideration the criteria concerning the service... particularly the quality, the professional or technical value, the aesthetic aspect and the price/fees relationship". Certain clients criticise these criteria for the legal insecurity that they generate : "The *VOF* states criteria covering aesthetics, quality... which can only be eminently subjective criteria, like all that concerns the architectural form... The legality of contracts cannot be assured if aesthetic criteria are included"². The references and the capacity to respect costs and completion periods are the determining factors.

The price of the service as a criterion is no more important than the others for clients. For project consultants, it is only a minor criterion. Most services are codified in terms of content and remuneration in the *HOAI*. The amount of fees is therefore not subject to negotiation unless the amounts are below a minimum level (50,000 DM, being 25,000 Euros for a building project) or a maximum level (greater than 50 million DM for building projects) or if

¹. Interview with M. Teicher (town of Munich) head of the administrative and legal section of the Munich building department : "Having reduced from 50 to 15 architects, the hardest remains to be done : to choose from 3 to 5 of them. This is achieved by using a provisional internal document, a sort of matrix, within which we cross-reference a certain number of parameters in which we define the concept of « even better qualified » or « overqualified ». I do not know if this system of +++ references is legally acceptable...".

² Interview with M. Teicher (town of Munich) head of the administrative and legal section of the Munich building department.

they concern additional services or certain specific services (example : surveys, certain town planning studies, project management, etc.).

During interviews (with or without remunerated design sketches¹), the candidate's clear understanding of the concerned problem², the way in which he intends to organise and identify the specific necessary skills (need to involve other specialists) and distribute his work (who will really be working on the project ?) are decisive criteria. The candidate must be able to develop a flexible and positive work relationship with the client and permit the duo represented by the architect / client and users to go through the numerous programme modifications.

Contracts remain local and direct personal relations between clients and project consultants continue to influence the choice of candidatures whether it be for invitation-only competitions or for a direct negotiated procedure³. For contracts where local skills could prove insufficient, the chosen candidatures may be from adjoining Länder or from German-speaking countries in the European Community. Controlling the unavoidable constraints represented by local town planning and building standards and regulations⁴ and the accompanying control system form part of the designation criteria for project consultants.

3. Methods of exchange between the client and the project consultant.

The purpose of the exchanges between the client and the candidates is to negotiate and better know the future service provider and his approach or ideas in order to have the maximum level of guarantee as to his capacity to produce the best service.

The candidates chosen after the selection of candidatures by the client's services or by the service suppliers that represent it are separately invited to present their offer during an interview. This moment of exchange is decisive as it allows the client both to test certain qualities of the candidates and their approach to the given problem. The client can ask the chosen candidates to develop their project designs or principles, but without the presentation of graphics. This approach is similar to that of the English *competitive interviews*. The chosen candidates can also be asked to provide more in-depth solutions (from a simple design sketch to a model for a building project) on the basis of a remuneration in accordance with article 24 of the *VOF*⁵. This step is used less often as it is expensive. It is practiced below the threshold

¹ An architectural competition is not obligatory.

² Werner Hoffmann, ministerial consultant to the Bavaria Land.

³ See Robert Prost, *La conception en Europe, Bilan –Évaluation –Perspectives*, Chap. 13 European concours d'architecture, des idées aux réalisations, PUCA Euro-Conception 2, 1998. He explains the influence of professional cultures and national contexts and reviews the importance of registering project consultants in local professional and influence networks if they want to carry out projects, especially if they come from « outside » p 325 to 329.

⁴ Example : the building permit attribution procedure which, a priori, (*Bauaufsicht*) takes place at the same time as the operational procedure via the *Prüfengineer* control engineer who is a service provider to the administration.

⁵ §24 VOF « Auftragserteilung » / contract attribution.

(2)... The production of variants (example : proposal of « pre-sketch » type solutions / *Vorentwurf*) in answer to the given problem can only be demanded by the contracting authority within the framework of a procedure noted in article 3 of the *VOF* (obligation to remunerate these services in accordance with the *HOAI fee scale*)

(3) “The contracting authority demands the proposal of solutions to the problem it sets. These must be honoured in accordance with the fee scales in force”.

for the attribution of a contract on the basis of surveys or feasibility studies using a competitive bidding procedure based on three invited architects.

The frontier between the negotiated procedure and certain forms of limited competitions is occasionally hard to discern. The cooperative procedure (*Kooperatives Verfahren*) is more project-oriented but also allows for the capacities of the project consultant teams to be tested. It is a sort of derivative of the limited competition (3 to 10 candidates) with, while the procedure takes place, two meetings/exchanges without anonymity between all the candidates and the jury. The final projects are anonymously presented to the jury. This procedure is justified, like the French definition studies, for projects requiring a high level of specialisation or knowledge. Using this procedure, fundamental project components can be further specified or detailed. On the basis of these exchanges, the jury members / the commission and the instigator of a competition or a consultation can modify or complete the initial consultation programme.

The open or limited two-phase combined competition (*Kombinierter Wettbewerb*) aims to provide a greater building cost control. The designer associates with a contractor to propose his candidature. This contractor undertakes to provide a service based on the designer's project and as priced by the contractor project. The projects of the chosen designers (maximum 7) are judged independently from the contractor bids. Among other uses, this procedure has been developed for the production of standard housing units. However, this procedure endangers the principle of separation between the design and the building of the works. It is listed in the GRW as a competition and permits a reciprocal definition of the programme and the architectural proposal. It is a sort of derivative of the limited competition (3 to 10 candidates) with, while it takes place, two meetings/exchanges without anonymity between all the candidates and the client. The final projects are anonymously presented to the jury.

On the basis of these exchanges, the jury members / the commission and the instigator of a competition or a consultation can modify or complete the initial consultation programme. This procedure has, in particular, been used for the production of housing. It is similar to the French "definition studies".

4. Forms and contents of the negotiations.

The aim of the negotiations is defined in articles 10 and 24 of the *VOF*: "Contract negotiations are used to choose the candidate who, given the proposed works, provides the best guarantee of carrying out the project from a professional and qualitative point of view". The subjects of negotiation depend on the specific points that interest the client for a given project. The negotiations can concern the number and nature of the project consultant project phases¹ and the amount of their remuneration². In fact, when project consultants are given a mission for 1 or 2 phases, the *HOAI* indicates a possible increase, to be negotiated, of 3 to 7% of the fee scale. However, it would appear that competition seems to generate the opposite effect. For basic services, the client seeks to obtain the best possible service for the given amount of fees. There is a range of fees for these services in each "zone" or degree of

¹ The practice of partial missions and the options system are widely used. As a reminder, an architect's project consultant contract can be based on design phases 1 to 4 of the *HOAI* (excluding working drawings) which represent 27% of the total fees, the working drawings preparation phase representing 25% and the works supervision (6 to 9) 31%. For engineering missions, the number of phases and the distribution of the fee amounts vary according to the engineering specialities.

² See I.3 Methods for determining fees.

complexity. The issue is how to negotiate the exact amount. For particular services (for example : phase 3, search for variants to save energy or limit gas discharges into the atmosphere...; phase 9, evaluation of the structure and the use of the building given the demand, etc.) that complete the basic services¹, the candidate proposes a price in accordance with the number of hours² he feels necessary to carry out these services. Where the services are not described in the *HOAI*, they can be remunerated as a lump sum or on the basis of the time taken to carry them out. This price is negotiable. The completion times, the work methods and competences made available to the candidate are also key negotiation points.

5. Attitude regarding young architects and/or young agencies

Since the middle of the 1990s, the reduced volume of public commissions has been particularly felt by young architects, especially in large towns. The transposition of the Services Directive, despite the equality of treatment principle, has had the effect of aggravating the situation since built references and the human and material capacities of service providers are determining criteria in the selection of candidatures. Despite the pressure of professionals already present, certain *Länder* try to favour the participation of given professional categories, such as architects from the new *Länder* in the Brandenburg *Land* or, to a lesser degree, young architects in Berlin, by showing a willingness to ensure that these represent a theoretical 20% of chosen candidatures. But, “the obligation to make a public call for candidatures would prevent the participation of a percentage of young teams already known to the client’s services”³.

A proportion of clients believe that only open and anonymous competitions provide young teams with commissions. But, in all *Länder*, the number of open competitions is becoming increasingly limited. Neither clients nor the institutions representing the profession have shown a marked interest in changing the situation.

Given the difficulty of being awarded public commissions as well as, to a lesser degree, private commissions, young architects no longer necessarily aim to create their own practices. The way they practice their profession is diversifying, although working as a self-employed professional is generally considered as the most sought-after avenue. This situation is not specific to Germany. They work as employees for general building contractors, for development companies and within public administrations responsible for checking or drawing up town planning documents. The new generations of self-employed professionals are beginning to no longer seek public commissions and are turning towards private contracts, developers and investors. Even though their training has not given them sufficient knowledge in the financial and legal sectors, it would appear that they are trying to acquire it progressively “in the field”. But this leaves them in a position of weakness in this sector, favouring their isolation and structures specialised in a single sector.

¹ Idem.

² The *HOAI* also sets the hourly rate for persons employed or subcontracted by the main service provider according to their qualifications.

³ P. Ostendorff, town planning and project department : choice of procedures, competitions, artistic expression in the urban environment, within the Berlin senatorial administration for urban development

6. Priority goals given by clients to project consultants

The concept of quality is anchored in Germany's technical and statutory culture as well as in its laws. According to the public client representatives questioned, the accent placed on the "quality"¹ of the works and controlling this quality is a battle that has now been won despite its cost and budgetary constraints². The dominant criteria in the choice of project consultants³ also illustrate the importance that clients give to the quality of the services required to achieve this "quality" of the works. This quality requirement exists in a great many aspects of the project work. For the last fifteen years, a large number of standards and regulations have integrated environmental and "ecological" aspects (energy saving, recyclable materials, impact studies, water treatment, etc.). The basic missions and particular missions taking account of all these dimensions are described in the HOAI. There are a large number of engineering firms highly qualified in these sectors. Other standards concerning the quality of materials and their installation are subject to specification documents specific to each client and enter into the constraints accepted by the project consultant when signing his contract.

Consultation with users right from the beginning of the project development is now accepted. The concerned departments participate in the definition of requirements or prepare internal specifications. The other users are then associated in all project validation steps with the project consultant. In project consultant missions or client assistance missions⁴, the client⁵ generally provides for the design and building to be monitored by a management group that integrates user representatives. This system is in use on over 80% of public building contracts. It is considered indispensable to meet the client's requirements, given the latter's cost control obligation.

Project consultant contracts have become increasingly complex and need to incorporate an increasing number of parameters. They require that project consultants have ever-greater competences in highly varied fields, whether these be technical, regulatory, financial, or management based. To meet client requirements, project management profiles, whether working for contractors or as self-employed professionals, have diversified. For the execution of these increasingly complex contracts, clients require professionals able to provide a high level of performance in their particular areas. Due to their training, architects do not have competences in all these fields. As a result, clients are calling on other professionals and are trying to equip themselves with expert tools⁶. When clients give architects design work, they want to know if these architects know exactly how to meet their requirements, whether they can control the technical and statutory aspects and whether they can respect costs and completion periods.

¹ The quality of works seems to particularly concern the implementation, details and finishes, durability, solidity, adaptation to requirements, etc.

² Clients are held by law to be economical and to make economically rational choices

³ See chapter B.2.

⁴ Interview with Klaus Schnetkamp, young self-employed architect, Berlin

⁵ Mission often confided in the architect or a *Projektsteuerer* / site engineer.

⁶ Data bank assembled and used by public clients concerning building costs. It is located in Freiburg.

FEATURES OF THE NATIONAL SITUATION AND CHANGES TAKING PLACE

In Germany, the architectural and engineering professions are very organised. Their titles are protected and the exercise of their professions is regulated in each *Land*. They benefit from a fee scale over the federal territory. The federal structure generates a highly decentralised client base that differs from one regional State to another and is generally represented on a local level. Public commissions have reduced by 10% over the last five years, as have project consultant commissions for self-employed architects and engineers. The trend is towards privatisation or the externalisation of client building departments which, in the past, had extensive know-how that integrated project consultancy. When attributing contracts, the progressive disappearance of these competences favours the client seeking a single contact despite the fact that the public authorities ask the client to give preferences to bids made up from separate contracts.

The Services Directive marks a clear break with the German tradition of using private agreement as a basis for the attribution of project consultant contracts. To reconcile this tradition and the principles of the Services Directive, the *VOF*, one of the main transposition regulations, affirms the specificity of intellectual services provided by self-employed professionals and, in particular, those of architects and engineers, due to their “non-describable and creative” nature. It imposes the obligation of only using the negotiated procedure to attribute these services. This specificity results in increasing the complexity of contract attribution procedures and justifies the criticism of largely untrained clients who are obliged to implement these highly controlled new procedures. However, the main principles of the Services Directive (competitive bidding procedure, transparency, equality of opportunity, the need to provide information, etc.) are unanimously approved, but their administrative complexity and the introduction of a right of recourse do not favour their acceptance.

According to our contacts in the Federal Ministry of the Economy, the project for unifying the three Directives (Works, Supplies and Services) within a “legislative package” will not be prejudicial to service provision contracts and, more particularly, to services carried out by professionals as these are clearly identified in the *VOF*.

From the project consultant point of view, the application of the Services Directive generates an opening of contracts within Germany itself, even if candidatures still remain local. As for the falling number of competitions, the proportion of candidatures from other countries of the European Union remains very low despite the fact that it might appear to be greater. This perception is accentuated by an increasingly limited access to project consultant commissions. The selection criteria for project consultants stated in the *VOF* are considered to be highly unfavourable by young teams and small structures despite the fact that clients have a certain leeway to define and adjust these criteria.

Our contacts in the Federal Ministry of the Economy and Technology implicated in the finalising of the European regulations with the commission consider that the new procedure currently being drafted (competitive dialogue / *wettbewerbliche Dialog*) is not relevant. On the one hand, the definition of commission bases is a phase described in the HOAI and must necessarily be remunerated. On the other hand, the regulations governing *GRW 95* competitions already incorporate procedures with similar goals such as the *kooperatives Verfahren* / cooperative procedure. They feel that this draft procedure is “too distanced from practical matters” and, if it is no longer remunerated, risks eliminating this indispensable stage

in which the project consultant formulates the public client commission. The negotiated procedure is considered as sufficiently flexible and highly adapted to project consultant services and the introduction of this new procedure is felt to represent a desire to see it eliminated and replaced by open or restricted procedures.¹

¹According BMWi Secretary of State Heinrich Kolb, in the article: *Neue Prioritäten, die Zukunft des öffentlichen Auftragswesens*, p 619; DAB 5/98.

BELGIUM

By Véronique BIAU¹
(April 2001)

A. THE NATIONAL STATUTORY AND OPERATIONAL CONTEXT

1. The nature of public building works, the public client structure

In Belgium, there was a long tradition of centralising the management and building of State buildings. In 1946, a Buildings administration was created within the Ministry of Public Works. Set up in 1971, the *Régie des Bâtiments*, given a juridical personality providing it with a certain administrative, accounting and financial autonomy, progressively became the dominant para-governmental body for making sites and buildings available to State departments and, for certain public services managed by the State, with the exception of buildings linked to education and military defence. However, its actions have diminished over the last twenty years. Firstly, there was the reform of the institutions (1980, 1988) which took the form of a vast number of competences being decentralised to regional and municipal levels. This was accompanied by the transfer of an entire building stock previously held by the State to these federal authorities. During the 1990s, the need to reduce Belgium's budget deficit led to the sale of entire sectors of this stock. The *Régie des Bâtiments* currently has 1,500 employees working in a central head office in Brussels and 13 provincial departments. All the specialists in the building sector are represented at the Bureau: civil engineers (stability, heating and air conditioning, electro-mechanical, electronics, power and lighting installations, communications installations, acoustics), architects, landscape designers, interior designers, industrial engineers, etc. The Bureau, which had an annual budget of approximately 25 billion FB (approximately 620 million Euros), has seen its investments cut over the last few years to approximately 10 billion FB a year and, last year, to just a few billion FB. Through its integrated project consultancy, the Bureau handles around 10% of works (particularly small works on existing buildings and highly specific programmes such as prisons). It subcontracts the remaining 90% to private project consultants for design work limited to works drawings. It carries out all site supervision and is responsible for the attribution of works contracts. It was recently transferred from being under the responsibility of the Ministry of Public Services to the Ministry of Business and State Participation, being the Ministry responsible for privatising large parts of the Belgian federal administration². The trend is towards public services having to pay for missions carried out on their behalf by the

¹ This summary has benefited from the attentive rereading and additional information provided by Martine Ponchau, architect, *Régie des Bâtiments de Belgique*.

² Since the general policy statement made by minister Daems on 15 October 2000, the entire federal administration is subject to the « Copernicus Plan ». In the field concerning us here, this Plan provides for a reduction in the personnel working for the Bureau to 500 persons by limiting its missions to the management of the cultural heritage.

Bureau. This should lead to a redeployment of these missions : while departments which were able to carry out project consultant tasks will cease to exist, competences in the fields of investment planning, programming and legal-administrative expertise concerning procedures will be privileged¹.

As a result, on a national level and excluding the *Régie des Bâtiments*, the main public clients are the Ministry of National Defence, the *Brussels International Airport Company* (BIAC) airport authority, the SNCB railway company, the Postal Services and Belgacom (this latter is still a joint stock company under public law with the State being the majority shareholder). But Belgium is a Federal State, and the management of public buildings is assumed by the three communities (defined by linguistic criteria : the Flemish-speaking community, the Walloon-Brussels French-speaking community, the German-speaking community), and by the four regions (Walloon, the capital Brussels, Flemish and German-speaking). Other public buildings are managed by the provinces, municipalities and “intermunicipalities”. The Flemish Community which recently provided itself with a public client advisory body is very similar to the Netherlands for negotiations concerning the Services, Works and Supplies Directives and has received an agreement in principle from the European Commission to practice a restricted procedure in the form of an annual list (*open oproep*), based on the Dutch procedure, for choosing its project consultants.

2. Main characteristics of the project consultancy

The Law dated 20 February 1939 strongly protects the architectural profession : individuals and public authorities must necessarily use an architect, whether to prepare drawing in order to obtain a building permit or to supervise the works. Belgian architects therefore hold a professional monopoly. Well protected by law, the professional group of architects has provided itself with a Code of Professional Conduct (approved by royal decree dated 22 April 1985) that strongly restricts internal competition by imposing the respect of minimum fee scales for each building category and which stipulates that “the architect must abstain from any participation in a public or private call for tenders aiming to place architects in competition on the price of their services”.

The activities of project consultancies integrated into public bodies are decreasing but remain salient in the division of tasks and the attribution of contracts. In the *Régie des Bâtiments*, as in other large public client structures, a certain number of operations are carried out almost entirely by the architects working within the structure. These may be very small operations (given the fact that nearly all building permits, with the exception of works of minimal importance defined by the regional delegated civil servant, must be signed by an architect) concerning maintenance and repairs, as well as occasional large operations on specific programmes such as prisons, police stations or the rehabilitation of historic buildings. In these cases, it is customary for the client to be responsible for the building up to a level of detail that corresponds to the French outline proposals or scheme design, and then to subcontract the works drawings. The client then resumes control for the attribution of contracts to contractors and for the works supervision.

The concept of “project consultant” does not exist in Belgium where the “author of the project” is the main credited player who, in general, is the architect. Consequently, the selection places emphasis on the architect although, during the attribution of contracts, the client can choose to attribute separate contracts based on fields of competence.

¹ Source : “*La Régie des Bâtiments*” brochure published in 1997 to celebrate its 25th anniversary.

3. Regulatory control of public contracts before and since the Services Directive.

In Belgium, the legislation governing public contracts takes place on the federal level and directly depends on the Prime Minister (Cabinet and Chancellery). Within the Chancellery, a Public Contracts section employing approximately ten persons ensures the coordination of the legislation. It makes use of a Public Contracts Commission that comprises representatives of the main ministries, the regions and municipalities, and representatives of the concerned professional organisations. Its goal, apart from ensuring the coherence of general contractual rules, is to give opinions in answer to questions asked by the adjudicating powers and professionals on the application of European regulations concerning public contracts.

The regulations currently in force governing public services contracts in the architectural and town planning sectors are as follows :

- The law dated 24 December 1993 concerning public contracts and certain works, supplies and services contracts.
- The royal decree dated 8 January 1996 concerning public works and services contracts and public works concessions.
- The royal decree dated 10 January 1996 (modified by the royal decree dated 25 March 1999) concerning public works, supplies and services contracts in the water, energy, transport and telecommunications sectors
- The royal decree dated 18 June 1996 concerning the competitive bidding procedure within the framework of certain works, supplies and services contracts in the water, energy, transport and telecommunications sectors.
- The royal decree dated 26 September 1996 (modified by the royal decree dated 29 April 1999) establishing the general execution rules for public contracts and public works concessions.
- The royal decree dated 6 February 1997 concerning public supplies and services contracts subject to article 3, § 3, of the law dated 24 December 1993 concerning public contracts and certain works, supplies and services contracts.

Prior to the transposition of the Services Directive into Belgian law by the law dated 24 December 1993, followed by its application decrees dated 1 May 1997, public contracts open to project consultants were based on the law dated 14 July 1976, implemented by the royal decree dated 22 April 1977. While limited to the study of a project, these contracts could be attributed by private agreement, much like private contracts, but “if possible, after the consultation of several potential competitors”¹. This consultation was rarely applied and favouritism severely condemned. The choice of project consultants by the public clients appeared to be the result of political pressure, personal interventions, local preferences and habits based on past collaborations.

By bringing the legislative framework governing architectural services into line with that of works and supply contracts, this transposition, followed by the new legislation on public contracts dated 1 May 1997, considerably modified practices, particularly through the obligation to advertise and the competitive bidding procedure.

¹ Article 17, 1st paragraph of the royal decree dated 22 April 1977.

By royal decree dated 26 September 1996, Belgian legislation also extended the advertising and competitive bidding procedure obligations to below the European threshold : depending on the adjudicating powers¹, this obligation now comes into play above thresholds of 5.2 million FB excl. VAT (128,900 Euros) or 8.1 million FB excl. VAT (200,790 Euros). For contracts under 2.5 million FB (approximately 62,000 Euros), the selection can take place using the negotiated procedure without advertising, but a consultation of several competitors is recommended; for contracts between 2.5 million FB and the European threshold, the adjudicating powers are obliged to use nation-wide advertising.

4. Methods to ensure the legality of procedures and contracts. Recourse for project consultants and contractors who believe themselves wronged. Recommendations, penalties.

In Belgium and depending on the particular cases, control over public contracts open to project consultants associates a financial control and legal control of the procedures used. Prior to the signing of any public contract of more than 1.25 million FB (approximately 31,000 Euros), the tax department checks the legality of the expenditure to be made and ensures that it is worthwhile. In parallel, the commitment control office of the Treasury Department ensures the existence and the legality of the required credits. A control is also carried out (after payment) by the Audit Office for all public contracts greater than 100,000 FB (approximately 2,500 Euros). On a local level, the responsibility principle subjects all investment decisions made by a local council to approval by the King or the governor of the province.

In terms of controlling procedures, the various adjudicating authorities have control procedures that allow them to guarantee the application of the legislation. This has led the federal government and the regional authorities to set up control structures that are external to the administrations in order to check acts issued by the competent authorities.

The European directives concerning recourse have not been transposed into Belgian law given that this already complies with Community requirements. Litigation concerning public contracts is based on administrative and civil jurisdictions. The breakdown of competences between the two authorities leads to the control of the regularity of administrative acts concerning public contracts being placed in the hands of the Council of State, while civil jurisdiction is used for all concerning the execution of the contract. The Council of State has adopted the theory of “removable acts” which allow tenderers ejected from a contract to question the legality of the contract attribution decision before the administrative judge. However, the annulment of such an act does not prevent the execution of the contract². When asked to give judgment on a complaint, the higher control Committee has the role of controlling, without coercive power, the preparation, signing and execution of public services contracts, as well as the preparation, granting and use of subsidies granted by the same public services.

¹ The 5.3 million FB excl. VAT applies to the adjudicating powers concerned by the agreement on public contracts signed in Marrakech on 15 April 1994 within the framework of the World Trade Organisation.

² The information summarised here is provided from a report prepared by the French Embassy's Economic Expansion Post in Brussels concerning public contracts in Belgium.

It should be noted that, for architectural contract services, a work group comprising architects and legal consultants was created within the Order of Architects at the end of 1999 to check the regularity of notices placed in the Adjudications Bulletin on a weekly basis. The Order is occasionally led to call on clients and give them advice as to the procedure to follow. This experiment, in addition to that carried out by the European Council of Architects on the same subjects, will soon be given concrete form by the publication of a reference document aimed at public clients and by argued claims submitted to the legislator with the aim of further developing the legal framework of these contracts.

5. Methods for establishing the amount of fees.

The Architectural Code of Professional Conduct, approved by royal decree dated 22 April 1985, stipulates that “the architect must abstain from any participation in a public or private call for tenders that aims to place architects into competition on the price of their services”. The same rules impose a minimum fee scale for all the services provided by architects, whether for private or public clients. This fee scale is not directly imposed on clients but is generally respected by professionals (it is known that there are a few rare cases where fees are set below the fee scale). A waiver can be applied to the use of the fee scale in the case of a partial mission, for example when the mission by the private architect is subsequent to missions carried out by a project consultancy service integrated into the client’s departments. Although this type of fee scale does not apply to consulting engineers, there is a possibility of it being applied when there is a mixed project consultancy team. Professional consulting engineer organisations keep a close eye on these situations given that, for a total amount of negotiated project consultant fees, engineers only retain what remains after the architects fees fixed by fee scale have been deducted. The Prime Minister’s departments have envisaged the possibility of devoting a Circular to this problem¹.

6. A policy aimed at distributing public commissions and supporting the profession ?

In his analysis of the new regulations governing public contracts, and their main repercussions on public clients, being to remove the freedom of choosing a co-contracting party, Ph. Flamme envisages a hypothesis in which the adjudicating powers could be tempted to “repatriate” certain public services, particularly the architectural services, to avoid a restrictive competitive bidding procedure². Public contract rules do not prevent the public authorities from satisfying their internal requirements through the use of their own resources, rather than providing themselves with the skills they need from the private sector. Consequently, it would be easy for them to avoid the application of the Directive by not having the services required carried out by the private sector. But this would represent a tightening rather than a liberalisation of access to public contracts and have considerable consequences on project consultancy organisation.

¹ Interview with Claude Dardenne, assistant to the Prime Minister, 9 November 2000.

² FLAMME (Ph.). *Architecture et commande publique. L'impact de la nouvelle réglementation*. Brussels, Fondation du Roi Baudouin, s.d. (1999 ?), 68 p. p.17.

B. PROJECT CONSULTANCY CONTRACT ATTRIBUTION PRACTICES

1. Most used procedures for choosing project consultants.

Belgian law provides a choice of several ways in which to choose a project consultant (see table 4) :

- adjudication, in which the price is the only choice criteria. Given that their Code of Professional Conduct prevent architects in participating in price-based competitive bidding, a large number of architects and clients have boycotted this procedure. This is not the case for engineers, specialist engineering firms and technical inspection authorities. However, clients increasingly feel that the price criteria in itself is insufficient for a pertinent appreciation of the quality of the works to be carried out.

- general calls for tenders (= open procedures) or restricted procedures, where, in principle, the price criteria should not be taken into consideration. This procedure is often interpreted by Belgian clients as a more flexible form of competition. Within the framework of this procedure, clients often demand the production of a “project design sketch” or even a preliminary design or a note of intention developed from a highly detailed programme. An increased production of more and more detailed drawing on request from the adjudicating powers or on the initiative of architects in order to better compete then takes place, making these procedures very similar to competitions, without anonymity, without jury and without compensation for tenderers. This procedure favours large architectural practices. The National Committee of the Order of Architects is very strongly opposed to this drift and has submitted a request to the European Commission to have this body define the term “project design sketch”.

- the negotiated procedure, with or without advertising rules. This procedure is currently highly controversial in Belgium because clients make abusive use of it : all too frequent use of the urgency argument to adopt a negotiated procedure without advertising; all too easy use of the argument by which “the contract specifications cannot be established in sufficient detail to permit its attribution” by the use of a negotiated procedure with advertising¹. B. Lambrecht, a lawyer in Brussels, explains that as far as he is concerned and on the basis of the example represented by the CCN tower in Brussels, the application of the negotiated procedure must be reduced to exceptional cases governed by article 17 of the law dated 24 December 1993, and that although in certain cases the administration is not required to use advertising, it should at the very least implicate several candidates in the negotiations². The Order of Architects is also taking measures against the abusive use of this procedure

- the project competition which, in Belgium, take the form of open competitions, multiple contracts or mixed formulas³.

- the multiple contracts, which are both comparable with the Dutch *Meervoudige opdracht* and the French definition contracts, in which 3 or 4 architects are invited and remunerated for anonymously producing a design sketch on the basis of a programme. The selection is then carried out using the negotiated procedure. “Combined formulas”, very similar to the former, take place over two phases (design sketch then preliminary design for chosen tenderers) and provide the jury with a sovereign judgment.

¹ Pierre Sauveur, Chairman of the National Committee of the Order of Architects in his editorial written for the Order of architects *Lettre d'Information*, March 2000.

² *Arch +* n°166, October-November 2000. p.111.

³ For further details concerning these variants, see *Arch+* n°166, October-November 2000. p.109.

	1 st phase	2 nd phase	Jury and anonymity	Remarks
Public or limited adjudication	. submission of bids . attribution to the lowest bidder	. only in the case of limited adjudication	. not applicable	Art. 30 of the Code of Professional Conduct : no competing on prices between architects. But a reverse judgment by the Competition Committee
General call for tenders	. submission of bids that comply with the selection criteria . attribution to the most interesting submission	. none	. anonymity not obligatory . non-sovereign jury	Often used to bypass competition rules that require a design sketch in the 1 st phase and a preliminary design in the 2 nd phase
Restricted procedure	. submission by invited participants of a file complying with the selection criteria . selection : most interesting files	. submission of bids by the selected candidates . attribution to the most interesting submission	. anonymity not obligatory . non-sovereign jury	
Negotiated procedure with advertising (if fees > 2.5 million BF)	. submission of a selection file . selection : most interesting files	. negotiation with the selected candidates on the contract conditions . attribution to the most interesting submission	. anonymity not obligatory . non-sovereign jury	Often used to bypass competition rules that require a design sketch in the 1 st phase and a preliminary design in the 2 nd phase
Negotiated procedure without advertising (if fees < 2.5 million BF)	. negotiation on contract conditions . attribution to the most interesting submission	. none	. no obligation . non-restrictive judgment	When, on completion of a project competition, the client disagrees with the jury's choice
Open competition	. each candidate submits a design sketch with his selection file . attribution : following a negotiated procedure	. none	. jury obligatory with restrictive judgment . anonymity required	Generally ideas competitions
Multiple contract	. each invited candidate submits a design sketch with his selection file . attribution : following a negotiated procedure	. none	. jury obligatory without restrictive judgment . anonymity required	
Mixed formula	. each invited candidate submits a design sketch with his selection file . selection : most interesting files	. the selected candidates submit a preliminary design . attribution : following a negotiated procedure	. jury obligatory with restrictive judgment . anonymity required	Usually recommended procedure
Competition calls for tenders	. submission of a file by a contractor and the author of the project . selection : most interesting files	. the candidate teams submit a preliminary design . attribution to the most interesting submission	. jury obligatory without restrictive judgment . anonymity not required	Architects are favourable to this system as it is the contractors that remunerate their services

Table 4 : The different contract attribution procedures in Belgium

(according to *Arch+* n°166, October-November 2000)

(Note : In all cases, compensation is optional)

- competitive calls for tenders, *design and build* type works contracts that cover both the design and the construction of the works.

- a new procedure, inspired from the one that dominates in the Netherlands¹, was launched in July 2000. An *open oproep*, being a form of restricted procedure which has been

¹ See details in the monograph concerning the Netherlands as well as in the second half of the report.

judged compatible with the Services Directive, will be issued yearly by the Flemish public authorities, establishing the list of buildings that they wish to see launched during the year.

This list which, for 2000 comprised 25 projects (representing over 2 billion FB, being approximately 50 million Euros of works), is published in the Official Journal of the European Communities and in the Belgian Bulletin of Adjudications. This results in architectural candidatures being submitted for either all or some of this list. These candidatures then remain valid throughout the year. During this period, the architects may be called on to participate in limited attribution procedures concerning a project on the list.

2. Dominant criteria in the choice of project consultant(s)

In the transposition of the Directive, Belgian law establishes a clear distinction between the qualitative selection criteria and the attribution criteria, with the former “allowing the contracting authority to appreciate the capacity of the candidates or tenderers to execute a given contract, by ensuring that they are not subject to exclusion and that they have a sufficient financial, economic and technical capacity”¹. The latter are intended to evaluate the intrinsic value of the submission.

The Circular dated 10 February 1998², produced by the Prime Minister’s departments review and detail this distinction. Consequently, references relative to the contractor’s experience, the professional and financial guarantees that it presents, the material means and equipment that it has available, the employed personnel and its qualifications, and the measures taken to assure the quality of the products cannot be used as attribution criteria. On the other hand, potential attribution criteria include the amount of the bid, the cost of using the proposed products, the works completion time, the quality of the after-sales service, the guarantees provided for the proposed products and the aesthetic and functional nature of the works.

In the file that it prepared concerning public contracts and architectural competitions in Belgium, the *Arch+* review notes that, having interviewed a number of architects, while proof of registration with the Order, social contributions and office insolvency guarantees do not present a problem for architects, the reference requirements are often too extreme (example : having designed five public swimming pools over the last three years). These requirements prevent architects from having access to any new field of investigation. This particularly applies to young architectural practices³.

3. Methods of exchange between the client and the project consultant.

Belgian clients are particularly concerned that they have a maximum level of information and guarantees concerning their architect prior to the signature of a contract. As a result, competitions are not favourable to them and, using an expression heard a number of times, equivalent to a “lucky dip” given that, according to the Directive, the client cannot either meet the candidates, nor make a completely free choice (need to respect the jury’s advice). This is why restricted procedures with submission of works is practiced so extensively. Although

¹ Outline of reasons for the law dated 24 December 1993.

² Circular dated 10 February 1998. *Marchés publics, sélection qualitative des entrepreneurs, des fournisseurs et des prestataires de services. Moniteur Belge* dated 13.02.1998.

³ *Arch +* n°166, October-November 2000. File on architectural competitions in Belgium. pp.84-87.

based on the competitions model, it overcomes its restrictions by not requiring the constitution of a jury or having to respect anonymity. In the case of the Flemish *open oproep* procedure, the second phase of the procedure is not subject to the rules of the Directive and interviews can be organised. In this same procedure, the second phase can, for a major project, comprise the submission of works for a final selection among the five consulted teams. Once again, there is no anonymity obligation.

4. Forms and contents of the negotiations.

In Belgium, the field of application of the negotiated procedure is wide, despite the fact that the rarity of competitions does not favour this type of procedure in the subsequent phase. Legal consultants regularly call clients to order, reminding them of the need to respect the cases clearly defined and limited by the Directive where there is the possibility of using this procedure. Nonetheless, it is the procedure generally used for contracts below the threshold and its use is tending to extend above the threshold. For example, urgency may be invoked as a more or less justified motive to validate the use of this procedure.

Negotiations can obviously concern the price, despite the architects' fees being subject to a minimum fee scale. It is the other project consultant partners that see their proportion of fees being discussed. For architects, clauses also exist to set a ceiling on fees should the amount programmed for the works be exceeded and if this is the fault of the architect. In the Flemish *open oproep* procedure, negotiations essentially concern the methods used by the contractor to control quality, completion times, the work methods to be established between the client and the architect, and on the general definition of the mission. However, neither in this procedure, nor in other procedures used by clients, does the choice made by the mandated architect of his technical project consultant partners appear to be an issue.

5. Attitude regarding young architects and/or young practices

Commentators on the new European regulations, including Ph. Flamme, insist on the equal treatment principle which underlies both European and national public contracts regulations. But, "this principle does not prevent certain particular advantages being given to certain categories, advantages legitimised by different kinds of situations¹". Noting that these new regulations are complex and not particularly adapted to the situation of architects (both experienced and inexperienced) seeking a first public commission, Ph. Flamme proposes a number of measures for a better distribution of architectural commissions and the development of young architects :

- obliging clients using the negotiated procedure to consult and invite to the negotiations at least one architect seeking his first public commission,
- maintaining a few open competitions, as a potential source of talents that have not yet been recognised,
- the invention of an assistant architect or associate architect status, or a tutor relationship that will allow a young architect to make use of work references that have been confided in a colleague but on which he has worked.

¹ FLAMME (Ph.). *Architecture et commande publique. L'impact de la nouvelle réglementation*. Brussels, Fondation du Roi Baudouin, s.d. (1999 ?), 68 p. p.15.

He refers to the existence of a provisional approval for works contractors having exercised for less than five years, giving them access to public works contracts.

Despite the citation of a number of examples, these developments appear to be in their very early stages in Belgium. The file in the *Arch+* review examining architectural competitions in Belgium¹ notes, for example, the existence of a competition reserved for architects less than 35 years old. It concerned the rehabilitation of a mansion to provide a home for the Institut du Patrimoine Wallon in Namur (30 million FB, being 740,000 Euros of works). Thirty young architects, who had lost earlier competitions, were invited to participate in this competitions which was carried out using the negotiated procedure, without advertising. The anonymously submitted projects took the form of a 1 :100 scale design sketch. All participants received a remuneration of 70,000 FB (1,700 Euros) to cover their costs.

6. Priority goals given by clients to project consultants

Neither the integration of the opinions of users or neighbours to the future building nor a potential consultation with the citizens concerned by the planned operation appear to be widely used in Belgium. The public figures met did not show any particular environmental awareness, either in terms of the landscaping and ecological impact of the operations, energy savings or sustainability integrating maintenance and operation, nor in terms of the recycling potential of the materials and components to be included in the future building.

Above all, clients appear to expect their architects to have a certain technical skills, particularly for the works drawings and site supervision, and a certain flexibility in the working relations that they establish with them (for example : reactivity, ability to develop formal or technical choices).

FEATURES OF THE NATIONAL SITUATION AND CHANGES TAKING PLACE

In Belgium, the architectural profession has for many years been strongly controlled and protected, excluding any principle of competition between architects, particularly where the amount of their fees are concerned. The State public client has a long tradition of centralisation within the *Régie des Bâtiments* (Buildings Bureau), a structure with a high level of well-qualified personnel that brings together all the required skills, both in terms of architectural and technical design, and in works management and supervision. Belgium is now confronted with a move towards privatisations and one of the foreseeable consequences is the weakening if not the dismantling of this body. In addition, the emergence of decentralised political powers has led to the development of new public client services dependent on local authorities. These latter, given their small size and current lack of capacity to, for example, provide a project consultant role for anything more than small operations, pay particular attention to the experience, references and the definition of the working relationships with the architects that they use.

The European Services, Works and Supplies Directives intervene in a context where public contracts have traditionally been little controlled, especially in the field of architectural

¹ *Arch +* n°166, October-November 2000. File on architectural competitions in Belgium. pp.78-79.

studies, and have generally been based on private agreement. National debate concerning their application and, at present, their modification, is based on the following points :

- the qualitative selection and attribution criteria, strongly dissociated in the Belgian interpretation, are criticised by professional circles for their particularly quantitative nature and the priority they give to the economic aspects of the service. The European Commission had envisaged eliminating this distinction for intellectual services and then abandoned this move.

- the bad reputation of competitions, as practiced prior to the Directive, had led to a controversial restricted procedures practice in which services were increasingly required and where an increasing level of detail was demanded. Within the framework of the revision to the Directive, the Belgian position is to insist that only design sketches can be required from bidders. The National Committee of the Order also used this occasion to demand a more detailed definition of what is meant by “project design sketch”¹.

- probably in relation with the preceding point, there was the recurrent question of compensation to candidates answering calls for tenders. This compensation appears indispensable in a procedure such as restricted procedures with the provision of services, but it is also being discussed within the hypothesis of developing a new competitive dialogue or “complex contracts” procedure where the price and the compensations appear to be the only means available to compensate eliminated candidates who have provided ideas but who have not been awarded the contract.

¹ Source : *Arch* + n°166, p.109.

DENMARK

By Véronique BIAU
(April 2001)

A. THE NATIONAL STATUTORY AND OPERATIONAL CONTEXT

1. The nature of public building works, the public client structure

For many years, the Danish State public client has been centralised within the Ministry of Housing and Urban Affairs and, more specifically, within the SES, *Slots -og Ejendomsstyrelsen* (palaces and royal properties agency), which had two complementary missions : 1) that of acting as client for building and then maintaining State buildings, 2) that of assisting and advising Ministries building for themselves. The Ministry of Defence, due to the specific nature of its buildings and, in 1974, the Ministry of Education whose already large number of buildings was considerably increasing, then decided to create their own specific building construction departments. The SES thus saw its works limited to palaces and buildings forming what is known as “group 1”, being those on a list of old and modern heritage buildings. But it has retained an advisory role for all the Ministries : above a threshold of 2 million DK (approximately 267,000 Euros), these latter are obliged to consult the SES for the contents of their call for tenders notices and the general running of their project consultant contract procedures; below the threshold, the decision to use this consultation lies in the hands of the requesting parties.

In 1997, the properties held by the Ministry of Education were transferred to the Ministry of Research and Information Technologies in view of improving maintenance cost control and “market pricing” : the buildings became the property of the *Byggedirektoratet* (Ministry of Research and Information Technologies buildings agency) and the universities and research centres occupying them had to pay rent to this body. No further property transfers are envisaged. This agency, which has sixty employees (including architects, civil engineers, economists and legal consultants), no longer acts as a project consultant but manages an annual investment budget of approximately 400 million DK (53.6 million Euros). The agency is occasionally called on to provide advice to requesting Ministries; this was the case of the Ministry of Culture for the Culture 2000 project which was based on an ambitious programme of amenities such as the National Library, the national art museum, etc.

However, both the Ministry of Defence and the SES have internal project consultancies that, for the former, essentially carry out civil engineering and architectural projects and, for the latter, restoration and maintenance works.

Consequently, the Danish public client can be described as follows :

- the Ministry of Defence and that of Research and Information Technologies each have their own building departments. The former carries out a small amount of project consultancy. The latter does not but, when required, provides a consultancy service to other related ministries.

- the other administrations use the SES (palaces and royal properties agency within the Ministry of Housing and Urban Affairs) for advice concerning the building of their required amenities.

- on local levels, public commissions are spread among the 14 counties and 275 municipalities. Among these, only the largest (+5,000 inhabitants) have specialised building departments.

- in the housing sector, social housing associations are also subject to the rules governing the Services Directive.

According to our contacts, Danish public commissions represent approximately 10% of building activity in the country and 15 to 18% of architectural and engineering contracts. They roughly covers the same fields as the public client in France, including social housing.

2. Main characteristics of the project consultancy

In Denmark, the professions linked to architecture and town planning are not protected. Anybody can call him or herself an architect, and there is no obligation to use an architect. As often in these circumstances, it is the affiliation to the dominant professional organisation (here, the DAL-AA) that provides the basic guarantee of professionalism. Architects graduating from the two schools in the country are thus generally “MAA architects” (*members of the Akademisk Arkitektforening*)¹. They exercise their profession alongside architects graduated from shorter and more technical courses who are grouped in another association and are generally designated by the term “architect-builders”².

The issues of the protection of the title and the authorisation to practice are recurrent subjects in professional discussions but professional organisations are split as to the approach to take. The tradition of the free market and the resulting competition are generally appreciated as positive factors by professionals and liable to raise the global quality level of Danish architectural services. But the increasing difficulties faced by young architects trying to enter professional activity and, since the Directive, to be chosen in European competitions, are arguments in favour of protecting the title. The professional organisations envisage establishing a sort of certificate based on post-graduate training.

The situation is fairly similar for consulting engineers. However, these latter are not favourable to having their activity protected as, for the past fifty years, they have had an accreditation (which is controversial within the world of consulting engineers), the “*statikeranerkendels*”, specific to structural engineers, that allows them to obtain building permits far more rapidly.

Danish architectural practices are generally small (33% of them comprise a single person and 85% have less than 9 employees). Two or three of them have both architects and engineers. On the other hand, the few consulting engineer firms that exist are large, giving them a powerful position in their relations with architects. Traditionally, clients signed separate contracts with an architect, a consulting engineer and one or more building contractors. But “total engineering” or “*total consultancy teams*”, grouping all design professionals into a single team and “*total entrepreneurship type partnerships*”, grouping the design team and the building contractor within a single contract are being increasingly developed for large private contracts as well as for local authority public contracts.

¹ There are currently approximately 6,500 (for a population of 5.3 million).

² We evaluated that there were approximately 6000.

3. Regulatory control of public contracts before and since the Services Directive.

Before the Services Directive, the choice of a project consultant was not subject to any regulatory control. The practice was one of a “house architects and engineers” professional status with a client relationship with one or more large public clients. The use of “framework agreements” employing a procedure different from that of the Directive was frequent, particularly in the field of social housing and for maintenance. In parallel, Denmark had a long-standing tradition of architectural competitions for its principal public buildings and, prior to the Directive, an average of twenty competitions were organised a year. The DAL played an important advisory and logistical assistance role for these competitions.

The Services Directive was transposed by decree n° 415 dated 22 June 1993, enacted by the Ministry of Trade and Industry, and included the entire text of the Directive and accompanied it with financial and penal penalties. All types of public contracts open to project consultants are also framed by the ABR 1989 (general project consultant conditions), being regulations resulting from an agreement between the main public clients (the State, municipal and regional building agencies, social housing associations) and the professional organisations representing architects, engineers and building contractors. Below the European threshold (200,000 Euros being 1.5 million DKK), public services contracts are dependent on the Circular of the Minister of Finance dated 1 March 1994 which encourages the adjudicating powers to use competitions for their contracts as often as possible.

4. Methods to ensure the legality of procedures and contracts. Recourse for project consultants and contractors who believe themselves wronged. Recommendations, penalties.

In Denmark, the professional bodies representing architects and consulting engineers have a major advisory role. The PAR (*Praktisendere Arkitekters Rad*, Federation of architectural agencies), alongside an association of local authority architects and the FRI (*Foreningen af Radgivende Ingeniører*, Federation of Consulting engineers), have written a number of recommendation manuals and guides for clients and professionals. These are particularly aimed at small local authorities which have little training in the new procedures and which apply them in a fairly approximate manner. Denmark is currently trying to rationalise the contract procedures currently in use by local authorities. These guides attempt to dissuade clients from using the lowest price criteria in the choice of a project consultant.

The *Konkurrencestyrelsen* (*Danish Competition Authority*, dependent on the Ministry of Trade and Industry) employs approximately 120 persons and is the central body governing public contracts in Denmark. Although it has no legal power, its role is to provide the adjudicating authorities with advice and incentives. It does not systematically check the procedures carried out by these powers, but assists them in the steps they take and receives complaints from practitioners and contractors implicated in contentious public contracts, whether these be inside or outside Denmark¹. Its role is to try and handle these complaints by arbitration between the parties, but should this conciliation not work, the *Konkurrencestyrelsen* can transmit the complaint to the Public Contracts Litigation Bureau which has a legal jurisdiction. This only takes place in a few isolated cases (an average of less than five a year).

¹ Approximately 50 complaints are submitted annually to the *Konkurrencestyrelsen* (interview with Pia Skov and Dora Bentsen, *Konkurrencestyrelsen*, 22 November 2000).

Because of its international “surveillance” role, the *Konkurrencestyrelsen* also works to favour the exportation of Danish contractors and professionals¹. In order to harmonise the interpretations of the Directives and simplify international reciprocities, the *Konkurrencestyrelsen* is currently implicated, along with six other European countries, in a pilot project aiming to resolve disputes linked to public contracts by negotiation².

5. Methods for establishing the amount of fees

Until 1989, Danish architects were remunerated in function of obligatory fee scales developed by the professional organisations. Since then, these fee scales have become indicative and provide a basis of negotiation for both public and private contracts. As in most countries, these fee scales take account of the size of the project as well as the nature and complexity of the operation.

The general opinion is that contracts are negotiated below the fee scales and a large number of informants note that, over the last few years, there has been a considerable fall in the fees paid to architects and engineers³. Consequently, the cumulated fees of architects and engineers, which represented between 15 and 18% of the amount of works prior to the Directive, now only represent 12 to 13% of this same amount since its application⁴. According to commentators, this trend towards reduced fees is due to the use of restricted procedures which have introduced a pressure on prices, or is simply linked to the general reinforcement of competition within the context of the introduction of a single European market.

6. A policy aimed at distributing public commissions and supporting the profession?

According to the answers given to our questionnaire, public commissions represented between 15 and 18% of project consultants revenues (architects and consulting engineers)⁵ and 10% of the building activity⁶, being approximately half of the values generally cited in France. Whether this is because of the relative weakness of this activity sector or for other political or cultural reasons, there does not appear to be a global public commission distribution policy in Denmark. There are not priced data concerning the number of Danish practices receiving public commissions but, on the other hand, there is a discussion on the access of young architects to this market. For example, it is now accepted that young architects can make use of references resulting from their work as employees.

The application of the Services Directive has resulted in two reactions from practitioners : 1) a reticence with regard to the competitive bidding procedure, being a procedure that they were not used to using with the exception of the twenty competitions organised every year in their country; 2) the fairly widespread opinion that the Directive is unfavourable to young architects and small practices, and favours structures that already exist. Looking at design offices having understood the nature of the problem, it can be seen that a number of small architectural

¹ A study carried out in 1996 evaluated the Danish import/export balance deficit at approximately 8 billion DDK (interview with Pia Skov and Dora Bentsen, *Konkurrencestyrelsen*, 22 November 2000).

² This is a project named "PPPP" (*Pilot Project on Public Procurement*). Further information can be found on the SIMAP Web site (<http://simap.eu.int/DA/pub/src/001.html>). Also see 2nd part of the report.

³ Interview with Keld Møller, PAR manager (*Praktisendere Arkitekters Rad*, Federation of architectural practices), 22 November 2000.

⁴ Interview with Michael Jacobsen, *Byggedirektoratet*, 23 November 2000.

⁵ Answer from Keld Møller, PAR manager, to our questionnaire.

⁶ Answer from Dorte Kjaer-Knudsen, SES, to our questionnaire.

agencies have already merged to create units that better comply with the references requirement and the means of the adjudicating powers.

B. PROJECT CONSULTANCY CONTRACT ATTRIBUTION PRACTICES

1. Most used procedures for choosing project consultants.

In Denmark, and according to a general trend that seems particularly marked in the smaller countries, design-build procedures are frequent and constantly increasing. It should not be forgotten that these procedures are the result of the Works Directive.

In terms of services contracts, the procedures used are almost exclusively restricted procedures and competitions; clients only exceptionally use open and negotiated procedures. A major architectural quality awareness campaign carried out in the 1990s by the professional architectural organisations (DAL-AA and PAR) led to public clients making more use of limited competitions which, until then, had only been used for exceptional operations. According to one of our contacts, the attitude of clients towards medium-sized projects is changing from “why hold a competition ?” to “why not hold a competition ?”¹. The deciding authorities seem to have become aware that the restricted procedure incorporates certain limits: reduced flexibility in cost evaluation, the very limited possibility of negotiation accompanying the procedure (further complicated by the difficulty of separating technical clarification and negotiation) and the difficulties in making modifications to the initial project. The PAR is pushing this change in approach towards a more extensive use of competitions in the interest of architectural practices, judging that competitions, with their evaluation by a competent jury and their anonymity clause, are the best way of ensuring a certain equity and a certain architectural quality in the chosen proposal. There are currently around 50 architectural competitions organised in Denmark a year. The remainder of the commissions are generally awarded through limited procedures. This, for example, is the case of the procedure most used by the SES (palaces and royal properties agency), which evaluates that 94% of its project consultant contracts use this procedure². This Agency generally carries out an initial selection of five candidates from among an average of 20 tenderers. The final decision, taken by the Agency manager, is essentially based on the intentions of the architect (it should be noted that the specific nature of the SES field of intervention, being heritage buildings, make a judgment on the basis of design sketches somewhat inappropriate)³. The *Byggedirektoratet*, which handles approximately 73% of its contracts through the use of restricted procedures, interprets this procedure by employing a method that is very similar to that used for competitions. The 5 to 10 candidates short-listed by a commission comprising representatives of its departments as well as the future users, are asked to produce a methodology and “solution design sketches”. At present, there is no interview during the contract attribution designation phase, but there are plans to introduce this discussion phase with the project consultant(s). The bids are then opened by a secretariat comprising representatives of the department as well as, in many cases, a representative of the DAL. The decision is taken unanimously by a jury comprising client representatives, representatives of the future users, independent experts as well as, when required, representatives of the local authority and persons neighbouring the operation.

¹ Interview with Michael Jacobsen, *Byggedirektoratet*, 23 November 2000.

² Answer from Dorte Kjaer-Knudsen, SES, to our information questionnaire.

³ Interview with Dorte Kjaer-Knudsen, SES, 23 November 2000.

2. Dominant criteria in the choice of project consultant(s)

According to Keld Møller, PAR manager, the criteria in force for the choice of a project consultant within the framework of a public commission are, by decreasing order of importance : the architectural project, the quality of the constructive design, the cost and ease of maintenance in the built building, and the amount of the fees¹. This is pretty much the same order in which the *Byggedirektoratet* states the criteria that it uses : architecture, the functionality of the building, the respect of the initially defined budget, environmental respect, low energy consumption. The amount of fees is not a criteria for the *Byggedirektoratet* as it is accustomed to providing a standard contract given in the ABR 89 regulations along with its contract notice, and at this stage sets a non-negotiable amount of fees. On the other hand, the SES states more organisational criteria : experience, the cooperative ability of candidate project consultants, and the efficiency of their work organisation. To establish the amount of fees, the SES has its own fee scale that incorporates a very reduced level of negotiation and applies it to all its contracts.

3. Methods of exchange between the client and the project consultant

As already seen in an earlier study², Danish clients and architects, via their professional organisations, have clearly stated their satisfaction with the respect for anonymity accompanying competitions. No interviews or request for further details from candidates are accepted. The restricted procedure, used as an alternative to competitions, is also particularly marked by this precaution. The *Byggedirektoratet* does not interview candidates but is informed that other public clients practice this method and envisages using it itself in the near future. The SES normally organises a site visit accompanied by the tenderers (prior to the pre-selection), but subjects the exchange of questions and answers to a written procedure with the sending of a report listing all the exchanges to each of the tenderers. In the second phase, the examination of the bids (and design sketches where these are required) presented by the candidates is carried out without interview. The contract is then signed, after technical clarification or any minor adaptations to the project, but without negotiation.

4. Forms and contents of the negotiations

Negotiation only holds a very limited place in the Danish methods used to choose a project consultant and attribute him with a contract. The negotiated procedure is exceptional, as stipulated by the Directive, and is subject to an application limited to the list of cases provided for by this text. As a result, only 6% of contract notices published in the OJEC used this procedure³. Like the other procedures, the restricted procedure is also interpreted in a fairly strict manner when it comes to the impossibility of the adjudicating powers to negotiate the contract with the candidates. The only accepted aspect is the right to clarify the project's technical conditions and to adapt the contract to meet the requirements of certain details. Only the competitions procedure is largely open to negotiation and this is particularly due to the frequent practice (explicitly validated on a national level by the *Konkurrencestyrelsen* and on

¹ Interview with Keld Møller, PAR manager, 22 November 2000.

² BIAU (V.), DEGY (M.), RODRIGUES (L.). *Project consultant competitions in the European Union; application of Directive 92/50/EEC dated 18 June 1992 and respect of candidate anonymity*. CRH-École d'Architecture de Paris-La Défense, report for DAPA (Ministry of Culture), December 1998.

³ Source : FRI, Danish Association of Consulting engineers, 1999 statistics on the Services Directive.

a European level by the DG XV) of designating several winners with whom negotiations then take place. Rather than concerning completion times or prices, these negotiations concentrate on the guarantees that the candidates can give concerning the respect of costs, stability, and functionality¹. Denmark is also showing a growing interest, especially in the industrial building and housing sectors, in British thinking on partnership and the "*total entrepreneurship*" that commits a team made up from the client itself, its project consultants and the contractor responsible for the works and the provision of materials and components, throughout the entire project design and building period. As can be seen in the United Kingdom, completely different forms of negotiations and work relations are developed through this approach.

5. Attitude regarding young architects and/or young practices

In Denmark, the application of the Services Directive has contributed to developing the practice of competitions which was already well-established in this country. But small practices and young architects that hoped, on the basis of pre-qualifications, to finally have access to all types of architectural competitions as provided for by the Directive, have been disappointed.. As limited competitions remain dominant, they have not gained the access they sought and public clients have continued to only select large, well-established practices. Access to public commissions therefore requires that young architects compete (and win) open competitions in order to be included in the circle of architects chosen for limited competitions. Another solution is to be employed by one of the large practices with the required level of reliability to develop a detailed project and assume the site supervision but which has few design skills. The professional organisations have backed young practitioners in their demand to have access to public commissions and successfully had accepted that during the selection procedures, young architects can submit as references works they have carried out as employees. They can also temporarily associate to submit on condition that they first organise the distribution of tasks². We are currently seeing, in a manner similar to that observed in France during the 1980s, that young architects and young practices are now specialising in public contracts.

6. Priority goals given by clients to project consultants

Although it likes to define itself as "the most Latin of Scandinavian countries", the professional architectural culture in Denmark seems to lie halfway between Sweden and the Anglo-Saxon countries on the one hand, and countries with a more Mediterranean culture, such as France and Italy, on the other.

Thus, in terms of defining the architectural service, the managerial thinking applied to the building process in the Anglo-Saxon countries remains embryonic in Denmark : the issues of controlling completion times and the technical quality of the works remain secondary in the remarks made by major clients. On the other hand, environmental imperatives find a favourable echo both from the professional building sectors and from users. An experimental policy favouring sustainability recently implemented by the Ministry of Housing and Urban Affairs received a very favourable response from the concerned professional sectors. But given that the linkage between environmental policies and public contract policies is currently

¹ Interview with Michael Jacobsen, *Byggedirektoratet*, 23 November 2000.

² Interview with Keld Møller, PAR manager, 22 November 2000.

being discussed by the European authorities, the problem has not yet been resolved to the point of being able to introduce environmental constraints and criteria in calls for tenders¹. Seen from the Latin countries, Denmark has a certain design sensitivity and its architects are seen as design specialists able to operate at all levels, whether it be for buildings, furniture and manufactured products or, at the other end of the scale, urban complexes. Consequently, it is often a project that is chosen in Denmark rather than a service provider defined by economic and organisational characteristics, and this is why architectural competitions hold such an important place (27% of notices placed in the OJEC as against 29% in France²), despite the fact that they are not obligatory and that the specifications to which they are subjected by the DAL are fairly restrictive with, in particular, the sovereign decision of the jury³.

FEATURES OF THE NATIONAL SITUATION AND CHANGES TAKING PLACE

When the Services Directive came into force, the attribution of public contracts open to project consultants was not subject to any regulations or controls. But the Directive was transposed very rapidly (by decree dated 22 June 1993) and largely unchanged, and the national regulations gave it an important status by accompanying it with penalties. Over the last few years, the attribution of public contracts open to project consultants has therefore undergone radical changes in its application and it is generally accepted that the European rules are scrupulously respected by clients. However, there is virtually no checking procedure and regulation is carried out through conciliation and arbitration by the body known as the *Konkurrencestyrelsen* when a wronged service provider draws its attention to a contentious procedure.

Denmark, which for many years has carried out a large number of competitions, although only for exceptional buildings, has retained a partiality for this procedure which allows it give prime importance to architectural composition and technical design criteria. As a result, on the one hand, public clients, encouraged and assisted in this area by professional organisations, are extending the field of application of competitions to medium sized buildings and operations; and on the other, make large use of restricted procedures which, while not as open to negotiation as competitions, are easier to organise.

Danish practitioners, fairly strongly organised despite the fact that their titles are not protected, are reluctant to see the introduction of the competitive dialogue procedure or the possibility, for a given procedure, to see the designation of several winners. They are concerned about the loss of intellectual rights and the level of their fees which, over the last few years of intensified national and international competition, have undergone a notable reduction.

¹ Interview with Marianne LARSEN, Ministry of Housing and Urban Affairs, 22 November 2000.

² According to the count made by the Danish Association of Consulting Engineers for 1999.

³ For further details, refer to the preceding study : BIAU (V.), DEGY (M.), RODRIGUES (L.). *Project consultant competitions in the European Union; application of Directive 92/50/EEC dated 18 June 1992 and respect of candidate anonymity*. CRH-École d'Architecture de Paris-La Défense, rapport pour la DAPA (Ministry of Culture), December 1998.

SPAIN

By Carlos GOTLIEB
Architect-Town planner

A. THE NATIONAL STATUTORY AND OPERATIONAL CONTEXT

1. The nature of public building works, the public client structure

Following the administrative reorganisation that took place after the approval of the new constitution in 1978, Spain has become a highly decentralised country. It has 17 Autonomous Communities, corresponding to what are known in France as “Regions”, although the jurisdictions are different. The Autonomous Communities have fairly far-reaching powers, such as the right to establish their own development and town planning legislation. On the other hand, insofar as the regulations concerning public contracts are concerned, a single law applies to the entire country : law 2/2000.

Currently, buildings constructed using public funds are very wide-ranging : town planning projects, remodelling of urban cores, infrastructures, building rehabilitations, housing construction¹, and facilities construction. In the decades following the adoption of the new constitution and Spain’s entry into the European Union, administrations at all levels began building a large number of public buildings and urban facilities to catch up with other European Union countries. To examine the nature and structure of the client body responsible for projects now being built, we refer in this document to the information provided by the bodies questioned for this study². These are different types of structure belonging to or responsible for different levels of public administration (national, regional, municipal) and, as they cover a wide range of works, they can be considered as a fairly representative sample of the entire country. The general trend of public administrative bodies is to “externalise” the project consultant and intervene in the control or management of projects in ways that differ from one administration to another.

On a national level :

General Directorate of Architecture, *Ministerio de Fomento* (ex Ministry of Public Works) :

This Directorate is essentially concerned with the rehabilitation of historic monuments and neglected coastal resorts. Apart from housing projects in Ceuta and Melilla, Spanish enclaves in Northern Africa, this Directorate no longer has any competences in the public construction sector. These have been transferred to the Autonomous Communities (Regions). The works carried out by this Directorate are largely financed by what is known as the “cultural 1%” procedure : 1% of the budget of all public buildings built by the *Ministerio de Fomento* is thus

¹ Most social housing in Spain is built within the framework of home ownership subsidies (*viviendas de proteccion oficial*). However, local authorities have bodies responsible for building and managing the rented accommodation stock.

² See appendix for the list of persons questioned.

set aside for rehabilitation works carried out by the General Directorate of Architecture. Other works are jointly financed by the Ministry of Culture.

To have an idea of the level of financing, the investments made by this Directorate for works carried out in 2001 represented € 37 million, € 12 million of which corresponding to the cultural 1%.

The client for the projects can be this Directorate or the local authority concerned by the project. In the case of small towns, the client role is assumed by this Directorate and the project consultancy generally provided by external teams. Where the client role is carried out by this Directorate, technical assistance is generally obtained from external teams for specific aspects (structural calculations, etc.).

On a regional level :

Autonomous Community of Madrid, Town Planning Department :

The Community of Madrid is rarely given design assignments. It can define the basic ideas for launching calls for bids. However, it is responsible for works supervision. At present, the most important works concern infrastructure projects (metro, motorways). This is different from the previous decades when a large number of housing projects were built.

The Catalonia *Generalitat*, Directorate General of Housing, Catalanian Land Institute :

The Catalonia *Generalitat* sets the housing policy in Catalonia and is responsible for promoting social housing (in coordination with the national administration). It has two bodies to define and carry out measures in this sector : 1) the Directorate General of Housing, which defines the policy and manages the financial aid, and 2) the Catalanian Land Institute (Incasol) which is responsible for promoting social housing. Incasol assures the land acquisitions and development works. Project consultancy for housing projects is generally placed in the hands of external architects. Particular attention is paid to innovation (ecological and sustainable development criteria). Open ideas competitions, without necessarily leading to the awarding of a project consultancy contract, are organised to address these new concerns¹.

On a municipal level :

City of Madrid, Directorate General of Building :

The projects under the responsibility of this Directorate encompass a wide range of facilities (sports buildings, social centres, fire brigade stations, municipal police stations, care centres for the aged, administrative buildings). The Directorate comprises nine architects, six of whom responsible for project supervision. Generally speaking, the project consultancy is provided by external teams for design and building works, but a few projects are nevertheless carried out by the architects in this Directorate. However, works supervision is, in all cases, managed by this Directorate. Investments for the period from 1999 to 2003 represents € 720 million (120 billion Pesetas).

City of Barcelona, Municipal Town Planning Institute :

This institute intervenes, on behalf of the city of Barcelona, in the management of the design and construction processes for town planning and major infrastructure works (construction of

¹ This theme is developed in point B.6.

parks, promenades, tunnels for expressways, etc.). It works in close cooperation with a *sociedad mercantil* (commercial corporation), majority financed by the City and responsible for carrying out the works : the Bagur S.A. (Barcelone Gestion Urbanistica S.A.).

In Barcelona, it is fairly standard to set up privately-owned companies to carry out the works for certain strategic projects. This was the case during the Olympic Games which saw the creation of IMUSA (municipal town planning institute S.A.) which incorporated a number of other companies (Olympic Ring S.A., Olympic Village S.A.). The Municipal Town Planning Institute and the Bagur corporation are run by the same management, but while the former is a public entity, the latter is a private company. Private companies are in fact less regulated than the administrations, and this means faster design and build processes. Between the two of them, these two structures cover all the phases in the process. The Municipal Town Planning Institute carries out the preliminary studies, defines the basic criteria for launching consultations (the preliminary designs and final projects are the responsibility of external teams). The works phase is under the responsibility of Bagur, which has two persons responsible for supervision and which “externalises” the various services that it provides (it currently has sixty persons to carry out the works supervision).

Since 1996, works investments have represented a total of around € 700 million. This figure corresponds to over 500 projects, of which around a hundred are fairly significant.

The Institute is not responsible for building housing. For these types of projects, the city has a structure that operates in a similar manner. The construction of other types of facilities falls under the responsibility of the city’s departments (Department of Education for schools, Department of Health for public welfare centres, Department of Culture for libraries, etc.). As mentioned above, *ad hoc* structures are created for special projects.

2. Main characteristics of the project consultancy

In Spain, the federating structure for architects is the College of Architects, comprising regional Colleges integrated within the Colleges of Architects Council. Registration in a regional college allows architects to work throughout the country. Currently, the Colleges of Architects have the role of checking projects prior to the issuing of building permits. They intervene as the intermediary body between architects submitting a building permit file and the local administration granting the permit. This checking function is exercised using the *visado* (visa) procedure. According to this procedure, all architects must send to the College of Architects the contracts that they have signed, whether for public or private works. In a subsequent phase, the architect must present the building permit file. The *visado* simply checks that the architect is accredited. It is also used to check that the file includes the necessary documents and is sufficiently developed. It is a sort of guarantee of professionalism, a label that allows local authorities to process the file with the assurance that it includes all the documents necessary for analysing the project in view of issuing the building permit. This system is contested by certain public administrations that believe that they do not need this type of checking procedure for the projects under their control. However, projects established by government employed architects working in public administrations are exempt from this procedure.

The Colleges of Architects also intervene in the designation of one of the jury members in the case of project competitions using juries. This is a customary practice, as is the election of one of the jury members by the candidate architects.

In the past, architects were remunerated through the intermediary of the Colleges. The architect handed over his/her completed project as well as his/her fee invoice to the College of

Architects. Following the *visado* given by this body, the client could then collect its project and pay the fees which were then reassigned to the architect. This practice was terminated in 1997 by law 7/1997, *ley de liberalizacion en materia de suelo y colegios profesionales* (liberalisation law concerning land and professional Colleges). Currently, concerning public contracts, the Colleges of Architects simply have the role of observing procedures. However, these Colleges want to assume a more active coordination role, especially in terms of advertising, decision-making and, to a certain degree, in checking the legality of contracts and the capacity of professionals to meet their conditions¹.

In Spain, most architects are self-employed. The size of agencies varies, from small agencies with one architect, three draughtsmen and an *aparejador*², through to large structures. It is fairly common that average-sized structures with three or four architects be created for specific projects. Architectural agencies of a certain size include technicians with various skills (electrical installations, etc.) within their structures. While contractors do not generally include architects in their structure, they often have engineers. The participation of architects in project consultancy teams brought together for public contracts depends on required services and the practices of each administration. The general tendency is to award a single project consultancy contract that groups together professionals with different competences. In the case of public contracts, the law requires that the professionals answering the call for bids first put together a technical team or have already set up a UTE (temporary association of contractors). Discussions are currently taking place within the Colleges of Architects on whether or not there is a need to create UTEs. The most common view is that in cases of individual competitors, it is sufficient to set up a team agreement in which the leader is designated. If this is an association of contractors, it is necessary to set up a UTE or a specific technical team³. However, it would seem that to remain below the negotiated procedure threshold (€ 30,000) certain administrations multiply the number of contracts (one contract per type of competence)⁴.

There is a more frequent tendency to break up contracts according to project development phases (preliminary design, works project, works supervision, etc.). According to certain architects, this system penalises the coherence and quality of the project⁵. Clients practicing this breaking up into phases argue that it guarantees the quality of the project inasmuch as it requires an optimal definition of the project at each phase (whereas in a global project, a project consultant might inaccurately define a given phase of a project, believing that this could be adjusted during subsequent phases). This is the case of Bagur in Barcelona which, for each project representing an amount greater than € 300,000, launches two separate contracts, the first for the project development and the second for works supervision, with an audit carried out between the two phases⁶. This audit is used to check that all graphic documents have been drawn up, all budget items estimated, as well as ensure that the graphic documents and the specifications are clearly matched with one another. For the project

¹ Discussion with Enrique Ximenez de Sandoval, Legal Advisor, Spanish Colleges of Architects Council.

² The “aparejador” or technical architect is a professional that assists the architect in supervising the works. While the architect looks after soil and foundations problems, the “aparejador” is responsible for checking the quality of all materials and measuring completed works.

³ Discussion with Enrique Ximenez de Sandoval, Legal Advisor, Spanish Colleges of Architects Council.

⁴ Discussion with Enrique Ximenez de Sandoval, Legal Advisor, Spanish Colleges of Architects Council

⁵ Discussion with Serafin Sardina, architect.

⁶ This audit is carried out by a municipal commission responsible for evaluating the architectural and constructive quality of the projects.

development phase, Bagur favours architect team / engineer team duos working within a same structure. For the works supervision phase, it prefers teams of engineers¹.

For certain projects, it is preferred that the architects be integrated within a contractor's structure. This is the approach taken by the City of Madrid Directorate General of Construction for projects representing an amount greater than that permitting the use of the negotiated procedure (€ 30,000). In this case, a design/build procedure is used for the public contract. Using this procedure, the administration chooses a contractor which, in turn, chooses its architect². Although the law only allows authorises this procedure in exceptional cases, it is nevertheless used by this administration to ensure that project completion times are reduced to a minimum.

3. Regulatory control of public contracts before and since the Services Directive.

Public contracts are regulated by Law 2/2000 concerning Public Administration Contracts which was established in accordance with the requirements of the European Union Services Directive (Directive 92/50). It is a national law that is applied in the same way to all the country's public administrations.

The introduction of this law favoured a change in the practices used by public administrations. The aim was to provide a maximum level of transparency in the procedures used to award public contract.

Prior to the approval of this law, free competition was not guaranteed and advertising was not assured. Exceptional procedures permitted the choice of a project consultant without the use of a competitive bidding procedure. In addition, the time within which the administration paid the project consultants was not controlled and could be spread over periods of up to a year³.

The practices existing in certain administrations meant that the competitive bidding procedure could be avoided and that the direct awarding of contracts could be favoured. In fact, over a certain amount, it was only necessary to have bids from three different teams in order to choose the project consultant. Agreements between these teams resulted in the setting up of rotation systems for the awarding of contracts. These practices were forbidden by the new law⁴. There was also a specific contracts procedure that authorised the signing of a private agreement contract for all project phases. This procedure was brought to an end in order to assure transparency and to align with the Services Directive⁵.

Law 2/2000, approved on 16 June 2000, established four types of public administration contracts :

- works contracts,
- public services management contracts (transport, etc.),
- supply contracts,
- consultation, technical assistance and services contracts.

These latter, which include architectural services, were given a specific definition in Spain and group together all services of an "intellectual" nature, generally provided by professionals.

Concerning the procedures for entering into public contracts, these can take the form of an open procedure, a restricted procedure or a negotiated procedure. In the open procedure, all interested contractors can present a proposal. In the restricted procedure, only contractors

¹ Discussion with Oriol Altisench i Barbeito, resident engineer at Bagur SA.

² Discussion with Arturo Ordozgoiti Blazquez, Building Department General Manager, City of Madrid.

³ Discussion with Ana Ortonobes, Municipal Town Planning Institute of Barcelona.

⁴ Discussion with Enrique Ximenez de Sandoval, Legal Advisor, Spanish Colleges of Architects Council.

⁵ Discussion with Immaculada Ribas, General Directorate of Housing, Catalonia Généralitat

specifically chosen by the Administration can provide proposals, with the number of contractors selected to present proposals ranging from five to twenty. In the negotiated procedure, the contract is awarded to the contractor having been chosen in a justified manner by the Administration following a consultation and negotiation of terms with at least three candidates¹.

In the open or restricted procedure, the awarding of the contract can also be through the *subasta* system (adjudication according to the lowest priced bid) and the *concurso* system (awarding to the candidate with the generally most advantageous bid, based on a set of criteria in which the price represents one element among others²).

In the case of consultation, technical assistance and services contracts, the *subasta* can be used for small contracts, while the *concurso* system is the one generally used for the awarding of large contracts³.

Public contracts are subject to a preliminary advertising obligation. The way this is carried out depends on the contract amount. Negotiated procedure contracts are exempted from advertising if their budget is lower than € 30,000⁴. Consultation, technical assistance and services contracts are subject to the “projects competition” procedure with the intervention of a jury. It can, in particular, be applied to contracts requiring the preparation of drawings or projects in the fields of development, town planning, architecture, engineering and data processing. In these cases, the projects must be presented anonymously. The type of contract advertising varies according to the amount of the set compensations. The awarding of projects to the winner or winners can be carried out using the negotiated procedure without advertising⁵.

In practice, a wide range of missions linked to architecture or development works (preliminary studies, ideas competitions, preliminary designs, works projects, works supervision, quality control, etc.) are subject to the open competition, restricted competition or negotiated procedures.

For public administrations, a way of not being restricted by the conditions of law 2/2000 is the creation of *sociedad mercantil*, private companies. These are companies partially financed by public funds but whose legal form is that of a corporation, a joint stock company, or a limited liability company. These companies are subject to law 2/2000 but only to a limited degree, even if their capital is 100% public. This mechanism favours a circumvention of the law. To study this development, a public contracts monitoring commission was set up by the Community of Madrid. It established that 60% of public administration contracts were carried out by these intermediary companies⁶. In certain administrations, the fact of commissioning via these types of companies permits the establishing of penalty criteria that are stricter than those imposed by law 2/2000, particularly insofar as the respect of completion times is concerned⁷.

¹ Law on Public Administration contracts, Book I, Title III, Chapter VII.

² Law on Public Administration contracts, Book I, Title III, Chapter VII.

³ Law on Public Administration contracts, Book II, Title IV, Chapter III

⁴ Law on Public Administration contracts, Book II, Title IV, Chapter III

⁵ Law on Public Administration contracts, Book II, Title IV, Chapter VI

⁶ Discussion with Serafin Sardina, architect. The Law on Public Administration contracts (Book I, Title I) stipulates that for these types of companies, the mechanisms provided by this law apply insofar as the capacities of the contractors, the advertising and the adjudication procedures are concerned (they are subject to advertising and competition principles).

⁷ Discussion with Ana Ortonobes, Municipal Town Planning Institute of Barcelona.

4. Methods to ensure the legality of procedures and contracts. Recourse for project consultants and contractors who believe themselves wronged. Recommendations, penalties.

Given the widespread nature of the contracting authorities, law 2/2000 encourages the creation of Consultative Administrative Contract Commissions (*Juntas Consultativas de Contratacion Administrativa*), both on a national and regional level. Their role is to promote standards or measures of a general nature that they consider justified for improving the public contracts system from an administrative, technical and economic point of view¹. The methods for checking the legality of procedures and contracts are placed in the hands of specific departments in each administration or in those of other bodies. In the case of the Community of Madrid, for example, the public contracts departments analyse the bids from a legal point of view throughout the entire consultation period. There is also an independent internal department, the general or delegated “intervention”, which is a structure within the administration that carries out internal checks. Over and above these bodies, an additional checking procedure is carried out by the Community of Madrid audit office².

The legal departments also have an advisory role during the consultation and adjudication procedure. In Barcelona, for example, they carry out the legal and administrative checking procedure. These departments also prepare the administrative specifications and are responsible for validating the administrative documents demanded from the candidates. They also advise the technical bodies on the interpretation of contracts and modifications³. Should a contract be cancelled, the law provides for the clients paying compensation to the project consultants⁴. If a candidate considers that he/she has been wronged as the result of a procedural defect, he/she may seek redress from the jurisdiction responsible for administrative litigation and, as a final recourse, from the administrative tribunals which, if necessary, can halt the procedure (although this is a very rare occurrence).

5. Methods for establishing the amount of fees

The setting of fees for architects has been modified within the scope of the trend towards deregulation that has been taking place in Spain over the last few years. Between 1977 and 1997, fees were set according to obligatory scales established by the Colleges of Architects. Since 1997, fees have been calculated on the basis of indicative scales. Set by the Colleges of Architects, they apply to both public and private projects. They provide appreciation criteria based on the type of works, its cost, its size, and the presupposed degree of difficulty. The scales apply to all project phases⁵.

Currently, the administrations do not necessarily follow the indicative scales and base themselves on the lower remunerations applicable in the private sector. However, bodies that are particularly involved in the enhancement of architectural quality (such as the General Directorate of Architecture, Ministry of *Fomento*), respect the indicative scales⁶.

¹ Law on Public Administration contracts, Book I, Title , I, Chapter II.

² Discussion with Ricardo Vicent Fernandez de Heredia, Chief Engineer, General Administration of the Community of Madrid.

³ Discussion with Jaume Barnada et Ana Ortonobes, Municipal Town Planning Institute of Barcelona.

⁴ Law on Public Administration contracts, Book I, Title IV.

⁵ Discussion with Enrique Ximenez de Sandoval, Legal Advisor, Spanish Colleges of Architects Council.

⁶ Discussion with Juan Marin, General Directorate of Architecture, Contracts Department, Ministry of “Fomento”.

The definition of fees for architects lies at the centre of a lively debate. For private sector contracts, they are freely negotiated between the parties. In public sector contracts, the architect's fees form part of the bid. They are only open to discussion in the case of the negotiated procedure. In certain call for bids procedures, public clients used to use a method for evaluating the economic bids made by architects which took as a basis a medium price corresponding to that of the scale : as a result, the best bid noted was not the one that was lowest, but rather the one closest to the scale. This practice was prohibited by the European Commission because it was anti-competitive. The Commission noted that it is the economically lowest bid that should receive the highest notation¹.

6. A policy aimed at distributing public commissions and supporting the profession ?

Since the introduction of democracy in 1975, Spain has become highly committed to projects in the public construction sector. The urban developments undertaken, as well as other types of projects at different scales, have been a way of demonstrating the willingness of government bodies to reply in a concrete manner to social requirements while seeking to assure a good quality level. If a sizeable number of Spanish architects are well-known on an international level, it is largely thanks to the public commissions they have been awarded in Spain. It should be noted that there are also many architects holding highly responsible positions in the public administration linked to urban and architectural projects. This, for instance, is the case of the city of Barcelona which has a Chief Architect responsible for the definition of key projects.

Architectural promotion campaigns were a fairly regular feature at the end of the 1980s and the beginning of the 1990s. Marking the end of the first decade following the country's democratic consolidation, these events took the form of exhibitions and publications that allowed the general public to see public building projects by well-known and lesser-known architects².

Equally, to raise the level of architectural production, renowned foreign architects were invited to contribute, especially for flagship projects (Olympic Games in Barcelona, transformation of Bilbao, etc.)

B. PROJECT CONSULTANCY CONTRACT ATTRIBUTION PRACTICES

1. Most used procedures for choosing project consultants

Although a single law (law 2/2000) is applied to all Spanish administrations, the chosen public contract attribution procedure varies according to the administrations. The open procedure is largely used, especially in administrations that consider that all professionals present on the architecture market have the competences necessary to handle ordinary

¹ Discussion with Serafin Sardina, architect.

² As an example : an exhibition of ten years of Spanish architecture, 1980-1990, organised by the Ministry of Public Works and Transport in 1991, including a publication ; Madrid Proyecto Madrid, 1983-1987, City of Madrid publication; Arquitecturas, 1983-1987, exhibition organised by the Community of Madrid accompanied by a publication, 'Barcelona espacio publico', City of Barcelona publication, 1993.

projects¹. The restricted procedure is used less frequently, generally for highly specific projects (civil engineering works, etc.). However, law 2/2000 contains a selection condition that applies to all attribution procedures, being the “contractor classification”, a system that obliges all contractors bidding for any public contract of a value greater than € 120,202.42 to have the “classification”. The “classification” is a label given for a two year period by competent bodies, on presentation of a series of documents communicating the contractor’s technical and economic capacities². The “classification” indicates the category of contracts for which the contractor can submit bids.

Certain administrations use the restricted procedure, not for well defined projects where there is a need to identify the specialists, but rather to avoid an overly large number of candidates. This is the case for the General Directorate of Architecture, Ministry of *Fomento* which, even if the types of building rehabilitation projects for which it is responsible are relatively simple, does not have the personnel necessary to handle more than twenty submission files³.

The negotiated procedure without advertising is applied either for contracts representing a small amount (the threshold is € 30,050), or for certain types of services (preliminary studies, small projects), or in cases of urgency⁴, or occasionally, as mentioned above, when the services have been broken up to be able to pass below the procedure threshold. It can also be used for small projects, allowing the administration to choose professionals with whom it has previously worked.⁵

For services representing amounts below € 12,020.24, the administration can choose a project consultant on the basis of an estimate (minor contracts)⁶.

2. Dominant criteria in the choice of project consultant(s)

Public contract specifications comprise two types of dossiers : the conditions of contract and the general technical conditions. The conditions of contract contain information concerning the subject of the contract, the programmed budget, the works schedule, the procedure and the way the contract is awarded, the conditions to be met to compete, the proposal presentation procedures, the criteria for the notation of the proposals and the selection of candidates, as well as the provisions relative to the contract⁷.

The general technical conditions include detailed information concerning the technical bid (way of presenting drawings, scales, etc.).

The procedure and candidate choice criteria are specified in the conditions of contract concerning the public contract that is subject to the competitive bidding procedure.

In the case of open “competitions”, the candidates must present four envelopes : the first envelope (A) contains the administrative documents (legal capacity, copies of degrees, documents justifying economic, technical and financial capacity, certificates stating that the competitor is up to date in his/her tax and social payments). The second (B) contains technical

¹ Discussion with Jaume Barnada and Ana Ortonobes, Municipal Town Planning Institute of Barcelona. This body makes use of the open procedure in 98 % of cases.

² Law on Public Administration contracts, Book I, Title II, Chapter II.

³ Discussion with Juan Marin, General Directorate of Architecture, Public Contracts unit, Ministry of "Fomento"

⁴ For example, when there is a need to rapidly use credits.

⁵ Discussion with Arturo Ordozgoiti Blazquez, Managing Director of the Building Department, City of Madrid.

⁶ Law on Public Administration contracts, Book I, Title III

⁷ Standard conditions of contract, Spanish Colleges of Architects Council.

documents (projects carried out, curriculum vitæ). The third (C) contains the technical proposal which varies according to the object of the “competition”. The fourth (D) includes the economic proposal (cost of the service)¹.

Once the competitors’ dossiers have been received, the Person Responsible for Contracts representing the administration launching the request for proposals designates a Call for Bids Commission (*mesa de contratacion*).

Initially, the Call for Bids Commission opens envelopes A and B and checks that they contain all the required documents. The Call for Bids Commission sends these documents as well as envelope C (technical proposal) to the Technical Commission (which must include at least 2/3 architects). Once examined, the Technical Commission draws up a report which is transmitted to the Call for Bids Commission. The D envelopes (economic bids) are then opened during a public session. The Call for Bids Commission then gives a notation to the economic proposal and awards the contract to the bid with the highest number of points resulting from the addition of the economic proposal and the technical proposal. In the technical proposal, the evaluation is made on the basis of criteria such as the way that the presented project meets the objectives and the established programmes, the construction completion time, the adaptation of the project to its environment, etc. In the economic proposal, the highest note is given to the lowest bid (see above).

In restricted “competitions”, two clear-cut phases succeed one another. In the first, candidates susceptible to submitting proposals are selected. The candidates send two types of envelopes : administrative documents (A) and technical documents (B). The Call for Bids Commission chooses from between 5 and 20 candidates by evaluating, in particular, their professional experience, the quality of their most significant works, the *curriculum vitae* of the team members, and their means. For the second phase, the chosen candidates are authorised to submit their technical and economic bid which will be evaluated by the Technical Commission in accordance with criteria similar to those used in the open procedure.

Certain administrations evaluate competitors in accordance with specific criteria. The Community of Madrid demands that there be an evaluation of the number of salaried staff in the candidate’s firm, the types of contracts for which they have been recruited and the number of stable jobs that are represented. This concession made to the unions is currently being appealed against before the European Commission by groups of employers².

Occasionally, architects find that the administrative aspect of the procedure and the answers required from them are overly taxing when compared with the technical or intellectual aspect of the work. According to one of these architects³, only 10% of competition procedures call on the provision of ideas.

3. Methods of exchange between the client and the project consultant

The elements used to judge the competences of public contract competitors are those to be found in their candidature dossiers, especially for contracts representing an amount greater than € 30,050.61 (open or restricted procedure). Candidate auditions are rarely used.

¹ Standard conditions of contract, Spanish Colleges of Architects Council.

² Discussion with Serafin Sardina, Architect.

³ Discussion with Serafin Sardina, Architect.

The technical proposal can comprise a memoir and graphic documents or simply a methodological note. In the standard conditions of contract provided by the Spanish Colleges of Architects Council, the graphic documents are fairly general sketches or plans presented at 1/200, all presented on A3 format.

4. Forms and contents of the negotiations.

The negotiated procedure is largely used in the surveyed administrations. Certain administrations apply the negotiated procedure to use architects that they have previously worked with and in whom they have confidence. For the other project consultant selection procedures, with the exception of the City of Barcelona Town Planning Institute, the administrations do not negotiate the amount of the contracts. The technical and economic bid is intangible and, in this case, has a contractual value. This can be fairly restrictive because architects are held to define their prices at a time when the projects are not generally at an advanced level of detail. This particularly applies to rehabilitation works. However, law 2/2000 provides for a mark-up margin representing up to 20% of the estimated amounts in cases where modifications to the project are attributable to the client¹.

5. Attitude regarding young architects and/or young agencies.

In the past, for public commissions with competitive bidding procedures, administrations tended to first call on specialists, even if the themes were not particularly complex (schools, etc.). This practice penalised the access of young architects to this market segment and was criticised by the European Commission and by the national Consultative Contracts Commission which demanded that it be abandoned².

As young architects have difficulties in gaining access to public commissions, the best option available for them to prove themselves are ideas competitions. A way of favouring young teams is the evaluation criteria which takes into consideration projects carried out over the past five years. However, this demand can be disadvantageous as it can coincide with a work development period rather than a productive period³.

In 90% of cases, the General Directorate of Architecture, *Ministerio de Fomento*, works with known architects, the remainder being young architects arriving on the job market. In the past, this Directorate was in the habit of favourably noting the presence of young architects in the teams, but the European Commission no longer permits the positive discrimination that this represents⁴.

6. Priority goals given by clients to project consultants

The definition of the type of project expected is generally developed by the client, without any prior collaboration with other parties. In certain cases, the programme ideas are discussed with the districts (neighbourhoods), but the final programme as well as the expected quality level are defined by the administration⁵. Consequently, the quality of a project is evaluated in the

¹ Discussion with Ana Ortonobes, Municipal Town Planning Institute of Barcelona.

² Discussion with Serafin Sardina, Architect.

³ Discussion with Serafin Sardina, Architect.

⁴ Discussion with Juan Marin, General Directorate of Architecture, Public Contracts Department, Ministry of "Fomento".

⁵ Discussion with Arturo Ordozgoitti Blazquez, Managing Director of the Building Department, City of Madrid.

notation of the technical proposal, where environmental criteria are particularly taken into consideration¹.

In a few cases, quality, especially in terms of innovation and originality, is a key factor. For example, the Catalonia *Generalitat* recently launched an ideas competition whose aim was to develop innovative environmental or ecological systems for housing projects. The chosen solutions could subsequently be used for pilot projects comprising innovative technical solutions and then be subject to a contract².

Certain clients apply fairly precise project quality control systems prior to moving onto the works phase. This is the case in Barcelona where committees are responsible for evaluating the architectural quality of projects after the drawing up of final drawings. These committees can comprise architects employed by the town, architects from other Spanish regions and even certain renowned foreign architects. In addition to this evaluation, Barcelona also has a system for examining the constructive quality of the project prior to the call for bids for the works phase. The projects are rated as A, B or C. Depending in which category the projects are to be found, the client decides whether or not to retain the *baja* (the amount corresponding to the difference between the estimate anticipated by the administration for the works and that corresponding to the project consultant's estimate). Category A signifies that the project is very reliable and can be subject to a call for bids on the basis of the lowest estimated cost. In this case the client can place the *baja* on another budget item. Category B also allows the call for bids to be launched, but the administration retains the *baja* to cover any unexpected expenses. Category C implies that the call for bids cannot be launched³.

FEATURES OF THE NATIONAL SITUATION AND CHANGES TAKING PLACE

Law 2/2000 is largely a direct transposition of the European Union Services Directive. It enlarges a practice that in the past was almost exclusively reserved for works contracts.

The law also permitted the consolidation of a practice that had already been in practice since 1995 and which permitted the control over certain abuses in the awarding of public contracts. Although the law has democratised access to public commissions, the complexity of the dossiers to be presented occasionally represent an obstacle for professionals, particularly those who are young.

However, the setting up of a "contractor classification" system has simplified the presentation of administrative documents.

Certain arrangements set up since the adoption of the law have, in certain cases, been the source of conflicts. This particularly concerns conditions of contract that are not sufficiently detailed or which are an over-simplified adaptation of works contracts procedures. The setting up of Public Contract Consultative Commissions and the work carried out by the Colleges of Architects, especially in the preparation of standard conditions, are elements that will contribute to amending practices in all administrations.

¹ Standard conditions of contract, Spanish Colleges of Architects Council.

² Discussion with Immaculada Ribas, General Directorate of Housing, Catalonia Généralitat.

³ The law nevertheless requires a system of guarantees (bond) that must be produced by the successful public contract bidders and which is dependent on the amount of the contract (Law on Public Administration contracts, Book I, Title III, Section 1)

FRANCE

By Véronique BIAU
With the collaboration of Sophie SZPIRGLAS for the survey
(June 2002)

A. THE NATIONAL STATUTORY AND OPERATIONAL CONTEXT

1. The nature of the public building works and the public client structure

The main characteristic of the French public client is that it takes the form of a large number of very unevenly organised bodies that do not necessarily have the competences to carry out their work. This trait was accentuated by the provisions of the 1982 and 1985 decentralisation laws which transferred to the very large number of French local authorities (36,433 communes, 96 departments, 22 regions) the competences relative to their town planning and their facilities, as well as the corresponding real estate properties.

On State level, the trend is for Ministries to increasingly externalise their real estate functions and place these in the hands of national administrative statutory bodies. This, for example, is the case of the Ministry of Culture, with EMOC (Établissement Public de Maîtrise d'Ouvrage des Travaux Culturels) [statutory body acting as client for cultural works] which has 80 persons structured around 11 project teams. A similar type of organisation is operated within the Ministry of Justice¹ where, since the beginning of 2002, AMOTMJ (Agence de Maîtrise d'Ouvrage des Travaux du Ministère de la Justice) [Ministry of Justice public works agency], a permanent structure, has taken over from DGPPE (Délégation Générale au Programme Pluriannuel d'Équipement) [General delegation to the permanent facilities programme], a mission directorate temporarily created to implement an ambitious modernisation programme of the penitentiary institution in 1999-2000 and provided with a budget of € 30 billion. AMOTMJ, which deals with penitentiary institutions as well as operations of a legal nature (particularly law courts), annually manages investment budgets of around € 1.8 billion and is organised into eight project teams². As can be seen, in these two cases, the public client structures are highly professional.

Other ministries retain the property aspect of their activity within their organisational structure. This, for example, is the case of the Ministry of the Interior where the Property Business Subdivision, which falls under the responsibility of the Programming and Financial

¹ Since 7 May 2002, J.-P. Raffarin's government has had a Secretary of State responsible for property programmes in the Justice sector. This could modify the organisation presented here.

² Discussion with Michel Zulberty, managing director of AMOTMJ, March 2002.

and Property Division, manages all the property budgets of the Ministry's central administration, as well as those of the national police, and the territorial and civil defence administration budgets. The Subdivision coordinates the budgetary programming¹ and is then locally relayed, insofar as the management of operations is concerned, by its decentralised echelons, the SGAP (the general administrative Police secretariats), and the prefectures². The Ministry of Defence has also retained the functions concerning its property assets within its organisation and even has an integrated project consultancy service that allows it to carry out the assignments concerning it within the framework of its specific actions, both in times of war and peace.

Depending on the extent of their property assets, the Ministries have organised themselves in different ways to assure new building works, as well as restructure and maintain their existing assets : certain of these made use of the services provided by the Departmental Public Works Departments (Public Buildings units), being the decentralised regional services of the Ministry of Planning .

The law of 12 July 1985, known as the MOP³ law, defines the role of the client and the functions forming part of its responsibility. As the body responsible for the works, this latter assumes a general interest function that presupposes that it cannot bow out from assuming responsibility for the feasibility and advisability of the operation, the choice of location, the definition of the programme⁴, the establishing of the financial envelope, and then the financing and the choice of selection procedure to be adopted. However, the law requires that the client be able to entrust a part of its powers to certain public or private bodies by mandate or operation supervision agreements. The client can entrust an agent⁵ with : 1) defining the administrative and technical conditions for studying and carrying out the works, 2) preparing the choice of the project consultant(s), and the signature and management of the contract signed with this or these latter, 3) the preparation of the choice of the contractor or contractors, and the signature and management of the contract signed with this or these latter, 4) the payment of remunerations to the project consultant and the contractor, 5) the handover of the works following approval given by the client. The following can, for example, assume these agent functions : the State, its statutory bodies, local authorities and their statutory bodies and organisations, semi-public companies and social housing bodies. Through a contract, the client can avail itself of an operations manager in order to have general administrative, financial and technical assistance. This assistance, which must be entirely independent from the exercise of a project consultancy assignment, can be provided by another local authority or by a public or private body that has been authorised by decree.

These more or less wide-ranging delegation possibilities for client tasks that presuppose both competences and experience, which are not held by a large number of public clients, nevertheless have the inconvenience, from the point of view of project consultants, of

¹ FRF 1.5 million (around € 230,000) of programme authorisations for 2000, including FRF 640 million (€ 97,500) for rehabilitation (source : *Equipes et projets : bougez avec les constructions publiques*. Articles of the public buildings seminar, 2000. DGUHC- Ministry of Planning, Transport and Housing, 2000; p. 41).

² Discussion with Patrick Mille, assistant director, Property Affairs, Ministry of the Interior, April 2002.

³ Law 85-704 relative to the public client and its relations with private project consultants came into force on 13 July 1985.

⁴ But it can place the studies needed to develop this programme in the hands of any public or private person of its choice.

⁵ See Title 1, article 3 of the MOP law.

increasing the complexity of the system and masking the expression of the “client’s¹” expectations. The fact is that the project consultant is confronted in turn by the client and his agent or operations manager, through the intermediary of different persons acting in the name of these bodies who are not always representative either of the future occupiers nor, *a fortiori*, the future users².

As already mentioned above, decentralisation has left a large scope of intervention to local authorities inasmuch as they have been confided with nearly all facilities linked to health, social welfare, primary and secondary education, sports and youth, as well as secondary infrastructures. The result is that commissions from local authorities are considerably increasing: they represented 45% of public works activities in 2000 as opposed to 36% in 1992. In terms of numbers of project consultant contracts signed, which does not reflect on their size, these commissions seem to account for around 90% of contracts (including inter-communal bodies and local statutory bodies)³. Over the past few years, they have essentially concerned sports and leisure installations and facilities aiming to improve the environment⁴. But this activity is very irregular and highly dependent on electoral cycles: politicians programme works so that they are completed before the final year of their mandate⁵. Within the context of local authorities, there is a great disparity between the different situations: there are a large number of small local authorities that have no department nor any administrative or technical competences to carry out a building or development operation. They therefore find themselves in the situation of being enthusiastic “occasional clients” without any acquired experience and, consequently, are worried by the risk represented by this situation⁶.

The inter-communal bodies now being developed, particularly through the backing provided by the SRU law (Solidarity and Urban Renewal), could in the coming years contribute to making up for this lack of administrative and technical means suffered by small and medium-sized local authorities.

The problem represented by reinforcing and increasing the professionalism of client functions is less crucial in large towns where, since decentralisation and even well before⁷, there have been technical departments and/or town planning departments that are competent to carry out building and development operations. The communes and their grouped bodies often turn to satellite structures: semi-public bodies, statutory bodies, development delegations, etc.

¹ For certain observers, this “bureaucratisation” of the client would be accompanied by “client personnel withdrawing their commitment and responsibility in favour of collective identities producing a “smoothing over” of intentions. The clients, especially when beginning an operation for which they are not financially responsible, and are not going to be working in or using the building, no longer believe themselves able to impose their architectural preferences. They are increasingly submitting themselves to the procedures and judgments of more or less controllable ‘systems’ such as juries”. Cf. IPAA, J. Allégret et al. *L’encadrement et la formulation de la commande architecturale: étude de cas*. Paris, METL-PUCA, June 1998. p. 15.

² We use the distinction usually employed between the occupiers of a public building, being the managers and the personnel of an establishment, and the users of the building who could be citizens, clients, beneficiaries of a public service (schoolchildren, spectators, subjects, etc.).

³ For this evaluation, we base ourselves on the assessment of public calls for bids notices published in the *Bulletin Officiel des Annonces de Marchés Publics* (BOAMP) or *Le Moniteur*, concerning the designation of a project consultant for a new building operation or the rehabilitation of a public facility. Local authorities were the source of 90% of the notices placed in these media in 2000, while the State was the author of 7% of notices and other public authorities represented 3%. See “*Les consultations publiques de maîtrise d’œuvre*”. G. Lamour, MIQCP, March 2002.

⁴ “2000: une année exceptionnelle pour la construction”, Marie-Anne Le Garrec. *INSEE Première* n°786, June 2000.

⁵ *Activité et emploi dans le BTP* n°28, October 2001, p. 51.

⁶ ARPAA, *Maîtrises d’ouvrage occasionnelles et logiques d’action*. Paris, PUCA, 2000.

⁷ LORRAIN D. “670 000 professionnels de l’urbain. La fonction communale, les élus et la réforme urbaine” in *Annales de la Recherche Urbaine* n°44-45, December 1989.

Unlike the various European countries studied here, France has not, or at least not yet, entered into a privatisation process for carrying out building and development works in the public interest. Nonetheless, the 1994 law on the creation of real rights in the public sector¹ has given the State the possibility of having its operations built by private parties having signed emphyteutic leases. The Ministries of Planning and the Interior occasionally use this legal possibility but, generally speaking, those awarding contracts have been reluctant to give up the managerial power resulting from this possibility and, to date, the law has had few repercussions.

An understanding of the nature of the current public construction sector in France is made difficult by the fact that, for example, the statistics produced by INSEE² on current building works separate housing from the non-residential sector but do not use the public or private legal status of their clients as a criteria. The statistics produced by the Ministry of Planning on the turnover breakdown of building contractors by type of client provides a certain amount of information. The public client (if one groups together administrations, public companies and social housing companies) provides this sector with 35% of its turnover, being a proportion equivalent to that of private individuals³. We are also provided with a certain amount of information concerning the public construction sector by counting the number of calls for bids notices. Of the 4,500 notices published in 2000, the breakdown of the types of works were as follows : 1) teaching and research : 28 %, 2) health and social : 16 %, 3) culture, sport and leisure : 17 %, 4) social housing : 13 %. The other construction sectors represent less than 8 %⁴.

Finally, it should be noted, because this development has a large number of repercussions on the ways of doing things and the competences used, that building activity in France, much like the rest of Europe, is increasingly concentrated on renovation-rehabilitation rather than on new buildings. Improvement and renovation works currently represent 54% of building works in terms of the amounts invested. In public contracts, the proportion represented by rehabilitations fluctuated between 26% of operations⁵ in 1993 and 45% in 1997, before stabilising at around 37-38% after 1998.

2. Main characteristics of the project consultancy

The architect's position is dominant within the French project consultancy sector, firstly because the architect has historically been and generally remains the main contact for public clients, and secondly because the architect benefits from a protection linked to his/her title and, partially, the carrying out of his/her practice. By qualifying architecture as an activity in

¹ Law n°94-631 dated 25 July 1994 completing the State domain code and relative to the constitution of real rights in the public domain.

² National Institute of Statistics and Economic Studies.

³ Source : DAEI-SES, Department of economic and international affairs (Economic and Statistics Department) of the Ministry of Planning, Transport, Housing, Tourism and the Sea. Figures for 2000 available from the Ministry of Planning web site.

⁴ See "*Les consultations publiques de maîtrise d'œuvre*", G. Lamour, MIQCP, March 2002.

⁵ According to the survey carried out on the basis of the public call for bids notices published in the *Bulletin Officiel des Annonces de Marchés Publics* (BOAMP) or in *Le Moniteur* relative to the designation of project consultants for new building or public facility rehabilitation operations. See "*Les consultations publiques de maîtrise d'œuvre*", G. Lamour, MIQCP, March 2002.

the public interest, the law dated 3 January 1977¹ took a number of measures in favour of architects and architecture. These included the obligation to use an architect for all constructions (with the exception of those for farming use) greater than 170 m² net floor area. Despite this provision, the penetration rate² of architects into the various building sectors remains low. Public commissions remain the sector where architects are best placed given that there is a much higher level of competition on the single family house market and in the rehabilitation sector. The proportion of public commissions within the activity carried out by architects is smaller and has tended to reduce over the last few years : 37 % in 1998 as opposed to 44.8 % in 1983 (in terms of the quantity of works)³.

The number of architects currently exercising their activity in France is evaluated at nearly 35,000, with 27,080 registered with the Order of Architects⁴. The French professional environment is marked by the strong dominance of the private practice (69% of architects are self-employed, 14% work in companies) over the public sector (3.3% of architects registered with the Order are civil servants working for the State or local authorities). The structures are very small : 66% of agencies do not have any employees⁵.

Consequently, the project consultancy takes the form of a more or less temporary cooperation between structures and specialised engineering firms : according to the Mutuelle des Architectes Français (French mutual insurance company for architects), 50% of the quantity of work by architects is carried out in partnership (10% with one or more architects, 40% with at least one non-architect partner), with an even higher proportion in public commissions where partnerships concern 75% of the quantity of works⁶. Concerning the scope of the assignment, nearly all project consultancy assignments awarded by public clients are, as required by the MOP law, complete assignments. A “complete assignment” is held to mean a single contract signed between a client and a jointly and severally responsible project consultancy team that covers all design and site supervision assignments linked to an operation. In the private sector, a third of the contracts signed with architects are for partial assignments, and this proportion is increasing, “demonstrating a trend towards architects increasingly losing control over the carrying out of works and thus over most projects”⁷.

The main partners of architects within project consultancy teams are engineers, either in the form of engineering firms or as self-employed consultant engineers, and building surveyors⁸. The engineers are represented by two professional organisations : the CICF⁹ for consultant engineers, which has a thousand natural persons and corporate body members, and Syntec¹⁰, whose members are, above all, large engineering firms (200 companies with 6 to 3,000 persons, representing 30,000 employees, half of whom intervening in the building sector with 50% of their turnover derived from the public sector and 50% from the private sector, and the

¹ Currently being reformed.

² The building contract penetration rate by architects is equal to the ratio of contract volumes they handle with regard to the entire number of contracts awarded in a building sector.

³ Source : *Mutuelle des Architectes Français, statistiques chantier*, March 2000.

⁴ NOGUE (Nicolas), *Architectes. Bilan 2000 de la profession*. Economic and architectural observatory, CNOA.

⁵ Source : INSEE, Services survey 1999.

⁶ Source : *Mutuelle des Architectes Français, statistiques chantier*, March 2000.

⁷ COURDURIER (E.), TAPIE (G.), *Contrat d'Études Prospectives sur les professions de la maîtrise d'œuvre*. January 2002. (to be published in *Documentation Française*).

⁸ Building surveyors are federated by UNTEC (*Union Nationale des Economistes de la Construction et des Coordonnateurs*). It is estimated that there are approximately 3,500 firms currently working in France. Web site : <http://www.untec.com>

⁹ Chambre des Ingénieurs-Conseils de France. Web site : <http://www.cicf.fr>

¹⁰ Web site : www.syntec-ingenierie.fr

other half which divide their activities between infrastructures and industry¹). French engineers have a respected social status marked by the tradition of the Grandes Ecoles (elite university level institutions) and by the prestige of the State corps of engineers. But the reality of this professional group is highly contrasted : there are many different types of training courses and the levels are unequal, the assignments are increasingly specialised, and the building and infrastructure sectors are currently not particularly attractive to the young. Neither the title of engineer nor the professional exercise of the profession are protected. Rather than trying to change this situation, the demands made by Syntec seek a deregulation that would allow engineers to freely compete against architects, who until now had been considered as “engineers specialised in architecture”, for the right to sign all building permits². Engineers also regret the lack of a “culture that accepts the remuneration of intellectual services in France”³ and the absence of a clear rule for the sharing of fees within a project consultancy team. The current situation is that recommendations only exist for the global fees⁴ and engineers, who are not always in a leader position when it comes to the definition of the fee breakdown, regret the absence of a merit-based payment. But, over and above the legal and contractual debates and even if one sees, in practice, smooth-running collaborations, it is above all in terms of professional culture that the tensions can be found. Architects and engineers, “rivals condemned to work together”⁵, do not share the same definition of the project and the part that creativity plays, nor do they have the same corporate culture when it comes to the organisation of the work, the economic evaluation of their activity, etc.

The trend in French project consultancy professions is towards specialisation and the emergence of professional micro-groups. Alongside the very small but well-established group of landscape designers (estimated at around 300 persons), town planners (whose title is not recognised but which, since 1995, has had a professional qualification office) and building surveyors, there are also lighting designers, sound control specialists, scenographers, ergonomists, etc. It is also highly probable that the requirements of sustainable development will lead to the creation of a group of environmentalists or ecologists specialised in the building and urban development sectors.

Most of these profiles are to be found in the private sector and, in France, there are very few integrated project consultancies in the building sector. Three specialised public transport infrastructure departments continue to exist : the Agence des Gares SNCF-AREP (French railway stations agency), the Service Technique des Bases Aériennes (air bases technical department) depending on the Direction Générale de l'Aviation Civile (French civil aviation authority) within the Ministry of Planning and Transport, and the Aéroports de Paris building department which, apart from designing and managing the company's installations, can also take on external contracts and does this successfully in the export sector. It is possible that the

¹ Discussion with Daniel Bousseyroux and Jean Félix, Syntec, April 2002.

² In this claim, the main argument presented by the engineers' association is that the Architectural Directive recognises architect-engineer degrees in certain European countries, and the right in certain countries for engineers to sign building permit applications. It is therefore discriminatory to authorise foreign engineers falling within the conditions of the Architectural Directive to exercise in France with all the prerogatives of an architect, while a French engineer would be excluded (source : discussion with Daniel Bousseyroux and Jean Félix, Syntec, April 2002).

³ Discussion with Daniel Bousseyroux and Jean Félix, Syntec, April 2002.

⁴ The *Guide à l'intention des maîtres d'ouvrages publics pour la négociation des rémunérations de maîtrise d'œuvre*. (Ed. du Journal Officiel, Paris, June 1994, republished June 2000) which is discussed in greater detail below.

⁵ According to the formula used by the French sociologist, François Bourricaud.

development of inter-communal groupings will favour this type of structure which is currently almost absent among local authorities. There are already a large number of clients of all sizes that carry out a small amount of project consultancy work to meet their own modification, maintenance and improvement requirements for their facilities using small teams of engineers and technicians (architects are rarely used), but these are generally very small works that do not require a building permit¹. However, public engineering is widely used in the infrastructures sector, whether through the Departmental Public Works departments or General Council departments, and the need for competitive bidding procedures in this sector within the framework of public contracts resulting from the pressure of European directives has been subject to numerous debates over the last few years.

3. Regulatory control of public contracts before and since the Services Directive

France has old and very detailed rules for awarding public contracts. These have ensured that the requirement to enter into a competitive bidding procedure is a well-established tradition among the various public contract awarders. In fact, all types of public contracts (supplies, works, services) are based on the Public Contracts Code, a set of texts that has been progressively assembled over the last forty years. A new version was published on 7 March 2001 after five years of reflective thinking and negotiations aimed at simplifying the Code, increasing its coherence and ensuring that it complies with European legislation². The new Public Contracts Code came into force on 10 September 2001. The main modifications made with respect to the earlier legal framework consist in raising the thresholds³ above which the public authorities can carry out a competitive bidding procedure and in abandoning the lowest price tendering and selections, replacing this by the economically most advantageous tender. As a result, price simply becomes one of the many criteria to be taken into consideration when comparing bids alongside others such as the cost of using the object or building, its technical value, the time required to carry out the works, the aesthetic and functional qualities, the after-sales service and technical assistance, profitability, etc.

Project consultancy contracts are subject to specific conditions in the Public Contracts Code⁴ and are also governed by texts complementary to this document. The legislation concerning public contracts carried out by project consultants, generally going back to the decree dated 28 February 1973, is essentially marked by the MOP law (law concerning the public client and its relations with the private project consultant) dated 12 July 1985 and its application decrees taken on 29 November 1993. This law imposed the definition of the client and the missions incumbent on it, placing emphasis on its responsibilities and on the crucial role of the programme in specifying all needs, objectives, constraints and requirements linked to the operation from the point of view of the contract awarding body. In parallel, it defined the tasks

¹ Discussion with Henri Sarda, technical manager of the Ville-Evrard hospital centre (93), April 2002.

² The Services Directive was transposed into French law by decrees n° 98-111, 98-112 and 98-113 dated 27 February 1998 and by decree n° 99-634 dated 19 July 1999.

³ However, the calculation of thresholds is subject to computation in accordance with the modification introduced by article 27 of the new Public Contracts Code : “Concerning works, no matter what the number of service providers that the person responsible for the contract calls on, the following are taken into consideration : a) if the requirements of the public person result in a unique set of homogenous works forming part of a same operation, the value of all these works ; b) if the requirements of the public person result in recurrent works resulting from homogenous works and forming part of a same operation, the value of all these works corresponding to the needs of a year ; c) if the requirements of the public person result in the continuous building of homogenous works, the value of all these works over the total duration of their construction”.

⁴ These requirements are to be found in article 74 of the new Public Contracts Code.

of the project consultant and established the principle of a basic assignment covering the sketch through to the handover of the works, and forming part of a single contract for building works. The MOP law applied to all contracts signed with public clients¹ for carrying out new building, rehabilitation or reuse works. It only concerned private project consultants, given that public project consultants were subject to their own texts.

The new Code enlarges the definition of project consultancy contracts : these now incorporated operations on historic monuments, major maintenance and repair works, as well as town planning and landscaping projects. The Code applies to contracts signed by public entities (public clients as well as combined structures such as semi-public companies (SEM), joint stock companies and associations with a majority public holding) with public entities or private persons. Consequently, a contract between two local authorities for the design of a building, an infrastructure or a development is subject to the Public Contracts Code.

The procedures concerning project consultants are defined² by two thresholds : a first threshold at € 90,000 excl. VAT and a second threshold at € 200,000 excl. VAT. These thresholds are taken to cover all services said to be “homogenous” and necessary for a same operation. The list established by the interdepartmental order dated 13 December 2001 is the reference for ruling on this "homogeneity" of services.

- below the € 90,000 excl. VAT threshold, project consultancy contracts can be awarded without any prior formalities.

- between the € 90,000 and € 200,000 thresholds, the competitive bidding procedure is carried out using the “negotiated project consultancy procedure”³. A public call for bids notice is published, either in the BOAMP⁴ or in a publication authorised to receive legal notices. The competitive bidding procedure only concerns an examination of competences, references and the means of the candidates. This examination is carried out by a jury identical to that assembled for competitions⁵. It examines the candidatures according to the methods indicated in the public call for bids notice and provides the client with a list of at least three candidates accepted for negotiation. Negotiations are then begun between the client representative and each of the chosen candidates ; they concern the conditions for carrying out the contract and the envisaged contract project. On completion of these negotiations, a provider is chosen and a contract signed between this provider and the deliberative assembly acting in the name of the regional bodies or the person responsible for the contract in the case of a State contract.

- above € 200,000 excl. VAT, the obligatory procedure is that of a project consultancy competition⁶. Insofar as this latter is concerned, the Code uses the competition obligation instigated by the decree dated 10 January 1980. Since the law of 1 December 1988⁷, which obliged competition organisers to compensate candidates by a minimum of 80% of the value of the assignment carried out for the service provided, competitions have always been restricted. The procedure is as follows : 1) a public call for bids notice is published in

¹ The State and its statutory bodies, the regional bodies, their statutory bodies and their groups, the chambers of commerce and the chambers of agriculture, the social security bodies; the social housing corporations, foundations and cooperatives as well as the social housing semi-public companies when these build State-aided rental accommodation.

² Taking account of the computation described above.

³ Cf. new Public Contracts Code article 74.II.2.

⁴ *Bulletin Officiel des Annonces des Marchés Publics*.

⁵ See below.

⁶ The project competition procedure is defined by article 71 of the new Public Contracts Code.

⁷ This law was implemented by decree 93-1269 dated 29 November 1993 concerning architectural and engineering competitions organised by public clients.

BOAMP and OJEC¹, 2) consultation regulations are prepared by the competition organiser, 3) the candidatures are received within a period of at least 37 days taken as from the sending of the notice, 4) a competition jury is designated by the person responsible for the contract and exclusively comprises persons independent from those participating in the competition and includes, when a qualification is required from the candidates, at least a third of members having this qualification, 5) the competition jury prepares the list of candidates (at least 3, often 5) accepted for the competition, 6) within a period of at least 40 days, the candidates submit their work which comprises graphic and iconographic documents linked to the project as well as, in a separate envelope, a fees bid, 7) the jury checks to ensure that the works comply with the consultation regulations, anonymously evaluates the works and formulates a motivated opinion in the form of a report which is then transmitted to the person responsible for the contract, 8) this latter chooses the winner(s), given that the jury's opinion is purely consultative in nature, then negotiates with the winner(s) and awards the contract to the chosen candidate.

Above these same thresholds, design contests are not obligatory in four cases :

- for the awarding of a project consultancy contract relative to the reuse or rehabilitation of existing works,
- for the awarding of a project consultancy contract relative to works constructed for research, testing or experimentation purposes,
- for the awarding of a project consultancy contract that gives no design assignment to the holder,
- for the awarding of a project consultancy contract relative to infrastructure works.

In these cases, the client can use either the negotiated project consultancy procedure or a call for bids. Article 35.I.2° of the new Code states that the client can use the negotiated project consultancy procedure “when the service to be provided is such that the contract specifications cannot be pre-established in sufficient detail to permit the use of a call for bids”. But this formula leads to divergent interpretations². The call for bids, either open or restricted, shares the characteristic that no negotiations, particularly those concerning finances, are accepted. The bids, which cannot include any element representing the beginning of a contract performance, are therefore intangible.

In an open call for bids, the procedure is as follows³ : 1) publication of a public call for bids notice, 2) reception, within a period of at least 52 days, of the bids comprising an envelope concerning the candidate and an envelope concerning the bid, 3) examination by the Call for Bids Commission taking the form of a competition jury⁴, of the receivability and then the quality of the bids, 4) choice of the economically most advantageous bid in compliance with the criteria stated in the published notice by the Call for Bids Commission for regional bodies or by the person responsible for the contract following advice received from the Call for Bids Commission for the State.

There are two successive phases for the restricted call for bids procedure, being the selection of candidates accepted to present a bid, then the examination and ranking of the bids⁵ : 1)

¹ Above a threshold of € 750,000 excl. VAT, a pre-information notice must be sent to the Office for Official Publications of the European Communities.

² “According to MIQCP, it is always possible to use the negotiated project consultancy procedure ‘when the contract includes works design services’. However, according to N. Charrel, barrister, it is never possible to make use of this procedure for project consultancy contracts subject to the MOP law ‘as the assignment elements making up the contract specifications are controlled’ and thus clearly defined”. *Les Cahiers de la Profession* n° 8 (Conseil National de l'Ordre des Architectes), spring-summer 2001. pp. 6-10.

³ Cf. articles 58, 59 and 60 of the new Public Contracts Code.

⁴ This condition is specific to project consultant contracts.

⁵ Cf. articles 61 to 65 of the new Public Contracts Code.

publication of a public call for bids notice which can indicate the minimum¹ and maximum number of candidates to be selected to present a bid, 2) reception of candidatures within a period of at least 37 days, 3) examination by the Call for Bids Commission taking the form of a competition jury of the receivability and quality of candidatures, 4) written invitation, sent by the Person Responsible for the Contract, to all candidates chosen during the first phase to present a bid and noting all the conditions to be met, 5) reception of the bids within a period of at least 40 days, 6) choice of the economically most advantageous bid, in compliance with the criteria stated in the published notice, by the Call for Bids Commission for regional bodies or by the Person Responsible for the Contract following advice from the Call for Bids Commission for the State.

There are a number of exceptions to the application of these procedures : these particularly include the case of an extension to a construction or, when the architectural, technical or landscaping aspect justifies it, the client can, without receiving advice from a jury and without any competitive bidding procedure, attribute the extension to the contract to the person having been awarded the initial contract.

Two other procedures can be added to the above. Firstly, definition contracts, as these are particularly adapted to urban projects which, by definition, are complex. These consist in simultaneously awarding several study contracts to different service provision teams upstream from a design assignment. The new Public Contracts Code permits, on completion of this measure and on condition that it has first been announced in the public call for bids notice and if a minimum of three definition contracts have been simultaneously attributed, to award, without any further competitive bidding procedure, one or more of the project consultancy contracts to the author or authors of the solutions chosen by the client².

Finally, and in principle and only in cases where the technical complexity of a building assumes the participation of the contractor who will be made responsible for the works during the design phase, the client can use a design and build procedure³. In European law, rather than being governed by the Services Directive, this procedure is subject to the Works Directive on condition that the cost of the works exceeds 50% of the contract.

4. Methods to ensure the legality of procedures and contracts. Recourse for project consultants and contractors who believe themselves wronged. Recommendations, penalties

The complexity and age of the regulations governing public contracts awarded to project consultants on the one hand, and the *a priori* and *a posteriori* administrative and financial control processes on the other, and finally, the multiplicity and disparity of public clients make it necessary, possibly more so in France than in other European countries, to have bodies and tools to circulate and explain the legal framework. The Legal Affairs Department of the Ministry of the Economy and Finance, which prepares texts concerning all public contracts, also has the role of circulating these regulations to all administrations⁴. Insofar as public contracts carried out by project consultants are concerned, it is the Mission for Quality in Public Construction (MIQCP) that lies in the front line through its works and manuals, technical data sheets, Médiations magazine, web site, and the technical support that it

¹ Which cannot be lower than 5.

² *Médiations* n°7, May 2001 (MIQCP). La maîtrise d'œuvre dans le nouveau Code des Marchés Publics.

³ Cf. articles 37 and 70 of the new Public Contracts Code.

⁴ See a presentation of this Department on the web site : <http://www.finances.gouv.fr/daj/missions/daj99.htm>

provides to clients through its team of a dozen specialists and its consultant architects that, among other aspects, represent MIQCP on competition juries. A number of other bodies concerned by this theme also publish recommendations and methodological elements : various departments in the Ministry of Planning (DGUHC, CERTU), major institutional clients such as the Ministry of the Interior which prepares and distributes guides for its operational managers, etc.

Depending on the nature and size of the operation, there are two types of controls :

- for projects dependant on the State and its statutory bodies, an administrative control to ensure the legality of the operation is carried out by the seven specialised commissions concerned by contracts defined by decree 2001-739¹, and by the Prefectures for contracts awarded by local authorities. Rather than examining the suitability of an operation, their task is simply to check its legality with regard to the competitive bidding procedure and the compliance of its implementation.

- a financial control is carried out by the Paymaster-Generals for contracts awarded by the State or by financial controllers for contracts awarded by local authorities.

The legal consequences associated with these controls are particularly far-reaching as they can even lead to the cancellation of the contract.

Article 76 of the new Contracts Code stipulates that the persons responsible for the contract must communicate to those candidates who so request “the characteristics and the advantages of the chosen bid”. As noted by J.-M. Peyrical, this requirement considerably extends the need for public authorities to motivate and justify their choices when attributing their public contracts and thus have a rigorous and clear understanding of the criteria having guided their choices². A person’s right to redress (generally the wronged service provider) can take two forms : 1) If it concerns a redress based on an irregularity in the procedure, the wronged service provider can address a referral to the Administrative Tribunal which, if the competitive bidding procedure is clearly erroneous, can cancel the contract within a very short time (less than three weeks). This measure, required by European law, is called the “pre-contractual referral”. Apart from the cancellation of the contract, it can lead to the client being fined. 2) If the redress is motivated by the presumption of a voluntary breaking of the rules concerning transparency and equity, the redress procedure can be taken through as far as the Council of State.

But, as noted by A. Guervilly, the number of litigations reaching the Council of State and the Administrative Appeals Court is not very high when compared to the large number of competitive bidding procedures organised in France and the fervent reactions to their results : there have only been around sixty legal decisions on this issue over the past ten years, and only half of these have concerned the competitions themselves³. The fact is that clients, often ill at ease with the large number of recent texts concerning public contracts, interpret them *a minima*, occasionally even barring themselves from taking measures fully authorised by law (such as auditions for project consultancy competitions organised for contracts smaller than € 200,000 for local authorities and € 130,000 for the State). In addition, project consultants seem to practice a form of self-censorship when it comes to their rights of redress. This is

¹ For project consultancy contracts, only those exceeding the € 200,000 threshold are subject to being controlled. See the order dated 3 April 2002 setting the competence attributions and thresholds of specialised contract commissions.

² PEYRICAL (J.-M.). “Marchés publics; une réforme à poursuivre”, *La Gazette*, 23 April 2001. pp.48-63.

³ GUERVILLY (A.). *La commande publique de maîtrise d’œuvre à travers la jurisprudence*. La Défense, MIQCP, 2000.

either because they are not or do not consider themselves to be sufficiently competent in legal matters, or because they think they have more to lose than to win than clients on the whole when it comes to becoming involved in this type of litigation, and risk giving themselves a name for being legal sticklers. The Order of Architects and MIQCP, more neutral bodies, receive their questions and complaints and provide a global and vigilant supervision over the awarding of contracts. The new Public Contracts Code has provided for the setting up of two bodies assigned to the Minister of the Economy and Finance which are responsible for collecting information on all public contracts concerning services, works and supplies : the Mission for surveying public contracts and the delegation of public services¹ (MIEM) and the public purchases economic observatory².

5. Methods for establishing the amount of fees

Since the entry into force of the decree dated 28 February 1973³, the remuneration of architects, within the scope of the project consultancy assignments, is based on the principle of a lump sum remuneration established *a priori* in function of a final “target price”⁴, the content of the assignment and the complexity of the work. Following the intervention of the 1982 decentralisation law, the remuneration of the project consultant by the public client has been modified by the law dated 12 July 1985. In article 9, this text introduces the principle of a contractually established lump sum remuneration based on three previously chosen criteria (extent of the assignment, degree of complexity, provisional cost of the works). Decree n° 93-1268 dated 29 November 1993, pursuant to the law dated 12 July 1985 and concerning project consultancy assignments awarded by public clients to service providers subject to private law, abrogated decree n° 73-207 dated 28 February 1973 which set up the fee scales.

Consequently, there is no fee scale, even of an indicative nature, applicable to project consultants in France as, under article 7 of the order dated 1 December 1986 which “forbids concerted actions, agreements, express or tacit arrangement, or coalitions, as soon as these have the aim or can have the effect of preventing, restricting or distorting the competition process”, the “indicative table of usual rates of remuneration for the normal architectural assignment” prepared and distributed by CNOA (national council of the Order of Architects) to its members was forbidden in 1997 by decision of the Competition Committee⁵.

However, public clients often refer to the guide published by MIQCP⁶ which helps them estimate the cost of project consultancy fees, all specialist fields included⁷. Requests for

¹ Cf. law n° 91-3 dated 3 January 1991 concerning the transparency and the legality of contract procedures and submitting the awarding of certain contracts to advertising rules and the competitive bidding procedure (art.1) and articles 120 to 125 of the new Public Contracts Code.

² Cf. article 135 of the new Public Contracts Code.

³ Decree n° 73-207 dated 28 February 1973 concerning the remuneration conditions for engineering and architecture assignments carried out for public authorities by service suppliers subject to private law.

⁴ The concept of target price is based on the cumulation of the cost of the works and the cost of the project consultant's fees.

⁵ Decision n° 97D45 dated 10 June 1997 by the Competition Commission.

⁶ *Guide à l'intention des maîtres d'ouvrage publics pour la négociation des rémunérations de maîtrise d'œuvre*. Published by the Journal Officiel, Paris, June 1994 reprinted July 2000.

⁷ A survey carried out in 1997 and concerning 198 projects revealed the divergences between real remunerations and the remunerations recommended by the *Guide à l'intention des maîtres d'ouvrage public pour la négociation des rémunérations de maîtrise d'oeuvre* mentioned above : the real remunerations are lower than those of the guide by 8 and 9% respectively in the housing and educational sectors, while they are higher by 11% for stations and technical facilities, and even 18% higher for office works. The authors also noted that commissions obtained

updates are regularly sent to MIQCP, given that over the past few years, market pressures have led to a reduction in these remunerations.

Contracts cover global fee amounts to be shared within the project consultancy team. Consequently, it is between partner project consultants in a same operation that the issues have to be settled. Engineers have an accounting culture far more developed than that used by architects, with a different relationship to the assignments taken on (the assignment stops when the forecast and remunerated work time comes to an end) and often a better estimation of the value of their work. They would like, through measures taken by their SYNTEC association, to obtain a differentiation between the tasks placed in the hands of architects on the one hand, and those placed in the hands of engineers on the other, in order to firmly establish the sharing out of fees. The demand goes as far as to differentiate between engineering contracts and architecture contracts, despite the fact that the MOP law laid down the principles, as yet not reconsidered, of a single project consultancy contract¹.

6. A policy aimed at distributing public commissions and supporting the profession?

The *leitmotiv* of architectural authorities in France is one of opening public commissions to a larger number of designers. France has a long tradition of an oligopoly that has seen a small number of architects being awarded major State commissions, a situation institutionalised over the past decades by the Prix de Rome and the status of *Architecte des Bâtiments Civils et des Palais Nationaux* (civil building and national palace architect) which gave the approximately one hundred practitioners bearing the title the right to share all works on public edifices and combine this activity with a self-employed professional activity². This system was abolished in 1968. In addition, the decree dated 10 January 1980 and the obligation to hold competitive bidding procedures for project consultants above a certain contract threshold led to the withdrawal of the Ministries' approvals lists, being lists of pre-selected architects from which the Ministries could choose to award their private agreement commissions. During the 1980s, the obligatory competitions policy, which led to the organisation of over 2,000 competitions a year, was intended to simultaneously improve the quality of public buildings and open this market sector to a greater number of designers, particularly the large number of young architects graduating from architectural schools readapted following the 1968-70 crisis. While this policy, according to an opinion shared both in France and abroad, contributed to improving the architectural quality of public buildings, it is less sure that it durably led to public commissions being awarded to a large number of architects. The "references" effect remains very strong and, as shown by a study carried out by MIQCP in 1993, an architect has a better chance of being chosen in a competition if he or she has already been chosen in other competitions, especially for same types of programmes. For programmes such as school buildings or hospitals, around 50% of architects chosen had already been chosen at least once in the past for a similar programme. Out of the 261 competitions studied, 60% chose architects that had been chosen three or more times in earlier competitions dealing with the same type of programme³.

through competitions are generally better remunerated than those resulting from consultations based on references or letter of commission. (UNSFA. *La répartition des flux financiers de maîtrise d'œuvre*. Paris, PUCA, 1998.)

¹ Discussion with Messrs. Daniel Bousseuyroux and Jean Félix, SYNTEC, April 2002.

² See MOULIN (R.). *Les architectes; métamorphose d'une profession libérale*. Paris, Calmann-Levy, 1973.

³ *Architectures Publiques* (MIQCP) n° 20, May 1993. "Concours : tous les chiffres depuis 4 ans".

Major clients, aware of this bias and supporting this more open approach, have developed specific initiatives to encourage this approach. This, for example, is the case of the Ile-de-France region; it is also that of the AP-HP (Assistance Publique, Hôpitaux de Paris) [public welfare, Paris hospitals] which records the awarding of commissions to architects, programmers, surveyors and contractors in order to monitor the concentration effects¹. The Ordre d'Aquitaine Regional Council also pays attention to this issue and makes a regional assessment of public commissions awarded using a survey that has been carried out for twelve years covering competition and project consultant consultation notices published in the *Moniteur* and the BOAMP.

But, as noted by interviewed clients and professionals, among the five teams chosen to compete, there are often three teams chosen from a pool of around fifty French architects. Within this pool, the effect of reputation is cumulated alongside that of references². This phenomenon is even greater for town planning and definition contracts where the concerned professional environment is limited to some twenty teams.

B. PROJECT CONSULTANCY CONTRACT ATTRIBUTION PRACTICES

1. Most used procedures for choosing project consultants

In France, the competition procedure is very widely used. In fact, as earlier mentioned in I.3., this system is made obligatory by the new Public Contracts Code for public contracts representing more than € 200,000 excl. VAT carried out by project consultants. However, there are four exceptions to this rule : the reuse or rehabilitation of an existing building, experimental buildings, contracts that include no design assignment, and infrastructure works. French architectural competitions are necessarily compensated and are always restricted. It is estimated that there are around 1,000 public competitions held for project consultants organised every year in France, and most of these are sketch or “sketch +” competitions³. This obligation to hold competitions, which goes back to the 1980s, and the subsequent adjustments of thresholds and the general compensation conditions, have made competitions a normal procedure that is generally well accepted both by project consultants and clients. Proof of this lies in the existence of competitions organised either by clients who are not subject to this rule, or for contracts that lie below the thresholds, or for types of works that are not subject to this competition obligation. This may be a way of expressing the “figurative impatience of the client (that leads to) the client often feeling more at ease in a project that is a synthetic, flattering and ambiguous reflection of his ideas rather than the result of the laborious and linear preparation of a programme”⁴. However, concerned parties and observers nevertheless find a number of faults in the system :

¹ Discussion with Guy Bernfeld, Buildings and Logistics Manager, AP-HP, March 2002.

² Concerning this theme, see BIAU (V.), “Marques et instances de la consécration en architecture”, *Cahiers de la Recherche Architecturale et Urbaine* n°2-3, November 1999, or BIAU (V.), *Les architectes français et la notoriété*. Paris, Anthropos, to be published in 2003.

³ According to the concept proposed by MIQCP in its recommendation guide : *Constructions publiques, le prix des concours*. Paris, MIQCP, November 1996.

⁴ IPAA (Institut de Programmation en Architecture et Aménagement). *L'encadrement et la formulation de la commission architecturale : étude de cas*. Paris, METL-PUCA, 1998. p.53.

- initially created to take the place of the approved lists held by Ministries, which had considerably reduced the awarding of public commissions to just a few designers, the competition, by the references required and the media prestige held by the project consultants, is once more tending to concentrate contracts onto a small number of teams,

- the programme prepared prior to the beginning of the competition procedure is not always respected : the programmatic compliance of the proposals made by the candidates is checked by the technical commission but its advice is not always taken into consideration by the jury¹,

- more than the other procedures, the competition provides the possibility of determining the team's capacity to design a project, but it does not allow the client to determine one of the project consultant's essential competences, being its real capacity to manage the operation, including administrative and legal matters, being areas where architects are often felt to have few competences².

- finally, the competition sets back the beginning of dialogue between client and project consultant to a stage when the design has already been largely established and, as a result, reduces the feedback possibilities between thinking concerning the programme and thinking concerning spatial hypotheses. The obligation of anonymity introduced in 1998 by the transposition of the Services Directive into French law has, naturally, aggravated this latter inconvenience and is subject to a vigorous outcry from both public clients and project consultants³. This obligation of anonymity is often qualified as hypocritical because the architectural languages of the candidates are often easily identifiable, at least in the eyes of those jury members closest to architectural environments. The absence of discussion with the authors of the projects during the design analysis and evaluation phase often leaves unanswered questions and requests for clarification from the jury. Certain persons also note that, due to this absence, the technical commission or the architect members of the jury occasionally substitute for the designers and assume an important (excessive?) power by providing explanations or interpretations of the presented projects⁴.

The possibility provided by European and French texts to designate several winners and then negotiate with these prior to designating the successful tenderer could be a solution increasingly used by clients as a partial way of getting around this non-communication clause.

The discussions held with public clients for this study were focussed on procedures used above the Services Directive thresholds. Consequently, there was little discussion concerning contracts awarded without prior advertising or competitive bidding procedures, which only concern assignments representing less than € 90,000 excl. VAT of project consultant fees, being the only contracts that can be awarded without prior formalities. For these minor operations, clients use more or less formalised lists (a simple list of service providers appreciated for an earlier project, or a periodically updated list established on the basis of systematic surveys of competences). The selection from within this list can be made on the

¹ IPAA (Institut de Programmation en Architecture et Aménagement). *L'encadrement et la formulation de la commission architecturale : étude de cas*. Paris, METL-PUCA, 1998. p. 194.

² Discussion with Marc Bourgeois, Hautes-Alpes General Council, April 2002.

³ See BIAU (V.) in collaboration with M. Degy and L. Rodrigues. *Les concours de maîtrise d'œuvre dans l'Union Européenne; application de la Directive 92/50/CEE du 18 juin 1992 et respect de l'anonymat des candidats*. Centre de Recherche sur l'Habitat-DAPA (Ministry of Culture and Communication). Paris, 1999. Translated into English under the following title "Project Consultant Competitions in the European Union; Application of Directive 92/50/EEC dated 18 June 1992 and Respect of Candidate Anonymity". The document can be fully downloaded from the web site : <http://ramau.archi.fr>.

⁴ One of the persons met even mentioned the "tampering with authors' rights" represented by anonymity in competitions. (Discussion with Loïc Jauvin, St-Nazaire region development delegation, April 2002).

basis of a note concerning the methodology and a fee proposal and, where applicable, takes into consideration the project consultant's work load and reactivity. These small commissions provide certain clients with an opportunity to give a chance to young and little-known teams. The risk is lower and certain persons have noted that young architects tend to put a great deal of effort into small operations in order to prove their competences¹.

Over the 1993-2000 period, there was a substantial increase in "simplified consultations". Taking the compilation of notices published in BOAMP as a basis, their number increased from 713 in 1993 to 3,383 in 2000. There are many reasons for this : on the one hand, a larger number of operations of this size were launched at the end of this period, partially due to the raising of the threshold above which competitions are obligatory², and on the other, because they were perhaps more frequently subject to being published in BOAMP even when this was not necessary³.

When the new Public Contracts Code came into force in September 2001, this procedure was continued under the name of "negotiated project consultancy procedure" for contracts ranging between € 90,000 and € 200,000. In these simplified consultations without submittal of works, the bid is analysed on the basis of fees but, above all, on the methodological report and the analysis of the operation, as well as on the experience, availability and the programming of works of the candidates, the distribution of fees within the team, etc. The choice is not necessarily made on the basis of the lowest bid. Full advantage is taken of the bid and the negotiation and exchange possibilities that the client has with his potential project consultant⁴. When emphasis is placed on competences, the project consultant is consulted as a team that includes architecture, structural engineering, fluids, landscaping and surveying capacities, with the role of the architect in this team being to design and organise the competences necessary for the project⁵. However, clients often state concerning this and other procedures, that there is the difficulty of identifying the engineering firm within the project consultant team. Because there are fewer engineering firms than architects and because the selection methods necessarily apply to groups, several problems arise : that of whether or not the engineering firm is acting in an exclusive manner (given that they have the possibility of being candidates alongside different architect candidates), and that of the appraisal of their specific references with regard to those of the architect, often a dominant factor in the evaluation made by clients. Certain of these latter would prefer that the selections be made separately⁶.

The possibility given to clients by the new Public Contracts Code to use calls for bids in the cases mentioned above is currently little used in France for project consultancy contracts. The Regional Council of the Aquitaine Order of Architects, in the compilation it makes of the notices published in BOAMP and Le Moniteur, has nevertheless noted a dozen in its region since the new Code came into force in September 2001, to be compared with the hundred

¹ Discussion with Marc Bourgeois, Hautes-Alpes General Council, April 2002.

² This threshold increased from FRF 900,000 incl. VAT (€ 137,204 incl. VAT) to FRF 1,300,000 excl. VAT (€ 198,183 excl. VAT) in June 1998.

³ Source : "*Les consultations publiques de maîtrise d'oeuvre*", G. Lamour, MIQCP, March 2002.

⁴ Discussion with José Santamaria, Technical Department, City of Lyon, April 2002.

⁵ Discussion with Jean-Claude Gilbert, Somme Architecture, Town Planning and Environment Council (CAUE Somme), April 2002.

⁶ "Before, the selection was made separately for architects and engineering firms. The engineering firms were selected on the basis of their competences rather than on the distribution of fees with the architects. But the new Public Contracts Code prohibited this practice..." Michel Zulberty, managing director of AMOTMJ (Ministry of Justice) during our discussion held March 2002.

negotiated procedures begun in this region over the same period. With just a few exceptions¹, this procedure seems essentially to have been used by clients with little experience or for whom the price is the criteria that can be evaluated in the most objective manner². “We are moving towards a call for bids logic based on a price, without negotiation. We do not yet have a sufficient perspective to evaluate the lowest price basis and we will only be able to appraise the situation *a posteriori* by observing the price levels used” explains T. Dillies who often uses this procedure for awarding contracts³.

2. Dominant criteria in the choice of project consultant(s)

The criteria mentioned by the interviewed clients were clearly divided into criteria for the selection of candidates accepted to present a bid, and criteria concerning the awarding of the contract, inasmuch as their reference procedure is generally the restricted competition with an initial selection of 4 to 6 teams among several dozen candidates, followed by the selection of an anonymous project by a jury.

During the selection phase, the clients seek, above all, reasons to have confidence in the candidates : the evaluation elements always include references for operations of a similar size as that covered by competitive bidding procedure, as well as the turnover, the size and the competences brought together by the team and, where applicable, the team’s reputation, the information available concerning a given team to manage a project through to its completion, etc. Clients frequently brought up the concept of “risk taking” : it is legitimate, at least for certain commissions, to waive these confidence criteria in order to “launch” teams with few references. Certain clients among those with regular commissions to award, also mention the problem of “over-familiarity” with teams that they are used to working with and note the need to find comparison criteria between the qualities and faults of known service providers (good project management, respect of deadlines, site performance, lack of disputes) and to have the capacity to bring in new designers that can be chosen for their references, as well as their size, means, arguments developed in a letter of interest, etc.⁴.

References remain the pivotal point in the selection and the examination of these references essentially and even virtually exclusively concerns architects. This is either because it is felt that design is essentially the architect’s job and that the engineer simply accompanies this person, or because while the engineers’ competences are not necessarily considered as better, they are probably more homogenous than those of architects⁵. Consistent with the responsibilities and assignments generally incumbent on it, the client generally demands that the team leader be the architect and, occasionally that candidate teams do not share any

¹ For example, the Aquitaine regional agricultural development committee (CROA) cites a recent call for bids by the Bordeaux authorities. This latter, having become aware of the investment made by the teams in preparing the methodological note, now envisages compensating candidates in its future calls for bids.

² It should be noted that among clients and during the survey we carried out concerning the formulation of public competitive bidding procedure notices, there is a certain lack of definition in the vocabulary used : for instance, the term call for bids is often used to designate a request for proposals during, for example, the first phase of a competition.

³ Discussion with Thierry Dillies, Building Department, Nord-Pas de Calais Regional Council, April 2002.

⁴ Discussion with Patrick Mille, deputy director, property matters, Ministry of the Interior, April 2002.

⁵ “The choice is based on the architect. The engineering firms are not particularly good, they have not yet gotten over the economic crisis. Only architects can propose an urban logic with a long-term vision. They know how to integrate town planning programmes and it is important that they be innovative”. Guy Bernfeld, Buildings and Logistics Manager, AP-HP, during our discussion in March 2002.

common component¹. But the ways in which these references are analysed differ from one another. According to Gilbert Ramus, the selection of candidatures in a competition is 80 or 90% based on the architectural quality of the presented references and, given the speed at which the decision is made (sometimes several hundred candidates to be examined in a single day), it would be better to adopt the method used by lawyers where any candidate that does not receive a minimum number of favourable votes is automatically eliminated². Some clients have developed highly qualitative methods for the presentation and the evaluation of references, such as those developed by the Hautes-Alpes General Council which are fairly comparable with the Dutch *visiepresentatie*³ methods. “We ask the project consultant to take from among his/her references the three or four that he/she judges the most relevant to the project, and to justify his/her choice. We also ask for two pages analysing the pre-programme that we send them. The idea is to avoid demanding an exorbitant amount of work. Rather than being a submission of a service, it is more comparable with an estimate. Using this method, a first selection is made of those who have bothered to answer and, as a result, instead of having 200 candidatures, we have 25. The jury discusses the selection and we try to have different profiles for the three or four chosen candidatures”⁴. At the other extreme, certain clients try to make a highly quantitative analysis of the references, probably with aim of fully rationalising their judgement. This, for example is the approach taken by the Nord-Pas de Calais Regional Council which has developed a star system to rank candidates according to the number of references they have for major operations. Only those candidates whose references are judged sufficient by the technical commission are submitted to the jury’s appraisal⁵.

In a competition, during the design evaluation phase, the criteria for judging the winning project places considerable emphasis on respecting the programme and this is why this aspect is unanimously considered as important. Certain clients take care to have a well-packaged programme to protect themselves against the risk of a demand for a programme modification⁶. But in certain sectors, such as hospitals, the programme is one of the main problems of the operation given both the rapid technological developments in areas of biology, medicine and data computerisation, and the changing heads of major hospital departments and the power that they exercise, including in property decisions. Apart from the respect of the programme, the evaluation naturally concerns the architectural quality of the projects, but everyone is aware that this evaluation is largely dependent on the nature and the competence of the technical commission and the jury. To better back up this evaluation, certain clients bring together two technical commissions, one concerned with the architectural aspect and the urban integration of the project (with members of the town’s architectural departments, the CAUE [architecture, town planning and environment advisory committees] or town planning department, a Bâtiments de France architect or a chief Historic Monuments architect), the other with the operational aspects and the technical quality (with representatives from the corresponding administrative division, user departments, safety departments, etc.)⁷. As far as the evaluation of the “œuvre” or the “architectural gesture” is concerned, this depends on the “culture” of the jury members. It is a subject where the technicians “educate” the elected

¹ Discussion with José Santamaria, City of Lyon Technical Department, April 2002.

² Discussion with Gilbert Ramus, UNSFA (Union Nationale des Syndicats Français d’Architectes), April 2002.

³ See the presentation of this procedure in the synthesis concerning the Netherlands.

⁴ Discussion with Marc Bourgeois, Hautes-Alpes General Council, April 2002.

⁵ Discussion with Thierry Dillies, Building Department, Nord-Pas de Calais Regional Council, April 2002.

⁶ Discussion with Loïc Jauvin, Development Delegation, St-Nazaire region, April 2002.

⁷ Discussion with José Santamaria, City of Lyon Technical Department, April 2002.

representatives; at least this is what is derived from the statements made by the interviewed persons.

The financial aspect intervenes neither upstream nor downstream, but rather in parallel with the evaluation of the project's functional and sculptural characteristics. Respecting the budget allowance for the construction of the operation is an important factor and is one of the reasons for which clients prefer competitions based on outline proposals rather than sketch projects as these former provide a better basis for estimating costs. But experienced clients are not fooled when it comes to competition candidates pricing their own projects. "The current system is bad. The client sets a budget and the architect designs what he wants, draws it, and prices it afterwards. Despite the current trend towards re-establishing a reality in costing, budgets are being exceeded by 30 to 40%. This requires an adaptation both of the programme and the project, otherwise the contract is cancelled. We encourage architects to practice realistic prices, and establish them according to the amount of time spent and the cost per day. Engineering firms have a better control over their spending and the time spent than architects. We want deadlines for studies and implementation to be reasonable (we provide architects with reasonable deadlines that are not too short) and consequently ensure that the budgets are sufficient during the study phases"¹. These clients use an independent quantity surveyor to check the budget estimates proposed by the candidates. Cost estimates appear to be a source of misunderstanding between clients and project consultants : a large number of clients are prepared "to pay more for a good project than for a bad one" and are not against studying a project implying that the budget be exceeded. On the other hand, they are shocked by the "lie" or dishonesty of a team stating a price for an operation that it is incapable of meeting, and even more so by the incompetence that the inaccuracy of this estimate could demonstrate. "Putting together the price is difficult due to the unwillingness and the off-limits approach when it comes to discussing rates. When there is no balance between the project and the proposed estimate, the team is asked detailed questions and it is at that point that one can see those that are lying and those recognising that they have made a mistake. This is an important stage given that exceeding the budget is not a criteria for elimination"². The concept of the global cost, integrating cleaning, operation and maintenance is, among the most professional clients, being replaced by that of the investment cost. The price proposed for the remuneration of the project consultant only intervenes in the competition once the projects have been examined. At that point, it is essentially a proposal, providing a basis for negotiation or, exceptionally, to decide between two very good projects that cannot be distinguished from one another in any other way.

3. Methods of exchange between the client and the project consultant

As stated above, the obligation of anonymity in the examination of works provided by candidates within the framework of a competition to meet the criteria of the MOP law and the new Public Contracts Code has not been well received by clients or the majority of project consultants. There are a large number that miss the audition which represented a simple and direct means not only to discuss the project but also to test inter-personal relations in view of a future collaboration. Although it is true that the audition introduced a level of subjectivity, inasmuch as the system favoured the best communicators, it was above all the beginning of a

¹ Discussion with Michel Zulberty, general manager, AMOTMJ (Ministry of Justice), March 2002.

² Discussion with Marc Bourgeois, Hautes-Alpes General Council, April 2002.

dialogue that was indispensable for the future implementation of a contract as specific as the type under discussion here.

However, probably due to a fear of legal irregularities, controls and redress actions, there is a certain inflexibility in the application of the procedures : according to the texts, anonymity only applies, in competitions governed by the MOP law and the Public Contracts Code, after the submission of projects (for an analysis of the submitted works) and up to when the jury gives its opinion. Contacts between the client and project consultants can therefore take place in the project development phase. This is the case at EMOC (statutory body acting as client for cultural works), where competitions often concern works on existing buildings and where the site visit, followed by a meeting where information is exchanged concerning the competition data, is a particularly important phase for the teams chosen to compete¹. Other clients always organise meetings with competitors a few days after the issuing of the programme to give any necessary explanations. But most comply with an exchange procedure at the moment that the works are being developed and which takes the form of written questions and answers. This procedure respects the constraints imposed by the need to retain anonymity between the client and all the competitors. This is followed by the same type of exchanges between the competitors and the technical commission and/or the jury at the moment that the works are being analysed and evaluated. Similarly, even when clients organise competitions that are not held to respect the legal anonymity obligations, they prefer not to hold auditions for fear of finding themselves in an illegal situation.

4. Forms and contents of the negotiations.

Ideally, according to project consultants and a proportion of clients, rather than concerning prices, negotiations should concentrate on the assignments and the conditions in which they are carried out. But all parties note that there is a particular difficulty at this stage, being the understanding of the specific roles played by each of the parties. This difficulty appears to be attributed to the lack of competences of the two parties when it comes to negotiating fees : a lack of understanding of the work involved in design by a large number of clients, the incapacity of project consultants to present their work, have it recognised and evaluated. Apart from the risk factors to which a contract can be subject (change in the programme, etc.), project consultants suffer from a lack of training and from the inability of the client to present itself through a single mouthpiece. This results in the project consultancy team not having a single interlocutor with whom discussions can be held and, as the person negotiating is not necessarily the decision-maker, there is little margin for negotiation.

Negotiations on the content of assignments is very limited in cases where the assignment given to the project consultant is highly fragmented and very dependent on the decisions taken within the client's departments. This, for example, is what happens when local authorities take on outside competences to provide upstream or downstream assistance. In infrastructure projects, there are cases where the project, presented in great detail by the client's departments, is only placed in the hands of an external architect to provide it with an "aesthetic envelope". Or, on the other hand, a first sketch for the design of public spaces is demanded from an external designer and is subsequently subject to technical studies carried out by the public client.

In negotiated contracts, the negotiation is based on a set of parameters : the content of the assignment with, for example, when the programme is considered as being able to change as

¹ Discussion with Jean-Claude Dumont, Luc Tessier and Olivier Hache, EMOC.

the project becomes more detailed, the methods by which this programme/project feedback takes place, the tolerance levels, the amount of fees, for which the remuneration guide published by MIQCP is often used as a basis, the distribution of these remunerations among the team members, etc. The point of view held by project consultants, at least as expressed by G. Ramus of UNSFA (French architects union), is that price negotiations are often masked by assignment negotiations. “The practical reality, as noted by fellow project consultants, is that the client presents its project, its programme and its mission as intangibles, and that the only item that remains to be negotiated is the price”¹. Basing itself on its own experience, the client assesses the time spent on each of the assignments and asks submitting project consultants to provide a contract proposal. In this case, the discussion is more about prices than content and, if it is for a lump sum, the client will attempt to obtain details concerning how this lump sum was arrived at. Consequently, UNSFA defends the idea of negotiations covering the entire contractual system and, considering that negotiations should be based on a detailed analysis of the specific works required for an operation, it is opposed to any approach attempting to impose an overly strict codification of the assignments, programmes, contracts, etc.

5. Attitude regarding young architects and/or young agencies

For historical reasons that it would take too long to describe here, a large number of French public clients are in favour of opening up public commissions and encouraging young architects and young teams. As a result, they have gone along with the various public measures taken over the last thirty years in favour of young architecture. Over the period from 1970 to 1980, the policy of promoting a “good and young architecture”² led the State to adopt an encouraging role in the designation of “quality” architecture and architects. Bodies were specifically created towards this end, such as the Construction Plan in 1972 which launched the New Architecture Programmes (PAN) in 1974 and subsequently became *Europan* in 1989, or the Mission for Quality in Public Construction (MIQCP) in 1977, responsible for “proposing measures permitting the dropping of lists and approval procedures for architects (and to) contribute to the promotion and renewal of designers responsible for public buildings”³. Then, in 1979, the *Direction de l'Architecture et de l'Urbanisme* [Architecture and Town Planning Department] launched the “*Albums de la Jeune Architecture*” [young architecture albums] to favour the access of young noted architects to public commissions, while the following year saw the creation of the French Architectural Institute (IFA), responsible for promoting and disseminating an architectural culture. Other initiatives, both local and private, accompanied this ministerial policy. These included the Young Architects competitions organised for a while by the City of Paris and the Cogedim and Butagaz foundation prizes, both of which were also short-lived.

As mentioned above, among other objectives, the competitions policy aimed to renew the designer environment called on to contribute to public commissions. However, the need for references and the lack of open competitions in France soon limited this circle of new “representatives”.

Nonetheless, public clients with a relatively large portfolio of commissions to be attributed, take care, for different reasons, to spread these commissions as widely as possible. For certain

¹ Discussion with Gilbert Ramus, UNSFA (*Union Nationale des Syndicats Français d'Architectes*), April 2002.

² CONTAL (Marie-Hélène), “De si bons élèves”, Catalogue for the “*Quarante architectes de moins de 40 ans*” exhibition. Paris, IFA, 1991.

³ According to the terms used by Raymond Barre in the circular dated 20 October 1977 on the creation of MIQCP.

clients, this concern is prosaically based on the fact that better results are obtained from a team with a small commissions portfolio that will take a great deal of time thinking about a given project and be more available to the awarder of the contract. “We do not want to have a same team working on two operations and this is why the team having won one of our competitions was not invited to participate in a subsequent consultation. With the impetus of the architects on the jury, we always give a chance to a young team. But, until now, none of these have won, with the exception of a particular case where a young team was chosen following a redress action by one of the competitors and the elimination of the initial winner”¹. For other clients, the opening of the contract goes without saying, even if it is difficult to organise in legal terms, with the far from negligible risk of being accused of positive discrimination. The practical solution is therefore to “mix the types” (for example : a well-known name “just to see”, a team with which we have already worked, a team from Paris, a local team, a foreign team, a woman, and a young team) but without stating these criteria. For G. Bernfeld, of the Assistance Publique-Hôpitaux de Paris, who regularly calls on architects who have never before worked on hospitals, the anonymity required by competitions prevents the renewal of architects awarded commissions as there is no way to make a choice on the quality of the teams unless they are already known and that this, by definition, disqualifies architects that are young, foreign, etc.².

As for the risk involved in encouraging architects with little experience, this can only be reduced by giving them small operations or through cooperative approaches : “on very large operations, we want the team to have a strong financial base, but this can be assessed in a global manner and we can, as a result, favourably accept a candidature from young architects on condition that they are associated with a large engineering firm. We do not have a systematic policy, our aim is to encourage quality”.

6. Priority goals given by clients to project consultants

The disparity of public clients, from the most professional and responsible for major and repeated commissions to the more occasional that do not have the necessary specific competences within their departments, goes hand in hand with attitudes that are very different from one another when it comes to project consultants and what is expected from the work given to them. Certain clients, using the simplest procedure, tend to try and find a “rapid response to a poorly defined need”³. And, for reasons of simplicity and complacency rather than for reasons of favouritism, they prefer to choose as partners those project consultants that they already know and whose work has been appreciated in earlier operations. But, unlike a large number of other European countries, the tradition of an obligatory competitive bidding procedure is deeply rooted in France and the awarding of private agreement contracts is restricted to very small assignments.

The more “professionalised” clients are developing a more sophisticated approach to quality : quality and the extent of the programme, choice of procedure, participation of users, quality of materials and their use in terms of, for instance, sustainable development, global cost, etc.

¹ Discussion with Henri Sarda, technical manager, Ville-Evrard hospital (93), April 2002.

² Discussion with Guy Bernfeld, Buildings and Logistics Manager, AP-HP, March 2002.

³ According to the proposal made by Jacques Cabanieu, MIQCP General Secretary. Discussion held 19 June 2002.

Concerning the programme, clients generally agree on its importance¹, but there are two opposing views. The most widely held view is to allow a great of time² for its preparation and, potentially, its presentation to and discussions concerning it with users, and then to make it the intangible base of the project. As a result, clients that had their own programming department working in a routine manner using standards and surface area tables are increasingly tending to make use of external programmers from whom they demand a more global approach in terms of feasibility and functional analysis, and whom they also require to run discussions with future users. The second view is to consider the programme as being able to change and adapt while the project is being developed, and while respecting the clearly established general objectives. Consequently, certain clients define the methods governing this reciprocal programme/project adaptation in the project consultancy contracts and, when the programming is carried out in-house, also incorporate the capacity for change for as long as is necessary.

The large number of regulations to which public contracts are subject considerably reduces the clients' possibilities of strategic thinking in terms of the selection procedure for their project consultants. At best, they are able to establish the development level of projects for competitions (sketch, "sketch+" or outline proposals) or, for complex operations where the programme is not yet defined, the level for definition contracts. The case of the Ministry of Justice is of interest as far as this is concerned, given the strong duality of the types of buildings it requires: the building of law courts and penitential institutions. For the first category, as explained by M. Zulberty³: "each building is atypical and is designed as a major project. The architects wish to make an architectural statement; it is them that select us rather us that select them". But the procedure is always that of a restricted competition with publication of the call for bids notice made on a European level. In the penitentiary sector, the Ministry of Justice uses a design-build-operate type of consultation. It considers that the invention of a penitentiary model and the prison management systems, in a state of constant change, imply an intellectual investment that pays itself off over around three operations. Thus, for a 4,000 prison place programme carried out over two phases, only two winners were selected. It is also in view of this "profitability" of design costs that a social housing client such as OPSOM regrets the passing of a policy of architectural models which "made it possible to achieve economic and architectural satisfaction in the production of single family house estates"⁴.

In France, with the exception of large operations requiring a public enquiry, there is no legal obligation to inform or consult personnel, users or neighbours. While consultation of users (persons and categories of the public that will be using the planned installations) is rare, consultation with the personnel (employees in the establishment to be built) is frequent during the programme development phase. The project is then generally subjected to administrative validation stages within the establishment and its related bodies and, finally, site visits may be organised for the personnel. These visits can also result in final modifications, usually small details⁵. It should also be noted that AP-HP, in order to produce upstream thinking concerning hospital establishments, has set up an architectural committee of twenty people, comprising town planners, architects, landscape designers, doctors and hospital personnel, who meet

¹ According to the opinion summarised by Th. Dillies of the Nord-Pas de Calais Regional Council: "The project consultant's work will be that much better adapted to what we want if the question is well expressed. It is almost impossible to create a good project based on a badly defined programme".

² The persons we met mentioned development periods ranging from 3 to 8 months.

³ Discussion with Michel Zulberty, general manager, AMOTMJ (Ministry of Justice), March 2002.

⁴ Discussion with Jean-François Munier, OPSOM director (*Somme* social housing department), April 2002.

⁵ Discussion with Henri Sarda, technical manager, Ville-Evrard hospital (93), April 2002.

twice a year and publish a report concerning the general directions taken in thinking on spatial layout¹.

By unanimous opinion, the main obstacle facing the quality requirements developed by the clients appears to be the lack of qualifications held by contractors, to which can be added a certain weakness in the abilities of project consultants when carrying out works assignments : “Generally speaking, we work fairly well with architects and always give them the works assignment, and often the scheduling, management and coordination assignment. But project consultants very rapidly lose interest and are rarely present on the sites. As a result, the works department is often called on to finish the works²”. The need for high quality materials and techniques, and the repercussions in terms of the solidity and long service life of the building, its capacity to evolve, the sustainable development criteria as interpreted by the HQE (High Environmental Quality) are becoming increasingly apparent to clients and will be further reinforced by the “sustainable development” sections of the new town planning documents represented by the PLU (Local Urban Development Plans).

The concept of global cost, extending and developing this value analysis and developed in Great Britain and the USA, is now being increasingly used by experienced client departments and occasionally justifies these latter using economists specialised in this approach. But its practical use is hampered by an inflexible accounting system that sees building, operation and management being dependent on different budget headings that have different management methods. The result is that the totalling required by global cost calculations is not always possible³. In addition, it assumes an evaluation approach that allows a return, ten years after the delivery of an operation, to the factors making up the building costs, the operating costs and the maintenance and, on the basis of these, an analysis of the design decisions. Certain General Councils, following ten years of experience in the production of colleges, have been able to carry out this type of analysis. But evaluation continues to raise a large number of problems, both methodological and political.

FEATURES OF THE NATIONAL SITUATION AND CHANGES TAKING PLACE

In France, entering into public contracts and, more specifically public architecture and engineering contracts, has been heavily regulated over several decades by the Public Contracts Code and, where project consultants are concerned, the MOP law and its application decrees. Within this context, European legislation, which is generally more flexible than the earlier regulations that existed in France, has not introduced any radical changes in the way that clients select their service providers. This was not the case in countries where contracts were traditionally attributed by private agreement. The intensive use of the competition procedure (obligatory above the European threshold) has made the profession particularly susceptible to the anonymity rule imposed by the European texts which is in contradiction to the usual practice of candidates being auditioned by the jury during the works evaluation phase. So, paradoxically, while the rules governing the competitive bidding procedure were, well before the introduction of the Services Directive, stricter in France than in most other member States of the European Union, the French approach found itself opposed to a condition that was

¹ Discussion with Guy Bernfeld, Buildings and Logistics Manager, AP-HP, March 2002.

² Discussion with José Santamaria, City of Lyon Technical Department, April 2002.

³ Discussion with Patrick Mille, Deputy manager, property affairs, Ministry of the Interior, April 2002.

probably minor from the point of view of the European legislator : the obligation of anonymity for competitions exceeding the Directive's application thresholds, despite competitions never being obligatory in these texts.

Public contracts carried out by French project consultants present the following features :

- they generally concern a basic assignment, obligatory for building operations, comprising design and site supervision of the works (introduced by the MOP law in 1985),
- with just a few rare exceptions, they are awarded in the form of a single contract negotiated without fee scale to a project consultant team whose leader is an architect, being the only professional authorised to submit a building permit application since the 1977 law on architecture,
- since 1980 and as soon as they exceed a threshold whose amount has varied over the last few decades but which is currently the application threshold of the European texts, they are necessarily subject to a restricted competition procedure and are compensated. Inasmuch as this threshold covers medium-sized operations, over a thousand competitions have been organised yearly in France over the past twenty years.

The French situation is also characterised by the great variety of public contract awarders : similarly to a large number of neighbouring countries, there is a considerable disparity in the organisation, the competences and the expectations of public clients, depending on whether they are large and provide a continuous assignment for the building, maintenance and improvement of a building stock or whether they are only occasionally responsible for these assignments. This aspect is particularly accentuated by a high level of administrative parcelling in France and the competences placed in the hands of the 36,000 communes by the 1982 and 1985 decentralisation laws. While the technical departments have been reinforced in the larger communes, the future for medium sized and small communes undoubtedly lies in the development of inter-communal bodies and the creation of new centres of competence to meet the requirements of repeated, large commissions. For the time being, this development remains in an outline draft stage.

Finally, France is one of the European countries where the *a-priori* and *a-posteriori* control procedures are probably the most complete and the most systematic. The salience of this control and the risks resulting from the slightest dispute have led a large number of clients to see the procedure less as a tool than as a constraint. Paradoxically, this further increases the constraint given that it results in a more prudent and thus more restrictive interpretation of the texts. The meetings held to carry out this survey revealed that the criticism of the administrative complexity of the procedures was a general *leitmotiv* that can be summarised by these words by Guy Bernfeld : "Respecting the procedures required by the Public Contracts Code is very time-consuming : it adds a year to each operation. The financial control adds a further nine months, without even counting the internal procedures. There is a danger of becoming embroiled in the complex management of the Public Contracts Code and to forget the end result of the procedures... with, in addition, the fear of making a mistake"¹.

¹ Discussion with Guy Bernfeld, Buildings and Logistics Manager, AP-HP, March 2002.

ITALY

By Antonella TUFANO
Architect-Town planner
(July 2002)

A. THE NATIONAL STATUTORY AND OPERATIONAL CONTEXT

1. The nature of the public building works, the public client structure

The administrative and institutional structure

The Republic of Italy, founded in 1946, is a parliamentary democracy with a President of the Republic but where the government, through *Ministeri* (Ministries), holds most powers. The ministry responsible for national public works is the *Ministero dei Lavori Pubblici* (Ministry of Public works, equivalent to the French Ministry of Planning and Transport. The Ministry responsible for heritage management (assets and property) is the *Ministero dei Beni Culturali* (Ministry of Cultural Properties, equivalent to the French Ministry of Culture).

These two entities have local levels : the former, on a regional, level has the *Provveditorati alle Opere Pubbliche* while the latter has the *Sovrintendenze*, generally on a *province* or departmental level.

The Italian regional bodies are the regions, the *provinces* (the departments) and the communes. Their status is defined by Title V of the Constitution¹. These bodies and their cooperation structures (the *consorzii*) have been given greater powers since the introduction of the decentralisation laws governing the *competenze amministrative*. The reference legislative enactment in this field is law n° 59/97, also known as the Bassanini law. This law also specifies the exclusive competences of the State with regard to the construction or maintenance of public works :

- the protection of monuments (sites and edifices so defined by the 1931 law)
- the programming, project, construction and maintenance of an infrastructures network when this is declared to be in the public interest.

The operation of the judicial system and the organisation of National Education programmes remain in the hands of the State, while the building of these establishments is locally organised. The only exception to this rule is the universities which have a specific status and can assume the role of being an independent client.

The regions play a very important role in the distribution of powers because, unlike the *province* and the *comuni*, they have a regulatory and legislative power. Nonetheless, public works remain a “sensitive” issue as the regions enact very little legislation in this sector. There are also the *enti*, statutory bodies whose competences can extend to all levels and in all sectors. For example, the Universities have *enti*, the *opere*, which supervise physical operations (design, maintenance, etc.). Occasionally, the building of new establishments

¹ cf. art. 114 to 133 of the *Costituzione della Repubblica Italiana*.

requires an *ente* status, such as in the case of courts or the development of new railway structures across the country (the *TAV, Treni a Alta Velocità*, High Speed Train).

The financing of public works is, on the one hand, provided by the State through the Deposit and Consignment Office, and on the other, by European bodies. The very high level of decentralisation to be found in Italy means that local bodies can directly benefit from this financing without having to go through the State's administration. This fact reinforces their actions across the country.

Public construction contracts

In 1995, the Ministry of Public Works set up a computerised system to collect data concerning works contracts : the *SIMOP, Sistema Informativo di Monitoraggio delle Opere Pubbliche*. This was followed by the creation of a national inspection body : the *Osservatorio*. Up until recently, data had been collected in a fairly general manner by statistical departments. As from now, it is the *Autorità di Vigilanza dei Lavori Pubblici*¹ that is responsible for collecting and listing the types and quantities of public works carried out in Italy, using forms filled in by clients.

Some data is provided by one of the statistical departments². In 2000, public works construction and maintenance investments in Italy reached € 99,600 million, of which € 481 million for "architecture and engineering services". The OICE³ also noted that in 2000, the business volume of its members represented 90% of these investments. However, it is difficult to establish the business volume for self-employed architects or engineers. In fact, according to ISTAT (*l'Istituto Nazionale di Statistica*) data, the public and private construction market increased between 1995 and 1997, then stabilised for two years before increasing again by 18% between 1999 and April 2002. The (*Autorità*) Authority should be able to provide detailed data concerning this in the near future.

The discussions held for this study with local authorities and professionals operating in Italy clearly revealed the characteristics of construction in Italy prior to law n° 109/94, known as the "Merloni law".

Prior to this law, which aimed to normalise the awarding of engineering contracts, the situation was fairly chaotic : contracts were given on a private agreement basis, competitive bidding procedures were rare and essentially limited to the works phase, ignoring the design phase. One of the reasons for works often being abandoned during their construction was probably a lack of reflective thinking during this preliminary phase. The situation was one of a chain of faults : the more or less designed building was built too fast ; when the first problems revealed themselves, clients consultants proposed major modifications that often radically changed the design. This meant that additional expenditures had to be borne by administrations that had not anticipated the necessary financing and this led to projects being abandoned. In addition, there was no one person clearly defined as being responsible for the operation : the various processes got bogged down while, at the same time, Italian insurance companies decided that they were no longer prepared to cover the cost of delayed site works completion times.

¹ The Authority was created at the end of 1999. See below for further details.

² Data can be found on the OICE Internet site; this is an association grouping together the *Organizzazioni di Ingegneria di architettura e di Consulenza Tecnico-Economica* (<http://www.oice.it>).

³ An association bringing together "architectural engineers" and other professionals involved in the construction of architectural works.

In the 1990s, due to these malfunctions, which were accompanied by embezzlement, public construction works in Italy ground to almost a complete halt. The *Mani pulite* scandal largely resulted from the construction of public works and revealed a trail that led from contractors through to political parties that “pocketed” the money that should have been used to carry out the works.

As from 1993, the legislator, under the impetus of Minister Merloni, drafted a law designating all that was necessary to budget works programmes ; the need to have insurance prior to the beginning the operation and that, in case of problems, the presence of a person within the administration, the “person responsible for the procedure” to ensure that the project was carried out in a satisfactory manner. Despite its ambition, the Merloni law has a number of imperfections : although the distribution of competences among a larger number of concerned persons aimed to create a climate of surveillance to do away with the complicity that existed in the old system, it in fact resulted in a high level of segmentation. The project consultant can now find him/herself before a large number of people within the *conferenza dei servizi* that are informally responsible for the project, and this results in a lack of homogeneity in the way that the project is run. In addition, the contract breakdown into design and works stages means that the project consultant for the works is not necessarily the designer and this leads to uncertainties during construction works. This, in turn, results in a lack of reliability insofar as the insurance companies are concerned and, consequently, they often refuse to cover projects. It is also clear that a project consultant not covered by insurance will not risk trying out new procedures. For example, architectural heritage in Italy is generally handled in terms of restoration and very rarely as a transformation because this would demand a considerable understanding of complex techniques and architectural languages¹.

Another inconvenience of the Merloni law is the over-encouragement given to in-house project consultancy : a bonus (*incentivo*) is provided for departments carrying out the *progettazione*² phases in-house. But nothing is provided to reinforce the technical potential of these departments.

Despite these few misgivings, the persons met were fairly satisfied with the Merloni law and believed that it could revitalise the Italian construction sector.

The public client

Only those public clients defined by the Merloni law³ are held to respect legislative provisions for carrying out public works. These are the State administrations, the statutory bodies (the *enti*), and the local authorities and their associations, local bodies and certain groups (*consorzii*).

The Merloni law also needs to be respected by private clients when these are responsible for works in the public interest, such as hospitals, sports facilities, schools, universities or administrative (local or State) and industrial buildings, on condition that the total amount of these operations is greater than € 1 million, with at least 50% provided by State funds.

As a result, apart from the Ministries, Regions, Departments and Communes, other statutory bodies are also held to respect these provisions, such as the *CNR* (National Research Centre),

¹ These remarks were made during the *Conferenza Nazionale sui Lavori Pubblici*, a conference organised by the Ministry of Public Works at EUR on 25-26 January 2001.

² Cf. below for further details concerning this bonus.

³ Law 109/94, known as the Merloni law, ter, article 2, § 2 .

the *USL* (Ministry of Health's regional body), the University Institutes, the industrial estate development structures, the public cultural and artistic promotion bodies (such as theatres), as well as other institutes and companies cited in art. 22 of law n° 142 dated 8 June 1990.

Public client organisations, competences and assignments

On a State level, the *Ministero dei Lavori Pubblici* occupies a preponderant place as it assumes the role of “operator” for all public works. It is formed from several directorates including :

- the *Direzione Generale Edilizia Statale e Servizi Speciali* (General Directorate of State Construction Works and Specialised Services), responsible for the design and building of public buildings, penitentiary architectures and, in cases of extreme urgency, emergency works (earthquakes, flooding, etc.). This Directorate is also responsible for carrying out earthquake-resistant building programmes throughout the country.

- the *Direzione Aree urbane e Edilizia Residenziale* (Directorate of urban areas and housing construction), essentially concerned by housing, its architectural design and, upstream from this, its urban insertion¹.

On a regional level, the decentralised administrations of the Ministry of Public Works are the *Provveditorati alle Opere Pubbliche*. These bodies are essentially concerned with the construction and maintenance of public buildings from the diagnostic of requirements through to the delivery of the completed building to the administration having requested the works, and includes the design, the works supervision and the technical checking procedures.

The staff of this Ministry essentially comprises technicians (especially engineers), as the client function is often accompanied by that of project consultant.

The *Ministero dei Beni Culturali* intervenes with its architects on Historic Monuments, except when the operation threshold is greater than € 130,000. This modification was made by law as, in the past, the *Sovrintendenze* architects managed all of Italy's architectural heritage.

A new directorate was created in 2000 within the Ministry, the *DARC, Direzione dell'architettura e dell'arte contemporanea*. This body concerns itself with the building of new cultural amenities that fall under the Ministry's authority. It is also responsible for increasing the awareness that the public and local concerned bodies have of contemporary architecture, environmental problems and the landscape. But its role is purely consultative and the *Darc* does not have the powers to compel the client to comply with its recommendations.

On a regional level, under the management of the Regional vice-presidents, are to be found the *assessorati* which are concerned with Public Works and Housing. The *assessorati* personnel are technicians that assume the role of clients in situations where certain administrations do not have the personnel qualified to manage the operations (hospital, courts, etc.). Their importance is reinforced by the presence on their level of a checking body linked to the *Autorità, the Osservatorio Regionale dei Lavori Pubblici*.

¹ To carry this out, this Directorate manages the funds set up by law n° 60 dated 14/2/63 and works in harmony with the regions to finance subsidised and assisted housing. One of the programmes launched by this directorate is the *patti di quartiere* (neighbourhood pacts) which combine technical experimentation with urban and social research.

The *Provinces* (the Departments) also have *assessorati* that concern themselves with housing, public buildings and town planning. Although certain departments have technicians, their role is very limited : in accordance with the new distribution of local competences, the *Provinces* are essentially concerned with the maintenance of educational institutions.

Communes of a certain size have technical departments. These departments form part of the Public Works Directorates and, in large towns, have personnel able to assume the project consultant role. The largest communes (Rome and Milan) also have structures whose only role is to organise architectural competitions. These small structures (5 or 6 persons), known as *Uffici Concorsi*, operate with the technical support of the *Uffici contratti e appalti* (Contracts Departments), these latter being concerned with competitive bidding procedures.

The role of the administrations occasionally integrates that of the project consultant, as the Merloni law encourages operations to be carried out in-house. This is what persuaded certain local administrations to provide themselves with satellite structures comprising technicians that are not directly employed by the administration : the *società di progettazione*.

These are private capital *Società per Azioni* (corporations), constituted by art. 22 of law 142/90 , placed in the hands of third parties responsible for carrying out works on behalf of a public body that provide these parties with over 50% of their financing (the economic provisions are set by art.12 of law 498/92). These technical structures assume the role of the being the public body's privileged project consultants : this for example, is the case of the *Risorse per Roma* company, which provides assistance to Rome's municipal authorities.

The client is responsible for the upstream stages of the *progettazione*¹. Faced with the problem of commitments not being respected and uncompleted works, a decree issued by the *Ministero dei Lavori Pubblici* was used to provide backing to the Merloni law in order to better establish the responsibilities of public clients should any problems be encountered during the works phase². As a result, it is necessary for administrations to incorporate the anticipated operations within a three-year programme, modified every year, which is accompanied by the list of works to be carried out during the year. The information is sent to the bodies responsible for authorising the operations :

- the *Comitati Tecnici Amministrativi* (Administrative Technical Committees), if the cost of the works is under € 10 million,
- the *Consiglio Superiore dei Lavori Pubblici* (Public Works Council), if the cost of the works exceeds € 10 million.

In this latter case, apart from the feasibility study and the approval of the *Sovrintendenze*, the administration must also present the preliminary project if the decision is taken to carry the project out in-house. Certain financial measures (cf. Law 549/1995) encourage the in-house project consultancy recommended by the Merloni law. Apart from the bonus, which is discussed below, local administrations carrying out the preliminary project in-house can be provided with additional financing if the cost of the operation (design and building) exceeds € 1.5 million. This financing comes from the Deposit and Consignment Office and the only condition for receiving it is to have already have carried out the feasibility study, to have submitted it to the Region and have obtained approval (the State having delegated to the Regions the competences concerning town planning and building, this local administration checks to ensure that the national town planning programmes are respected).

¹ Being the three project phases : preliminary, final, execution.

² D. 21 June 2000 (published in the OJ dated 27 June 2000 n. 148).

The administration also provides information concerning the financing, indicating the sources of the funds necessary for the construction of the works and if they have already been paid; otherwise, the administration indicates the need for a loan – over what period and for how much –, or else indicates that the funds will result from a property sale.

When the budget is calculated, a provision is set aside¹ to carry out urgent works, studies and surveys (technical analyses and/or *accordi bonari*, being a special fund to be used in the final phase of the works in case of disputes or delays).

All or part of this budget preparation phase (described by the law as *programmazione*) as well as the subsequent phases – design, awarding of the contract and construction of the operation – are carried out under the responsibility and the supervision of a “person responsible for the procedure” who is chosen from among the awarding administration’s personnel. The person responsible for the procedure is the foundation stone of the operation ; he/she is a technician with qualifications directly related to the nature of the operation and is a member of a professional Order². A civil servant having held a post for at least five years and whose professionalism in the particular field of the operation is renowned can also be the “person responsible for the procedure”.

If this person’s competences permit it, the person responsible for the procedure can manage the design of the operation in-house. However, the design and works management functions cannot be cumulated in the case of very technically complex works (art. 2, 1, h and i of the decree), nor in cases of operations representing more than € 500,000.

The “person responsible for the procedure” is named upstream from the preliminary project phase so that this work can be integrated into the administration’s three-year programme³. This person is also responsible for launching and supervising the preliminary analyses carried out to ensure the technical, economic and administrative feasibility of the operations, to ensure that the operations respect legislation concerning the environment, landscaping, national planning and town planning legislation and, if required, supervise the measures taken to modify existing town planning documents. He/she finalises this data by drafting a preliminary document and then assumes responsibility for the competitive bidding procedures.

Should there be a lack of competences within the awarding administration⁴, the person responsible for the procedure proposes to the awarding administration that it makes use of a Client assistant⁵. He/she also justifies the need to give the design of the operation to an outside person; in this case, he/she has the freedom of choice (while of course respecting the thresholds) for the choice of procedure to be adopted and checks the legality of the methods used for advertising, notices and invitations. In the case of an ideas competition, a “*progettazione*” or “*appalto-concorso*” competition (design-build), he/she also proposes that the awarding administration names a jury (*commissione giudicatrice*).

¹ L.n.143, art. 7.

² The exact translation makes reference to "accreditation", the exam following the degree and which gives the person the right to be included in the Order's lists.

³ Merloni law, art.14, §1. The person responsible for the procedure must present the proposals to the person responsible for the three-year plan and communicate with this latter at the moment every year that the three-year plan is updated, as well as during the contract awarding phases, in order to receive approval for the preliminary, final and execution projects.

⁴ This lack must be demonstrated by the person responsible for the procedure.

⁵ The client assistants must have professional insurance and cannot participate in competitive bidding procedures for design and/or works contracts.

If the competences exist, he/she coordinates activities in order to prepare the preliminary project and checks that this preliminary project respects the indications given in the preliminary document insofar as the design choices are concerned. If the administration decides to intervene in-house, he/she also coordinates the drafting of the final project and the execution project and checks that these projects respect the indications given in the preliminary document and in the preliminary project.

As mentioned earlier, article 18 of the Merloni law provides for a bonus to be given to administrations deciding to carry out studies in-house. A *Determinazione* of *l'Autorità dei Lavori Pubblici*¹ taken to define this bonus specifies that its amount must be set upstream from the project and that it represents a saving to be subtracted at the end of the operation if it is not used. Its amount is set on the basis of the “execution project” assignment indicated in the fee scales and must be between 1% and 1.5 % of the total amount of the operation². It is the person responsible for the procedure and the persons in the technical departments providing the service that profit from this bonus. The distribution between these two parties is set by the same decree. Finally, should the person responsible for the procedure not respect the obligations under his/her responsibility, he/she shall have the bonus provided for by the Merloni law withdrawn and be held to compensate the administration for damages.

2. Main characteristics of the project consultancy

The Merloni law defines the different types of service providers³. The following can carry out the preliminary project, the final project and the execution project⁴, as well as provide support to the “person responsible for the procedure” :

- the technical departments forming part of the client’s administrative structure (in-house),
- the technical departments created by groups or associations formed by the local authorities and/or other *enti*, such as the “mountain communities” or national industrialisation and improvement bodies (in-house),
- the technical departments of other public administrations that the client has freely decided to make use of (in-house)
- registered professionals (outsourcing)
- associations of professionals (outsourcing),
- engineering firms (outsourcing),
- temporary groupings of professionals or engineering companies (outsourcing).

The term “project consultant” does not exist in Italy, and the law generally makes mention of *effettuazione delle attività di progettazione* (implementation of project activities) by *professionisti*. The *professionisti*⁵ are architects, engineers, as well as land surveyors, quantity surveyors, graduates from technical schools and other experts whose activity is recognised by belonging to a Professional Order. The activities of these professionals are tiered. As a result, engineers and architects are involved in the same projects : the architect can intervene in a project concerning a technical structure (bridge, motorway), and the engineer can intervene in urban or architectural projects. As the university education is of a generalist nature, architects

¹ Determinazione n. 43, 25-09-2000

² Decree n. 555 dated 2 November 1999, published in the O.J. dated 11 May 2000 n. 108.

³ Merloni law ter, art. 17, §1.

⁴ See below for the detailed definition of these three project phases.

⁵ As required by the Law dated 23 November 1939, n. 1815.

(or engineers) are registered in the same Order. There is a high level of competition between these engineers and architects : incidentally, the term *ingegneria di architettura* is used to designate engineers providing architectural services.

According to the CENSIS¹ survey carried out in 1999, there were 78,000 architects registered with the Order (30 % more than in 1992). This survey also revealed that there was a greater concentration of architects in Italy than in the other European countries. France, which has around the same number of inhabitants, only has 27,000 architects, three times fewer than in Italy.

Once the architect has obtained his/her degree, he/she registers with the Order, having successfully passed a professional accreditation exam : as the success level for this exam is low (around 40%), it is not unusual to see architects entering the educational sector or other sectors that do not require their registration with the Order.

Engineers also need to pass an exam to register with the Order. As the success rate is around 95%, nearly all Engineering School graduates rapidly find themselves working in the construction sector. The situation for engineers remains a positive anomaly : the number of graduates is stationary – 6,949 in 1976 and 8,761 in 1994 – while the demand continues to increase. In addition, less than 20% of those graduating from Engineering Schools choose sectors related to construction, being the *civile* (large structures, bridges, etc.), *edile* (construction) and environmental sectors that provide the greatest employment possibilities to graduates.

Among the outsourced service providers, the law cites the *Società di ingegneria*, engineering companies, being business corporations subject to private law². Their personnel must include at least one technical department manager with engineering training or holding a scientific degree related to the service that he/she provides (being a member of an Order is the only constraint). This technician signs the drawings and the project because, usually, the corporation has delegated all powers to this person³. With their large amounts of capital, these structures are very reassuring to clients and, as far as independent professionals are concerned, are increasingly becoming formidable competitors⁴. The engineering companies are not allowed to compete for contracts smaller than €40,000. In theory, they can only participate in competitive bidding procedures for services representing between € 40,000 and € 200,000 if the characteristics of this service require a high level of technical competences. But, because they have the financial capacity to reassure and cover expenses in the case of site delays, clients for these types of operations continue to invite them to submit bids, even when the project is not particularly technically complex.

3. Methods for establishing the amount of fees

The assignments

Three project phases were introduced by the Merloni law and have been defined in the application decree related to this law, the D.P.R. 554/99. They are called the *progetto preliminare*, the *progetto definitivo* and the *progetto esecutivo*.

¹ *Centro Studi e Investimenti Sociali*; this is a research institute financed by public and private funds.

² cf. Merloni law ter, art.17, para. 6, b; also see the Civil Code, title V, § V, VI, VII.

³ DPR 554/99, art. 53.

⁴ The Merloni law (art. 17, § 3) states that if the project is carried out by the administration, this same administration shall be responsible for the insurance cover; if the contract is outsourced, it is the professional that is responsible for the insurance.

The **preliminary project** establishes the most representative characteristics of the successive “*progettazione*” levels given the typology, category and economic size of the project. Generally, the preliminary project comprises a note explaining the operation, a technical note, an environmental feasibility study, a general plan, diagrams and a brief calculation of costs.

The **final project** is based on the preliminary project, and takes account of remarks made during the preliminary project administrative validation phase, the “*conferenza dei servizi*”. The final project contains all the elements necessary to file the “*rilascio della concessione edilizia*” demand (building permit).

It includes a descriptive note, a geological, seismic, geotechnical, hydrological and hydraulic analysis, technical reports by specialists, a planimetric survey, a note concerning the project’s insertion into the urban context, graphics, environmental impact study, preliminary calculations for structures and technical installations (water, electricity, etc.), descriptions of the technical elements of the works and, finally, the estimate (*computo metrico estimativo*).

The **execution project** defines the building to be built and provides all its architectural, structural and installation details. This project includes a general note, notes from specialists, drawings of structural details, structural and installation calculations, the final *computo metrico estimativo*, the economic framework, the building’s maintenance programme, the safety plan, the list of unit prices, a programme showing the plots to be expropriated and a draft contract.

The fee scales

The law governing the remuneration of professionals is the 1949 law n.143, updated by Decree n.233 dated 11/06/87 and by the *Ministero di Grazia e Giustizia* Decree n. 417 dated 03/09/97. These rates are of a binding nature and applied both in the public and private sectors. However, “rebates” can be proposed by the service providers on a proportion of their fees (*parcella*, in Italian)¹. These fee scales, depending on the type of work to be carried out, are applicable to architects, engineers and other concerned professionals. The contract provides for all services. It is signed with a single provider who may subcontract certain services to other specialists. The precise calculation of this amount is important as the choice of competitive bidding or competition procedures depends on thresholds that have been set by the Merloni law and calculated on the basis of this figure.

Law n.143 has a general section that indicates all the application provisions and “Titles” that detail the typology of the works and the services to be provided².

With the introduction of the new “person responsible for the procedure” role and the three project phases (preliminary, final and execution), the rates were modified in accordance with the provisions of art. 7, 14 bis of the Merloni law. These indications were introduced by a Decree issued by the Ministry of Justice (4 April 2001, published in the O.J. on 5 June 2001) and set the fee scales for works whose global cost is between € 25,000 and € 50 million.

¹ See in B.2. for further details.

² Title II concerns the types of works (buildings, roads, railways, etc.) and the assignment categories, from the project through to the carrying out of the works. Sub-titles (*Tavole*) detail the types of construction (rural, civil, industrial, etc. constructions) and sub-categories specify the types of construction according to their degree of complexity (simplest building works (a), housing and small schools (b), etc.). Cf. L.143, art.14.

Methods of remuneration

In a same contract, the different services are remunerated in different ways :

- as a percentage of the cost of the works,
- based on quantity, according to the elements of the works to be carried out¹,
- on the basis of fees paid according to time (for example, preliminary studies, information meetings, travel and survey time, as well as additional remuneration should variants be required²)
- on a discretionary basis, in accordance with a criteria set by the professional ; these fees cover, for example, the town planning sector.

If the contract awarded to an architect incorporates all phases, from project through to handover, the fees are calculated on the basis of the gross total cost of the works. The gross total corresponds to the sum of the gross amounts paid to the contractors, without counting rebates, without integrating the amounts added during the works and without subtracting any savings made³. The law clearly defines the tasks to be carried out by the professional in the case of a global contract : drawing up the project, cost estimate, technical and decorative details, client assistance in awarding contracts and drafting the *capitolati speciali*, site supervision and technical handover.

To calculate the amount of fees, it is necessary to apply percentage pricing, with the exception, naturally, of works paid on a time-based fee basis. This calculation includes the services indicated in the tables (project phases, cost estimate, surveys, etc.) with the addition of the accessory services (preliminary studies, travels, etc.). According to the rule, it is necessary to calculate the design project consultant's remuneration on the basis of the cost of the works without accessory services ; however, administrations are in the habit of paying the two services together, with the only constraint being that when taken together, the total of the accessory services must not exceed 60% of the amount of the percentage pricing⁴.

Should variants be necessary during the design or works phases, and only when these variants are necessary and outside the control of the project consultant, these will be paid for on a discretionary basis, being a lump sum that the project consultant will have proposed.

The client must reimburse expenses resulting from travel as well as the professional's additional expenses if this latter is obliged to hire personnel (for example, specialists from other fields, geologists, etc.). The client also reimburses administrative expenses for processing applications as well as expenses for materials (drawings, translations if necessary, etc.).

4. Regulatory control of public contracts before and since the Services Directive

The Merloni law brings together all the various laws that have existed over the last hundred years concerning public works and harmonises them with the European directives. The first law, which dates back to 1865 (L. 20/3/1865 n. 2248), for example, concerned the definition of a "public work" (built with public financing) and the "work in the public interest". Insofar as the rest is concerned, no legal text provides any distinction between the project phases, nor

¹ L. n. 143, art.3. The services carried out by engineers and architects are mainly remunerated on a percentage basis and according to quantity.

² L.n.143, art.4.

³ L.n. 143, art.15.

⁴L.n. 143, art.14.

the way of awarding contracts, which remained discretionary until the new legislation (the last decree concerning this, the D. Lgs. 406/91 remained based on this logic).

Legislative decree 157/95 translated Services Directive EEC 92/50 which provides information concerning services for an amount greater than € 200,000. As from now, engineering services (157/95, annexe 1) incorporate all architectural and engineering services, including integrated engineering, town planning and landscaping services, as well as services concerning scientific and technical activities. They are governed by articles 16-18 of Law 109/94 (Merloni law) modified by the 215/95, and by the 415/98 and applied by DPR 554/99.

The Merloni law was introduced in the previously discussed political context. However, its first application decree, DPCM 116/1997, also known as the Karrer Decree, saw three objections being raised by the European Commission : firstly, this decree, which brought together the main provisions of national law translating the Directive, had not been notified to the Commission ; secondly, it left open the possibility, when awarding the contract and subsequent to the drafting of the specifications, of making use of chosen sub-criteria, which did not comply with the transparency mentioned in the Directive ; lastly, the most important objection concerned the awarding phase because it included criteria that, according to the Directive, should have been used in the selection phase, such as, for example, the “quality certificate”¹.

Lengthy discussions led to the creation of decree 554/99, which came into force at the beginning of 2000. The decree has 15 titles. Title 1 provides the main definitions and sets up a national Public Works supervision body (the *Autorità di Vigilanza*), responsible for assuring that contracts are conducted in a correct manner, while the “person responsible for the procedure” is introduced in title 2. This is followed by the detailing of the *programmazione* phases which correspond to budgetary preparations, the preparation of the competitive bidding procedure, through to the definition of the three more detailed project levels : “preliminary, final and execution” (titre 3). Title 4 concerns the attribution of architectural and engineering contracts, while Titles 5 to 15 concern works contracts and define the *appalto-concorso* (design-build).

5. Methods to ensure the legality of procedures and contracts. Recourse for project consultants and contractors who believe themselves wronged. Recommendations, penalties

During the discussions held within the framework of this survey, clients often referred to the Order of Architects : this organisation is dependent on the Ministry of Justice and is concerned with defending the rights of architects, although it has no power to apply penalties. However, the Order can draw the attention of local authorities to rules that are not being respected. This is because it participates at all levels in the contract awarding commissions through its local representatives (*Ordini Provinciali*)². Should the decision be taken to carry

¹ In fact, it is the National Council of Architects that noted these three points and brought them up before the European Commission.

² The Order takes the form of a central body, the *Consiglio Nazionale degli Architetti*, whose representatives are elected by the *Ordini della Provincia* (Orders on a local level whose competences are limited to the departments). The departmental Order councillors are elected by the votes of the members.

out open or restricted competitive bidding procedures, the *Itaca*¹ has prepared a manual in which the stages are described in a linear manner in order to simplify the clients' task.

The real supervision power is held by the *Autorità di Vigilanza dei Lavori Pubblici* (Public Works Supervision Authority), although none of the clients we met ever mentioned the activity of this institution. The fact that it was only recently created (2000) probably explains why its actions are not known or recognised. In addition, there is a lack of clarity as to the areas supervised by the *Autorità*. Constituted by article 4 of the Merloni law, the Authority, by carrying out actions on site, is intended to provide support to the supervision activities of the *Consiglio Superiore dei Lavori Pubblici*².

This Council is the paramount institution insofar as Public Works are concerned. The Merloni law removed its consultative functions – technical consultations and legal advice – and gave them to the Authority. However, it is the Council that gives final approval for the construction of public projects (those where 50% of the financing is provided by public funds) costing more than € 25 million³.

The *Autorità* is an autonomous structure whose five main members are chosen from public figures in civil society and are named following approval from the Presidents of the Chamber of Senators and the Chamber of Deputies.

The *Autorità* has three departments : a Technical Secretariat that concerns itself with legal aspects, an Inspection Department and an *Osservatorio*. This latter is organised into a central section and local sections on a regional and departmental level in the case of “*province autonome*”. With the aid of information forms, the *Osservatorio* collects data concerning works carried out throughout the country. This data is then transmitted to the Authority which ensures that contract awarding procedures and site work methods are respected.

The interpretation of the law is much debated : while the control in fact appears to only be over the works contract attribution phase⁴, another part of the law seems to provide the possibility of controlling and applying penalties on all phases of the competitive bidding procedure. The Authority's Inspection Department can therefore demand from contract-awarding administrations “all documents, information and clarification concerning the public works underway or to be carried out, concerning the awarding of design contracts and works execution contracts”⁵. Should clients not provide the demanded elements, they can be penalised by a fine of up to € 25,000; if they provide false documents, the fine increases to € 50,000.

The Authority can intervene with the *Atti di segnalazione*, on the basis of information provided – for example, if the local Observatories note anomalies – or under its own initiative – through the use of its inspection departments – and can penalise the clients or service providers. The Authority can pronounce in two ways : through the *Determinazioni* and the *Pareri*. The *Determinazioni* (as well as the *Deliberazioni*) take the form of a financial penalty

¹ The *Itaca* (*Istituto per la Trasparenza, l'Aggiornamento e la Certificazione degli Appalti*) is an association formed by representatives of the Regions and the autonomous provinces.

² Merloni law ter, art.6

³ Approval for projects for lower amounts is given by the local representatives of the National Public Works Council, the “*comitati tecnici amministrativi*”, which sit with the *Provveditorati*.

⁴ Merloni law ter, article 4, § 2. During discussions, the manager of the Latium *Osservatorio* discussed supervision during the works execution phase, while the legal manager of the *Autorità* insisted on the global role of the control exercised by this new institution (discussion with Maria Luisa Chimenti, *Autorità per la Vigilanza sui Lavori Pubblici, Affari istituzionali e giuridici*, February 2002).

⁵ Merloni law ter, art.4, § 6. My underlining.

and the persons concerned by a decision of the Authority can dispute it by, within a period of 30 days following reception of the penalty, making an appeal to the *Procura des Tribunale* (the Public Prosecutor Office) or the *Corte dei conti* (the Tribunal of Accounts). The *Pareri* are generally answers resulting from questions asked in writing by the administration and which, after publication, provide clarifications that can have the status of jurisprudence.

B- PROJECT CONSULTANCY CONTRACT ATTRIBUTION PRACTICES

1. Most used procedures for choosing project consultants

The procedures

Clients can choose the procedure most amenable to them from among those that correspond to the amount of the project consultancy contracts :

- if the amount is below € 40,000, the client can choose to award the service through a negotiated procedure (*trattativa privata*),
- if the amount is between € 40,000 and € 200,000 (€130,000 for Ministries), it must use a restricted procedure (*licitazione privata*),
- if the amount is greater than € 200,000 (€ 130,000 for Ministries), the Merloni law follows the position taken by European Directive 92/50 and provides the possibility of choosing between an open procedure (*pubblico incanto*), a restricted procedure (*licitazione privata*) or, in exception cases, a negotiated procedure (*affidamento a trattativa privata*).

The Merloni law also defines two competition procedures : the ideas competition (*concorso di idee*) and the project competition (*concorso di progettazione*) which can be used either in the case of amounts ranging between € 40,000 and € 200,000 (€ 130,000 for Ministries), or for amounts greater than € 200,000 (€130,000 for Ministries). The only aspect that is different is the advertising : in the first case, the competitions are national while, in the second, they are necessarily open to all Member States of the European Union.

1) The restricted procedure, *licitazione privata*

In the restricted procedure, all interested providers are invited, in the preliminary phase, to complete a standard “participation request” form that requires no official documents : all that is needed is to indicate the identity of the participants, the name of the leader, to certify that he/she has no criminal record, to be in possession of university degrees and have the accreditation to exercise the profession. It is then necessary to describe the technical and organisational capacity of the structure and its financial means. In the case of temporary professional groups, each participant must complete the form and present its structure. The submitting party must also complete a “qualification form” that details the economic and technical characteristics of his/her team and allow the client to check that this team has the required minimum qualifications and that it has already carried out contracts that are similar or of an equivalent amount.

In the notice, the administration will have already published the criteria used to select the candidates and the number, between 10 and 20, of candidates to be selected for the final phase.

After the selection, the *stazione appaltante* (the client) sends a letter of invitation in which are noted the documents to be provided by the invited professionals. When only a single candidate meets the required conditions, the administration can award this person the contract using the negotiated procedure (*trattativa privata*).

The letter of invitation must give detailed information concerning the documents included in the bid. This is generally a C.V. and two envelopes : one containing the technical bid and the methodology note ¹, the other containing the financial bid.

The bid must be submitted within a period of 40 days. In both phases, the evaluation and the selection are carried out by a technical commission.

2) The open procedure, *pubblico incanto*

The *pubblico incanto* procedure is only used for amounts greater than € 200,000. In open procedures, the bids comprise the two envelopes required for the restricted procedure (technical bid and financial bid) as well as the presentation of the team and its characteristics. The technical commission analyses and evaluates all submissions and designates a successful bidder on the basis of the presented documents. The financial bid is only opened at the end of the procedure.

3) The negotiated procedure, *trattativa privata*

If the contract amount is below € 40,000, the client can use the negotiated procedure (*trattativa privata*) to call on professionals or associations registered with an Order², having first checked their experience and professional capacity (Merloni, art. 17, § 12.3).

The Merloni law states that administrations are held to make public the competitive bidding procedure in an “adequate” manner. But neither this law, nor its application decree, define how it is to be published, nor the methods to be used to check the capacities of the service provider. The *Itaca* association has raised the problem represented by this lack of information. In fact, administrations are in the habit of establishing lists of professionals, pre-sorted and ranked according to the evaluation of their C.V., that the administration consults as soon as the need presents itself. The lack of detail in the legislative text appears to validate this method, as it is easier for the administration to have confidence in an approved professional that has already worked for the same administration or for another public structure. According to the *Itaca*, it represents a form of discrimination against other professionals ; consequently, it would be preferable to publish the notices in the local press and to display them on a public billboard or in the client’s head office. In addition, it would be judicious to carry out the selection in a standardised manner by, for example, evaluating a standard C.V. form provided by the administration for the candidate to fill out.

4) The design competition, *concorso*

The Merloni law and its application decree define two competition procedures that are not open to persons working within the administration : ideas competitions and “*progettazione*” competitions.

The ideas competition aims to present an idea, that is to say a note and a sketch that cannot under any circumstances be more detailed than the preliminary project. The procedure is necessarily one of an “*pubblico incanto*” (open procedure). The result of the ideas competition can represent the basis for a subsequent competitive bidding procedure for the

¹ Generally speaking, the technical bid is limited to five A3 or ten A4 sheets, and the methodology note must be between 20 and 40 pages long.

² Engineering companies and business corporations cannot participate in these calls for bids.

definition of more detailed projects, that is to say final and execution projects, using either open or restricted procedures, or a “*progettazione*” competition¹.

For the “*progettazione*” competition it is possible to either use the open procedure or the restricted procedure. If the programme is particularly complex, the competition can be organised in two phases: the first for a definition of an idea and the second for a more detailed “preliminary project” type of submission. Exceptionally², the two-phase competition can provide a preliminary project at the end of the first phase and a final project at the end of the second.

The law permits clients to give the winner of the competition the final and execution projects by carrying out the “*trattativa privata*” (negotiated procedure)³.

In all cases, the choices concerning the procedure and what is to be provided by the candidates must be clearly indicated in the competition notices. A jury is designated to choose the winner and, if a two-phase competition is used, a technical commission is also designated.

Exceptionally, another competition procedure that incorporates design and building works can be used. This is called the *appalto-concorso*. This procedure is only used after the Public Works Council has been consulted and having demonstrated that it concerns special works or works that are particularly technical. In this case, the client uses a competitive bidding procedure based on the preliminary project carried out earlier by its departments. As a result, the competitors’ bids only concern the works execution project and on the economic savings that can be obtained with regard to the estimated cost of the works.

Calculating the contract amount

The law and the decree specify that the amount of client contracts must refer to the previously mentioned thresholds (€ 40,000, € 130,000 and € 200,000) and be calculated in a global manner. However, these texts are not clear where certain accessory services (geological and geotechnical reports, land surveys) are concerned and this issue has been subject to a “*Deliberazioni e Determinazioni*” by the *Autorità*. These *Determinazioni* specified that the amount not only includes these technical services, but also the site supervision which is preferably given to the project consultant carrying out the project⁴. To calculate this amount⁵, it is necessary to include the project consultant’s services for the three different project levels (*preliminare, definitivo e esecutivo*), the insurance, as well as the compensation to be paid for organising a competitive bidding procedure aimed at project consultants from outside the administration and, finally, the remuneration fees for the “person responsible for the procedure”.

The total sum provided for in the budget of the contract-awarding administrations therefore includes the expenditures for the design (being the carrying out of the three project levels), the works management, the site supervision, the technical handover, as well as studies and research, the safety plans and the assignments carried out by specialists and necessary for the preparation of the final drawings. Where applicable, 1% of this global amount is retained by

¹ Merloni law ter, art. 59, § 7. Exceptionally, the two-phase competition can provide a preliminary project at the end of the first phase and a final project at the end of the second.

² Merloni ter, art. 59, § 7.

³ Even before the Merloni law, the prize for an ideas competition could be the contract for the building of the project. For example, for the construction of the Contemporary Art and Architecture Centre in Rome, the Darc launched an ideas competition and the competition winner was awarded a contract for the construction of the building.

⁴ Merloni law, art. 17, § 14.

⁵ Merloni law ter, art.17, § 14 bis.

the administration and incorporated into the budget under the term “*incentivo*”, being the bonus given to the department that decides to carry out the work in-house.

Once the administration has decided to invest in the works and made a theoretical calculation of the amount, the decision is taken and incorporated within a “three-year programme”. The decision is notified to the Ministry of Public Works and the total amount is registered in chapters X and XI of the State budget (national planning, including economic aspects). The administration can levy a maximum of 10% of this sum to finance the organisation of the competitive bidding procedure (including, for example, reimbursements for juries and prizes for the winners¹) and for carrying out the projects through their three levels and, naturally, including expenditures for technical and geological analyses, the environmental impact study and drawing up the safety plans².

This way of calculating the amounts and types of services required (especially the geological analyses) privileges the assignments being carried out in-house as it would be too expensive to ask different service providers to carry them out and then to pay them for their services. In the case of competitions, the law explicitly states that these complicated technical analyses must be carried out by the clients and provided to the competitors. This is probably why the persons interviewed stated that the “competition” is the only procedure that allows external service providers to intervene as from the preliminary project phase.

Client practices

It is important to note that the Merloni law encourages the in-house production of the preliminary project. However, nothing has been done to reinforce the technical departments of administrations and local bodies by providing new personnel and new qualifications. In the Latium region, the *Osservatorio* manager underlined the absence of technical personnel in administrative structures. He also explained that the same applies to other structures concerned by the design and building of works (such as insurance companies and banks), given that they have not recruited technicians capable of evaluating the importance of the works to be covered³. The result is that clients continue to use negotiated procedures to place their contracts in the hands of known professionals, being those included in a formal or informal “list” or the *Società di Progettazione* that they finance⁴. In theory, this procedure just applies below the € 40,000 threshold and, only exceptionally, above. For example, in the case of a restricted procedure, if just a single candidate meets the conditions required for pre-qualification, the administration can give this candidate the contract using a negotiated procedure (*trattativa privata*)⁵. However, the use of negotiated procedures seems to extend these exceptional cases.

On the other hand, the restricted procedure (*licitazione privata*) appears to be rarely used. This is because the choice criteria (analysed in the following paragraph) are very restrictive and fairly difficult to calculate. In this case, the professional completes a “qualification form” that is used to establish whether he/she has already carried out similar services or services of an

¹ Merloni law ter, art. 59, § 4.

² Merloni law ter, art. 18, § 2 bis.

³ Discussion with Maurizio Meiattini, Latium region Regional Observatory, February 2002.

⁴ The Rome municipal authority officials that we met said that they used this list and the *Società di Progettazione*. Discussion with the Rome Commune *Servicio di Lavori Pubblici* representatives, February 2002.

⁵ Merloni law ter, art 17, § 12,3.

equivalent amount¹. This gives a clear advantage to service providers with large economic capacities and, consequently, engineering companies are particularly favoured over architectural agencies and engineers.

In addition, this procedure presupposes a high level of administrative organisation as all answers received in the first phase must be analysed and checked. In the open procedure (the *pubblico incanto*, a procedure introduced by the Merloni law and only applicable above the € 200,000 threshold (€ 130,000 for Ministries), the checking phase is less extensive : however, this procedure is rarely used and often confused with competitions.

The competition procedure is being increasingly used in Italy : like the large towns (Rome, Milan) that wanted to use internationally known professionals, medium -sized towns (Trieste, Salerno) are now also developing competition policies. As underlined by the Milan *Ufficio Concorsi*, competitions are the preferred method in the case of the *progettazione* for a complex building². As the choice criteria could go beyond those indicated in appendices D and F of the Merloni law³, the competition remains the most open procedure and permits the choice of a designer according to criteria concerning the building project to be carried out and not just the economic capacity of the professional's structure. Until the Merloni law transposed the Services Directive into Italian law, the first phase of the competition was anonymous, while the second was not. Consequently, the client could ask for explanations from candidates. The Rome *Ufficio Concorsi* official insisted on the difficulty that now exists for exchanges between the parties given that anonymity is now imposed as from the first phase of the competition⁴. Aware of the value of an exchange between client and project consultant prior to the choice of a service provider, the Order of Architects has favoured exceptions to this anonymity rule but stricter controls have since been applied.

Competitions are also appreciated by clients because they lead to new ideas and professionals other than those of the administration's own departments where these exist, or those of engineering companies. However, they also represent a major disadvantage : as underlined by the Rome *Ufficio Concorsi* official, they are very expensive to organise.

Firstly, the assembly of the preliminary document made available to all candidates is very expensive : this document includes the planimetric site survey, the contour lines, the geological, geotechnical, hydrological, hydraulic and seismic analyses, as well as the programming of the works carried out by external consultants⁵. The payment of jury members can also be very expensive, especially when internationally reputed public figures are included⁶. Finally, there are the prizes for the winners and the compensation for the other candidates⁷.

2. Dominant criteria in the choice of project consultant(s)

Prior to the Merloni law, legislation concerning Public Works provided the choice between two project consultant selection methods : the lowest price (the system most used) and the

¹ The number of chosen candidates varies between 5 and 20. Having examined the submissions, if the commission considers that less than 5 persons are able to meet the conditions, a new call for bids is launched.

² Discussion with Silvia Garro, *Ufficio concorsi di progettazione*, Commune of Milan, February 2002.

³ See following paragraph.

⁴ Discussion with Francesco Ghio, *Ufficio Concorsi*, Commune of Rome, February 2002.

⁵ Merloni law ter, art. 60, § 3.

⁶ Discussion with Francesco Ghio, *Ufficio Concorsi*, Commune of Rome, February 2002.

⁷ Concerning this, the Rome *Ufficio Concorsi* has developed an interesting initiative : to enhance competitions and all the participating candidates, it has chosen to make the projects public by publishing them in high quality reviews.

economically most advantageous bid. In the new legislation, only this latter criteria is retained. In addition to the financial bid, there is also the presentation of the structure and a technical bid concerning the way the operation is to be carried out. Each criteria is expressed in a weighted manner.

The criteria to be used for open and restricted procedures are defined in appendices D and F of the Merloni law application decree (554/99). The project competition is the only procedure that escapes these relatively complicated calculation systems, as decree 554/99 provides clients with the possibility of attributing the points in the way that they want, on condition of taking a transparent approach.

As a result, in the case of ideas competition and *progettazione* competitions, the choice is made by a jury comprising a minimum of three persons¹ with a recognized expertise in the field covered by the competition, one of whom must be employed by the client. The competition notices must specify whether or not the jury's choice is final (*vincolante*), as well as the choice criteria. In the first phase, the candidates are selected on the basis of their references ; in the final phase, the choice criteria place more emphasis on the idea, the project proposal and the methodology.

The restricted procedure follows the “most advantageous bid” criteria. The notices note the criteria for selecting the candidates chosen for the second phase. Apart from the presentation of the team and the C.V., it is necessary to justify a total business volume over the past ten years that is equal to between three and five times the amount of the demanded service. If the number of candidates meeting these criteria is greater than twenty, the commission takes the first ten in accordance with the ranking provided by the number of obtained criteria compliance points and randomly draws the ten others from among the remaining candidates.

In the second phase, the commission evaluates the bids in compliance with the conditions given in appendix D of decree 554/99. It should be noted that the bids at this stage comprise 1) an administrative envelope concerning the professional(s), 2) a “technical” bid comprising the team's references and the methodology note concerning the project, 3) a financial bid presenting a “rebate” when compared with the contract amount noted in the notices ; this rebate can concern the reimbursement of expenses, the fees for special services and for services provided to the administrations, or it can consist of a reduction in the time required to carry out the service.

The commission must attribute 20 to 40 points for “professionalism”, 20 to 40 points for the methodology and the technical bid, 10 to 30 points for the economic rebate and, finally, 0 to 10 points for the rebate resulting from the time required to carry out the work². The two first elements, professionalism and the technical bid, are evaluated during a secret sitting. Then, during a public session, the commission reads out the ranked list and then opens the financial bids. Having attributed points for the financial bids, the commission calculates the total number of points obtained by the candidates, establishes the ranking, reads out the results and announces the “winner” of the competitive bidding procedure.

In the open procedure, the *pubblico incanto*, the choice is made on the basis of the presentation of the structure and the business volume. This business volume must, over the previous five years, be between three and six times the amount of the service covered by the competition. It is also necessary to provide a list of works carried out over the previous ten

¹ Merloni law ter, art.55.

² cf. appendix F of D.P.R. 554/99.

years and, in particular, put forward two works of an amount equivalent to the proposed contract. Consequently, in this phase, the economic proposal is not taken into consideration.

Finally, for an amount below € 40,000, the choice of selection criteria is left to the client and thus to the person responsible for the procedure. *Itaca* proposes setting up an evaluation based on a standard C.V. in which only the characteristics and competences in the field of the demanded service are developed. This would be in line with the need to respect art. 3 of Law n.241/90 concerning the transparency of documents and administrative procedures. For the time being, the choice is discretionary, with a preference for the random draw system among the candidates included in the administration's lists.

3 Methods of exchange between the client and the project consultant. Forms and contents of the negotiations

The administration's choice is based on administrative documents describing the activity of the professionals and, in the case of the restricted procedure, on the financial bid. Meetings with project consultants to "discuss" the drawn project are never taken into consideration in the legislative texts. Prior to signing the contract, the exchange therefore uniquely takes place in writing and meetings do not appear to take place until the works execution phase. However, it is occasionally necessary to make modifications to the initial bid, and this implies meetings between the client and the project consultant(s). These modifications must be explicitly authorised in the competitive bidding procedure notices otherwise the administration can invalidate them. The only possible modifications concern the construction technique and the savings that can be achieved.

However, the administration can require "written" clarifications. For example, should the financial bid seem exceedingly low, before discarding this proposal and excluding the candidate, the administration invites this person to explain in writing how he/she can achieve such a great saving. The administration may accept this bid if it respects the technical construction conditions using a new technology.

Art. 7, §7 of the Merloni law ter, refers to a meeting called by the "person responsible for the procedure", the "*conferenza dei servizi*", during which all administrations concerned by the project are invited to intervene on the basis of the final project in order to express their intentions, opinions and for issuing authorisations. Generally speaking, the project consultant is not present during this meeting, but the *conferenza* can ask him/her for clarification and explanatory documents in writing¹. Exceptionally, this "*conferenza di servizi*" can be called on the basis of the preliminary project to decide on the administrative conditions that must necessarily be respected during the preparation of the final project in order to subsequently obtain the approval of the administrative partners. If a representative is opposed to the project, he/she must specify in writing the modifications to be made to the project for its subsequent validation.

4. Attitude regarding young architects and/or young agencies

Current legislation tends towards the introduction of transparency in the methods used to select designers to ensure that all candidates are on an equal footing when participating in competitive bidding procedures. Despite this, and given the selection criteria defined by the

¹ Merloni law ter, art. 7, § 10.

law, it remains difficult for young professionals to post the required business volume or technical and organisational capacities. This problem is not just limited to the young, as it also applies to all agencies that have regular activities that do not represent a large financial volume. The temporary association of professionals ought to overcome this problem. However, engineering companies and business corporations remain more reassuring for clients.

Attempts to expand public commissions have been made by medium-sized municipalities, especially through the organisation of competitive bidding procedures for the redevelopment of public spaces. Two elements favour this approach : on the one hand, the works concern public spaces of a limited size (generally town squares) representing a low level of investment; on the other, the competitive bidding procedure for town planning works is less restrictive when it comes to the construction of public works and the criteria can be chosen by the administration.

The Rome and Milan municipal authorities have carried out this type of experiment using competitions. Both the Milan and Rome *Ufficio Concorsi* have declared themselves highly satisfied with this approach, although they regret that young designers have a tendency, for their first work, to overly “clutter” public spaces where the initial intention has been to remain as simple as possible ¹.

The *Itaca* association, in its manual intended for clients, encourages assistance to young professionals. To this end, for procedures representing less than € 40,000, the manual recommends the development of a standard C.V. supplied by the administration. This measure would guarantee the equality of all competitors.

Apart from these local measures, there is no policy in favour of young architects or small agencies.

5. Priority goals given by clients to project consultants

According to the Merloni law², the *progettazione* must include a preliminary project, a final project and an execution project “in compliance with the existing obligations and the pre-established expenditure limits” in order to assure :

- the quality of the works and that the intents of the works are respected,
- compliance with town planning and environmental standards,
- that the required qualities are provided, as defined by Italian and European regulations.

regulations.

However, with the exception of the competition procedure, the client never gives precise guidelines to be followed to obtain a quality *progettazione* insofar as the quality, technical solutions or architectural schemes are concerned. The criteria generally concern the economic rebate or the evaluation of the professional’s experience, rather than the drawn project.

This situation results from the context within which the Merloni law was written. This latter was based on the principle of controlling, supervising and defining responsibilities for an operation. Priority was given to transparency in the choices made in order to assure that site works were carried out in a satisfactory manner. While the issue of quality is obviously not absent from the aims of the law, the choice of the best quality/price ratio seemed sufficient to the legislator to guarantee the quality of the work when taken in comparison with the lowest price criteria that had previously been applied.

¹ Discussion with Francesco Ghio, *Ufficio Concorsi*, Commune of Rome, February 2002.

² Merloni law ter, art.16, § 1.

In addition, the fact that the works are compartmentalised and the Ministry of Public Works is the exclusive client for the works, despite its absence during the design phase, reveals that disequilibrium continues to exist between the upstream phases and the finished project¹.

FEATURES OF THE NATIONAL SITUATION AND CHANGES TAKING PLACE

Despite a few imperfections, the Merloni law represents a focal reflection point for the construction of public works in Italy because, on the one hand, it synthesises all the laws and decrees written on this theme over the last hundred years by aligning them with the requirements of European legislation and, on the other, it introduces new elements: the upstream administrative and budgetary programming of projects, the breakdown of the projects into three phases – permitting a better development of the design phase that had previously been limited to the final project –, and finally, the definition of a “manager”, being the operation’s single referent.

As legislation has remained very complicated in terms of the competitive bidding procedure – especially the weighted criteria system given in appendices D and F –, competitions appear to be the most open solution, despite the high cost of their organisation. The clients met appeared favourable to competitions, as shown by the creation of the *Uffici Concorsi* – competitions department – within communal administrations.

Extending the thinking concerning this matter, Milan is studying a type of competition aiming to choose the “best professional”, being the person most apt to follow through a long-term operation, such as the restoration and conversion of a monument. This approach takes the form of a “competitive dialogue” and aims to select a professional capable of supervising the work of several professionals and to imagine different solutions. This type of procedure, which takes the form of a competition, is still at an experimental stage and has not yet been used in other Italian towns.

In Rome, it was strongly emphasised that “preliminary projects”, which should already represent the results of the competitive bidding procedure, are carried out in-house by the technical departments in order to obtain the 1.5% bonus instigated by the Merloni law. In addition and on the basis of these preliminary projects, competitive bidding procedures using the restrictive procedure are often used to avoid the confrontation represented by competitions. “Buildings requiring high level of competences are placed in the hands of unknown persons in order to profit from the rebate. Because the law permits it, architects arrive with execution projects and are made responsible for works that they are not really capable of controlling” explained the Rome *Ufficio Concorsi* municipal authority manager². This is why the Rome municipal authority wanted to set up competition procedures for large facilities, public spaces and engineering works marking the city’s identity. However, the need for anonymity is criticised by clients: with the new provisions, the author of the project no longer has the possibility of explaining and defending his/her project.

Finally, in order to assure Italy’s development, the Merloni law imposed very strict controls upstream from the operation: a law is currently being studied to facilitate the construction of

¹ However, architects remain owners of the design copyright and are the only persons responsible for its satisfactory completion. Cf. L.143, art. 11.

² Discussion with Francesco Ghio, *Ufficio Concorsi*, Commune of Rome, February 2002.

public works. In the Ministry of *Beni Culturali*, the *Darc*¹ representatives underlined that this law could lead to the revitalisation of public construction in Italy, on condition of not neglecting the constraints imposed by town planning and by legislation concerning the country's heritage (artistic, architectural and landscaping) on pretext of simplifying procedures.

¹ Discussion with Margherita Guccione, *Ministero dei Beni Culturali*, DARC *Direzione generale per l'architettura e l'arte contemporanee*, February 2002.

THE NETHERLANDS

By Véronique BIAU
(May 2001)

A. THE NATIONAL STATUTORY AND OPERATIONAL CONTEXT

1. The nature of public building works, the public client structure

At State level in the Netherlands, the public client is essentially represented by the *Rijksgebouwendienst* (Government Building Agency) which, within the Ministry of Housing, Land use management and the Environment (VROM¹), is responsible for building and managing public buildings. In 1995, the Government Building Agency took over from the Public Buildings Department in the same Ministry which, since 1992, had been responsible for the building and maintenance of buildings for ministries (with the exception of Ministry of Defence buildings), central services, and State councils and assemblies. The Public Buildings Department also managed the royal palaces and approximately 700 historic monuments. Its transformation into an “agency” also saw it being provided with a certain financial autonomy given that it was now responsible for managing the buildings in the same way as a property owner with the various administrations occupying the buildings renting them from the agency at the market rate. In exchange, the agency is held to provide an annual balance-sheet of its income and expenditures, much in the same way as any other business². The agency employs 950 persons, of which 350 in its central departments in The Hague and 600 distributed in its six regional branches³. Since 1 November 2000, it has been managed by Mr. Joe Coenen, Chief Government Architect (*Rijksbouwmeester*), named for a five year period and succeeding Mr. Wytze Patijn. This architect, designated by cooptation between the Minister responsible for architecture, politicians and professional architectural organisations, has a number of very important missions : the 1989 royal "Rijksgebouwendienst" decree makes him responsible for the integration of buildings into the urban fabric, the architectonic quality of buildings, historic monuments, as well as the selection of architects to carry out public projects. He is also responsible for carrying out public building projects that fall under the responsibility of the Ministry of Housing's public building department. The Chief Government Architect also acts as a consultant for all service projects where the State is the direct client or where this latter is directly financially implicated. He also selects and proposes architects to other client ministries⁴.

¹ *Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer.*

² VROM presentation brochure (Ministry of Housing, Land use management and the Environment. Building the future : environment, space, housing and public amenities. The Hague, August 1997.

³ See the Government Building Agency site (<http://www.rijksgebouwendienst.nl/>)

⁴ Source : VAN DER HAAS (Eric), TATIBOUËT (Yves), *Les architectes aux Pays-Bas*. Direction des Relations Économiques Extérieures, Notes des Postes d'Expansion Economique, The Hague, June 1999. 64 p.

The Government Building Agency also carries out a number of project consultant services for the administrations, being either complete project consultant missions or missions that are partially subcontracted to private project consultants. The Agency is paid for these services on the basis of a fee scale¹. It is the Chief Government Architect who decides, on a case by case basis, whether to transfer a given project to private project consultants or whether the design works will be carried out by the Agency departments. The current policy for most projects is to have a greater upstream control over operations and to carry out design sketches². The Ministry of Justice is currently the Agency's main client for a major programme including prisons, law courts, police stations, etc.

The local authorities (650 municipalities, 12 provinces) play a very small role as public client for buildings: they are responsible for schools, a certain number of sports and leisure amenities and social housing operations. The Government Building Agency does not provide local authorities with building project consultant services but, on request, can provide architectural advice for the design of infrastructures. In small local authorities, the trend is to prepare highly detailed Land Use type town planning plans and then check building permit applications to ensure that they comply with the Dutch building decree and the Land Use Plans, as well as ensure their aesthetics through the *Welstand*, a system that has existed since the beginning of the century. The final decision as to whether or not to grant the building permit is taken by the Municipal Council.

As in many other European countries, it is the growth of developer competitions for the building of public amenities being organised by local authorities that most worries Dutch architects.

2. Main characteristics of the project consultancy

Most Dutch architects have an engineer-builder qualification and have studied for five years in one of the two technology universities that incorporate a department of architecture (Delft and Eindhoven). To be called an architect, it is necessary to register with the *Stichting Bureau Architectenregister* (SBA) (Architects registration bureau) which, while requiring that certain diplomas and certificates be obtained, does not demand any professional experience or the observation of any Code of Professional Conduct. The SBA is responsible for updating the register of architects, interior designers, town planners and landscape designers. These qualifications have only been protected since 1988 in order to ensure that the Netherlands complies with Directive 85/384/EEC dated 10 June 1985, known as the Architecture Directive. However, registration with the main professional organisation of architects, the BNA (*Bond van Nederlandse Architecten*), is completely voluntary but provides an added level of legitimacy to those who are members. As well as requiring registration in the legal register, the BNA, an association governed by private law, created in 1919 by the merging of two architectural associations, also demands observance of its Code of Professional Conduct and two years of professional experience (or, if applicable, a two year post-diploma course established in 1996, the PAS).

While the title of architect has only recently been protected in the Netherlands, the same cannot be said for the exercise of the profession: anybody can request and obtain a building

¹ Information provided by Mr. Emiel Lamers, architect in the Government Building Agency and professor at the Delft School of Architecture, interview held 17 November 2000.

² According to Mr. Hans Blok, of the Government Building Agency (VROM), interview held 18 November 2000.

permit from a local authority on condition that the project respects a set of fairly complex national building rules and local regulations.

There are approximately 7,500 architects registered in the Register, among whom 2,900 are BNA members. This body has prepared a number of statistics on its members and on the 1,450 practices in which they work (being approximately 75% of Dutch practices). It can be seen that there is a steady although slow growth in the average size of practices. The average staff level per practice (all personnel, including the “director” architect) is 6.2 persons¹. But large architectural firms (10 employees and more), which only represented 11% of Dutch agencies in 1992², now represent 14% of agencies listed by the BNA³. The following table shows this growth over the last five years.

	1995		1996		1997		1998		1999	
	no	%	no	%	no	%	no	%	no	%
1 person	680	46	660	45	624	43	615	43	610	42
2 persons	219	15	211	14	217	15	186	13	194	14
3 and 4 persons	209	14	202	14	210	14	212	15	207	14
5 to 9 persons	214	14	219	15	221	15	221	15	233	16
10 to 24 persons	117	8	125	8	125	9	137	10	148	10
25 to 49 persons	33	2	37	3	42	3	43	3	39	3
50 persons and more	11	1	9	1	8	1	8	1	13	1
TOTAL	1483	100	1463	100	1447	100	1422	100	1444	100

Table 5 : Staff level changes in BNA affiliated Dutch architectural practices (1995-1999) (Source : 1999 BNA brochure)

For Yves Tatibouet, Transport and Environment attaché to the Economic Expansion Post in the Hague, the Netherlands is currently at the crossroads in the way that project consultation is organised. Architects, who have a tradition of dispersed and medium-sized practices (42% of Dutch architectural practices are single person operations⁴) are being increasingly influenced by the Anglo-Saxon model of large integrated firms that associate a wide range of professional profiles in order to be better positioned for export contracts. This change is already largely felt in the engineering sector which is now highly concentrated into a very small number of very large structures⁵.

However, clients continue to make a clear distinction between architects and engineers. The SR 1997 (*Standaard Voorwaarden Rechts-Verhouding Opdrachtgever-Architect* 1997), being the regulations that, among others, defines the methods for cooperation between architects and their partners on building projects, indicates that the client designates, in consultation with the architect, the various engineering firms that will be participating in the project and signs separate contracts with these firms. The architect is responsible for supervising the works of

¹ As a comparison, note that the average size of French architectural practices is 1.4 employees per practice (source : FAF-PL data, 1996 cited by N. Nogue, head of the CNOA *Observatoire de l'Économie de l'Architecture*)

² Source : VAN DER HAAS (Éric), TATIBOUËT (Yves), *Les architectes aux Pays-Bas*. External Economic Relations Department, Economic Expansion Posts notes, The Hague, June 1999.

³ Source : BNA (Bond van Nederlandse Architecten). *BNA jaarverslag 1999* (BNA annual report, 1999). 66 p.

⁴ 56% of French architects work alone (source : CNOA *Observatoire de l'Économie de l'Architecture*).

⁵ Interview with Yves Tatibouet, The Hague Economic Expansion Post, French Embassy to the Netherlands, 17 November 2000.

the engineers but is not considered to be legally responsible if the quality of their work prove insufficient or should they not respect the agreed completion times.

3. Regulatory control of public contracts before and since the Services Directive.

Prior to the Services Directive, there was no public contracts concept in Dutch legislation and these were simply assimilated as civil contracts. All clients, whether public or private, were thus free to choose their architect. Unlike France or Germany, there was no obligation to hold competitions or any other form of competitive bidding procedure and, in the rare cases where competitions were organised, they were often not taken through to the building phase. The general practice was one of private agreement or, for more complex projects, the “multiple commission” (*Meervoudige opdracht*) in which, like the French definition contracts (*marché de définition*), three or four architects are invited and remunerated for producing a design sketch on the basis of a programme. Consequently, the choice of architect to whom the operation is given is made exclusively on the basis of the design sketch. This practice, which continues to operate below the Directive application threshold and which also exists in Belgium, is approved by the BNA¹. Price-based selections (*prijsofferte*) are also made for 13% of project commissions, generally small projects that fall below the European threshold. In this method, the only selection criteria used by the client is the price. This latter asks a number of architects (it is free to consult as many architects as it wants) to propose a price for a project on the basis of a global outline. The client then selects the architect proposing the lowest price².

The Services Directive has been transposed into internal law by a Community outline law that came into force on 21 April 1993³. This law refers to the Directive without making any other additions. It does not distinguish between the different call for tender categories (works, supplies and services) and applies both to State departments and local authorities.

The basic regulations for controlling relations between architects, other building partners and clients, is, in both the public and private sector, the "*Standaard Voorwaarden Rechts-Verhouding Opdrachtgever-Architect 1997*", more generally known as the SR 1997. This regulation was written and finalised by the BNA. It defines the responsibilities of the client and the architect as well as the detailed contents of a mission. Consequently a building project is separated into five phases : 1) preliminary studies, 2) final project, 3) the construction preparation phase, 4) the establishing of the price and the terms of contract, 5) the execution of the contract and the completion of the works.

¹ Communication read by Agnes Evers (BNA) during the "General architectural practices in the Netherlands" conference organised by the French Embassy Economic Expansion Post in The Hague, 10 December 1999.

² See VAN DER HAAS (Éric), TATIBOUËT (Yves), *Les architectes aux Pays-Bas*. External Economic relations Department, Economic Expansion Posts notes, The Hague, June 1999. p. 49.

³ The texts of this Law are published in the official journals (*Staatsblad*) n° 212 and n° 213 in 1993 and n° 378 in 1994.

4. Methods to ensure the legality of procedures and contracts. Recourse for project consultants and contractors who believe themselves wronged. Recommendations, penalties

Several recommendation initiatives have been developed in the Netherlands to simplify the application of the Services Directive by public clients and, in particular, where local authorities are concerned. In 1989, and thus prior to the existence of this Directive, the Dutch European building-related affairs council (*EG-Beraad voor de Bouw*) was created, chaired by the general secretary of the VROM Ministry. It comprises representatives of a certain number of public and private bodies concerned by these issues: the ministries with the greatest building activities, the building firm federations and building materials federations, the federation of social housing associations, professional architectural and engineering organisations and the construction industry research centres organisations¹. The aim of this Council is to firstly inform Dutch professional sectors of decisions taken in Brussels which have repercussions on the building sector by providing a bulletin, guides, annual conferences that, among others, invite representatives of European institutions to present the new provisions, and finally, themed meetings on issues with major repercussions. But this Council has also provided itself with strong lobbying capacities, having understood that any influence on European decisions necessarily depends on the speed of reaction to discussions taking place in Brussels, the aptitude of national professional sectors to clearly develop collective positions and, finally, the ability to propose discussion themes resulting from national concerns to the European commissions.

Apart from this collective measure, there are other different measures being developed within the administrative and professional organisations. The BNA, which publishes and distributes a brochure on the ways in which architects can be chosen in compliance with the Services Directive², strongly recommends that clients use the limited procedure, in the form of the “multiple commission” or that of the “*Visiepresentatie*”, being more efficient and less expensive than that of a competition. The BNA recommendations place great emphasis on simplifying the procedure and trying to reduce the costs resulting from the selection method, both to the client and the project consultants submitting their candidature. By developing a software package to assist clients in publishing their contract notices and defining their selection and contract attribution criteria (called the EURASBO), the VROM Ministry pursues the same goal: reduced transaction costs, standardised methods, targeting the information to be asked from candidates and rationalisation of the methods used to evaluate the received answers. Like the VROM, the BNA provides clients with legal and technical advice for the choice of the procedure, the drafting of the notice, etc.

The Netherlands also have a structure, the *Architectuur Lokaal* foundation³, whose advisory role to local authorities, somewhat similar to the French CAUE (*Conseils d'Architecture, d'Urbanisme et Environnement*), includes advice concerning the attribution of public contracts. This lightweight structure (11 persons), created in 1993 and subsidised by the four Ministries concerned by architecture (Culture, Town and Country Planning, Environment, Transport), is in contact with both public and private clients: these include the local authorities as well as real estate developers and private individuals involved in building operations. This body's

¹ See the *EG-Beraad voor de Bouw* web site: <http://www.eg-beraadbouw.nl>

² BNA. *Aanbevelingen voor de architectselectie volgens de regels van de Europese Richtlijn diensten*. (7 pages). November 2000.

³ See the *Architectuur Lokaal* web site.

mission is to act as a link between national policies and local practices : to help local agents apply national policies as well as incorporate local practices and experience into national decisions. *Architectuur Lokaal* was very active during the 1990s in the collective thinking on competition which led to the drawing up of the first *Kompas*, being an indicative organisational model for competitions approved by the Ministries and the professional organisations¹. It then focussed on developer competitions, increasingly being used in a much disputed manner by Dutch local authorities, with the aim of introducing an indicative procedural framework. This was carried out in September 2000 with the publication of *Kompas 2* which proposes three competitive bidding procedure models and a contract model. *Architectuur Lokaal* endorsed the production of these specialised training reference documents aimed at clients.

In the Netherlands, litigation and recourse are not particularly regulated : because they are assimilated as civil contracts, public contracts are not a priori subject to an administrative control over the regularity of procedures and, in case of litigation, fall under the jurisdiction of civil judges. According to our Economic Expansion Post contact, this represents a tradition of consensus that places decision-makers in the public sector more in a situation of cooperative relations with rather than dominance of the private sector, and where each of these parties, both for pragmatic reasons and because of their lack of experience of public contracts, tend to simplify the procedures as much as possible while remaining in compliance with the European directives². Within the field of public contracts, the building sector has a specific method of recourse through arbitration rather than the use of the legal process. A Building Sector Arbitration Committee (ABBI) comprised of professionals is used (this committee examines approximately 850 cases a year, if one adds together public services, supplies and works contracts). In formal terms, it works in the same way as the Civil Court and interviews the two parties, but it can base itself on non-obligatory practices and rules when making its judgement. The Arbitration Committee, whose main advantages are its speed of action and the specific competences of the arbitrators in the building sector, has the power to quash a decision made by a Municipal Council and interrupt a contract being carried out if it can prove that the Directive is not being respected³.

5. Methods for establishing the amount of fees.

The relations between architects and public or private clients are governed by the document called the SR 1997 (*Standaard Voorwaarden Rechts-Verhouding Opdrachtgever-Architect* 1997) prepared by the BNA. Among other points (see above), this document is used to define an indicative fee scale. The SR proposes four different remuneration methods based on :

- a percentage of the amount of the building cost
- the time devoted to the project
- a lump sum
- negotiations.

¹ See our first study : V. Biau in collaboration with M. Degy and L. Rodrigues , *Les concours de maîtrise d'œuvre dans l'Union Européenne*, Centre de Recherche sur l'Habitat (LOUEST, UMR n°7544 du CNRS), study carried out for the Ministry of Culture and Communications, Architecture and Heritage Division, 1998.

² Interview with Yves Tatibouet, The Hague Economic Expansion Post, French Embassy to the Netherlands, 17 November 2000.

³ Source : the document presenting the Dutch situation within the PPPP web site (<http://simap.eu.int/DA/pub/src/d0083.html>).

Although not obligatory, it represents a reference that is much used, especially within the framework of State-run public commissions. There has been an increasing change from the use of the percentage payment towards the lump sum payment which provides the client with a greater guarantee¹. Although engineers also have a fee scale, this too is indicative. The BNA plans to unify the remunerations system, alongside a definition of the responsibilities of architects and engineers, in a subsequent version of the SR.

6. A policy aimed at distributing public commissions and supporting the profession?

The list of around 300 architects short-listed by the Government Building Agency for implementing the annual building programme² gives large Dutch practices a preponderant role. There are few foreign architects or small national practices, although this may well be because of the cost and the complication of the steps that need to be taken, or due to a self-elimination by these latter, rather than as a result of the selection criteria which, as we have already explained, are not particularly demanding. It would be interesting to observe, within this list, exactly how the five to seven teams chosen for each project are selected, relate this to the size or location of the projects and see how the final attribution of contracts is distributed among this group. Our contacts informed us that these types of statistics exist, showing a satisfactory distribution of commissions within this group (which, it should be remembered, represents approximately 20% of practices in the Netherlands) but we were not able to have access to this quantified data. According to E. Lamers, architect in the Government Building Agency, Dutch architectural practices are currently beginning to specialise in certain types of programmes, but this specialisation does not cross the boundary of public / private commissions³.

B. PROJECT CONSULTANCY CONTRACT ATTRIBUTION PRACTICES

1. Most used procedures for choosing project consultants.

As the preceding study revealed, competitions are not obligatory in the Netherlands and remain extremely infrequent⁴. The dominant procedure is the restricted procedure, particularly in the highly specific form adopted within the framework of State public commissions.

Since 1997, two identical and parallel procedures have been operated by the Government Building Agency, one based on a list of architects, the other on a list of engineers among whom the successful tenderers for the year's public contracts will be chosen.

These procedures take place over three phases :

1 – An annual public building works programme to be carried out by the Agency is subject to a notice in the ECOJ. On the basis of criteria known as “minimal requirements” (means, staff levels, workload, professional skills, experience and references), a highly

¹ Interview with Agnes Evers, legal consultant to the BNA, 18 November 2000.

² Note that this programme does not distinguish between commissions above the European threshold and those below this threshold.

³ According to M. Emiel Lamers, architect in the Government Building Agency and professor at the Delft school of architecture, interview held 17 November 2000.

⁴ See our previous study : V. Biau in collaboration with M. Degy and L. Rodrigues, *Les concours de maîtrise d'œuvre dans l'Union Européenne*, Centre de Recherche sur l'Habitat (LOUEST, UMR n°7544 by the CNRS), study carried out for the Ministry of Culture and Communications, Architecture and Heritage Division, 1998.

flexible selection is made that virtually only eliminates those files that are non-receivable for reasons of exceeding the submission period or for serious non-compliance with the fiscal or penal status criteria. A selection of approximately 300 architects is thus directly made by the public building department under the authority of the chief architect.

2 – Project by project, a preselection is then carried out by the chief architect according to the experience and desired architectural quality. The five to seven candidates chosen from the list then receive more precise details concerning the project and the missions they are to be given. This appointment also includes the list of points that they must use to organise their arguments to defend their vision of the project before the commission which comprises the Chief Government Architect, the Government Building Agency project manager responsible for the project, and a representative of the local authority and/or the future users.

3 – According to the nature and complexity of the project, the contract is attributed following a second phase that consists of :

- the candidates formulating written answers to written questions asked by the commission concerning the project
- an oral interview of the candidates by the commission on their intentions concerning the project
- an evaluation by the commission of a set of plans, one or more models, as well as an outline financial estimate provided by each of the candidates. The candidates are then compensated by a previously stated amount.

On a local level, the selection appears to operate project by project and also uses a limited procedure, without competition and in an extremely varied manner. The price criteria more frequently represents a competitive element for local authorities than it does for State clients. As previously discussed, local authority contracts are increasingly works contracts attributed to developers. The “architectural policies platform” represented by the concerned ministerial bodies and professional organisations have prepared a non-obligatory reference document, the *Kompas 2*, which formalises three procedures for choosing developers : either a consultation of at least five developers on the basis of specifications and evaluation of the proposed drawings and programmes by a commission; or the consultation of at least five developers, but only on the basis of their financial bid; or, finally, the consultation of at least five developers, based both on their drawings and their financial bids, but by two different juries. In this latter procedure, a jury of professionals evaluates the drawings and notes them while elected representatives open the sealed envelopes containing the financial bids and note them according to their amount. The technical note represents 90%, the financial note 10%, and it is the total that designates the developer that will be attributed the contract.

A survey carried out by the BNA with 300 Dutch architectural practices (of the 1,450 noted by the BNA, being just over 20% of the total number of practices in the Netherlands) revealed an interesting correlation between the size of the practices and the selection method by which they obtained their commissions. Naturally, it should be noted that this is for all types of commissions, both public and private, where the amount is either above or below the European threshold. Not surprisingly, direct selection was largely dominant (73% of selection procedures) and public procedures dependent on the European directives very rare (0.8% of the selection procedures). However, this breakdown did not pick out the different types of procedures of interest to us here. Nonetheless, this table clearly shows that the European procedures are clearly advantageous for large structures (15 persons and more) and almost never concern practices with less than seven employees. Adjudication, or selection of the lowest bid, plays a far from negligible role (13% of all selection procedures) but analysis of

this data would require that they be cross-referred to the types of commissions that they concern (very small project consultant interventions, architectural services other than those of project consultant, commissions provided by occasional clients?). Finally, this table reveals two other rarely used selection methods that have previously been mentioned : multiple commissions (which are here associated with competitions which, as we have seen, are virtually non-existent in the Netherlands), and the *visiepresentatie*, interview of candidates by a commission without the former having to produce documents specific to the project for which they are competing.

Selection methods	Number of persons per architectural practice				Total	%
	< 3 pers.	3-7 pers.	7-15 pers.	15 pers and +		
Competitions and multiple commissions	6	10	83	134	233	2,5
<i>Visiepresentatie</i> , presentation-vision	108	205	233	326	872	8,2
Selection of the lowest price	283	445	321	315	1364	13
Public selection in accordance with the European directives	5	0	22	64	91	0,8
Direct selection	1779	1737	2030	2197	7743	73
Others	43	40	126	91	300	2,8
Total	2224	2437	2815	3127	10603	100

Table 6 : Number and annual percentage of project commissions by selection methods and according to the size of architectural practices in 1998 (survey carried out on 299 Dutch architectural practices)

Source : BNA- Extract from the PEE report on architects in the Netherlands

2. Dominant criteria in the choice of project consultant(s)

In the national procedure organised by the Government Building Agency, there exists a very great difference of requirements between the qualitative selection criteria (otherwise known as “minimum requirement”, voluntarily not particularly selective and which allows nearly all project consultants who have expressed an interest in the programme to be retained on the short-list) and the attribution criteria, which have been subject to in-depth thinking by the VROM in terms of the definition of these criteria, as well as on the notes, ranges and levels of acceptability that the adjudicating powers should give them. Thus, in the EURASBO software package developed by the VROM ministry for all public clients wishing to simplify the use of their selection procedures (and in view of the generalised use of computerised procedures in the near future), the proposed attribution criteria are as follows :

- integration into the site,
- architectural design
- account taken of users
- site safety
- logistics
- cost control.

Each of these criteria must be noted from 1 to 3 and be subject to an acceptability rating coefficient indicated in the notice.

The BNA intervenes strongly with clients (and, in particular, has had this position accepted by the designers of the EURASBO software) to simplify the selection criteria being used. During the selection phase, architects should be authorised to only make declarations and not attestations (of their situation with regards taxes and social charges, solvability, etc.). Attestations would only be made at a later date. The BNA also draws attention to the criteria concerning the minimum turnover by the service provider that the client tends to place too high on the list and the generalised reference to a single type of building.

It would seem that the price criteria, which is hardly ever used on a national level given that the Government Building Agency uses the indicative SR 1997 fee scale to establish architectural fees, is much more used on a local level. In its recommendation document, the BNA recommends that clients use the economically most advantageous tender criteria rather than the lowest price, arguing that experience has shown the lack of ability of clients to judge price offers that are often not strictly comparable. It has been seen that local authorities, especially the smaller ones, preferred making use of concessions and real estate developers for their larger operations. In the section concerning the price criteria in the choice of developer, the *Kompas 2* takes into account the importance that this represents for the conceding authorities (one of the proposed procedures only allows for this criteria).

3. Methods of exchange between the client and the project consultants.

Although Dutch clients and architects are particularly reticent about using the competitions procedure, they are more tempted to use the *visiepresentatie*, being a sort of interview without submission of works. It is in effect the point of view (*vision*) and the architect's philosophy concerning the given problem that will be evaluated over a thirty minute interview during which he will present his approach based on existing documents. No drawings or models prepared in advance can be used to back the approach taken by the candidate during this interview. Because this procedure does not involve the production of specific graphic documents, it is both rapid and inexpensive.

If the client wishes to base its choice on a project design sketch, it can use the "multiple commission" (*Meervoudige opdracht*).

It is interesting to note the blurring of the public client / project consultant boundary in cases where the Government Building Agency project manager is led to assume a more or less high level of control over the professional project consultant awarded the contract, generally a young team or one with few references. The result in this case is a more reduced and more informal form of partnership than that currently developing in the United Kingdom, but which appears to be fairly well accepted in the Dutch professional context.

4. Forms and contents of the negotiations.

Negotiation is not a theme developed in the various interviews we were able to have with architects, their representatives or clients. In fact, the negotiated procedure is very rarely used (9% of notices published in the OJEC for 1999, as compared with 82% in Germany, 75% in Luxembourg or even 27% in Belgium, to just cite neighbouring countries)¹. But this should

¹ Source : FRI, Danish Association of Consulting Engineers, 1999 statistics on the Services Directive.

not be interpreted as a weakness in the negotiation practices that take place in the Netherlands. On the contrary, according to our Economic Expansion Post contact, negotiation forms an integral part of the Dutch culture of consensus and, in the project consultancy sector, this is translated by a certain flexibility in the initial calls for tenders, followed by protracted negotiations prior to the attribution of contracts¹.

5. Attitude regarding young architects and/or young practices

The State public commission attribution policy, based on a list of approximately 300 practitioners, provides the Government Building Agency (*Rijksgebouwendienst*), which runs this procedure, with an opportunity to develop a specific way of treating candidatures from young architects. Given that this list applies to all State commissions, no matter whether their amount lies above or below the threshold, the procedure makes it possible to privilege young teams by giving them access to small contracts. For the building of the project concerned by the contract, they may be asked to associate with more experienced practices or to accept a form of control from the Government Building Agency².

6. Priority goals given by clients to project consultants

Sustainability has been an important subject over the past ten years in the Netherlands and is subject to various incentives both from the BNA and the VROM ministry. Within this latter, the Government Building Agency is trying to present itself as a model insofar as the respect of sites and the environment are concerned. The BNA has placed this among its goals, insisting on the necessary contribution of all disciplines to the thinking on town planning, architecture and building, but also affirming the preponderant role of the architect in his role as specifier, particularly concerning the choice of materials and the ways in which they are incorporated into the works. The organisation representing architects recommends the use of a specifically architectural approach to sustainability given that any other solution would risk seeing architectural creativity stifled by standardised technical approaches³.

Cooperation with users is considered as one of the essential success factors⁴ but our survey did not cover the methods in which this was practiced.

FEATURES OF THE NATIONAL SITUATION AND CHANGES TAKING PLACE

In the Netherlands as well as in a large number of other European countries, the coming into effect of the Services Directive marks the beginning of a public contracts legislation which, in the past, had been assimilated as private contracts and largely dominated by private agreement attributions.

¹ Interview with Yves Tatibouet, Economic Expansion Post in The Hague, French Embassy to the Netherlands, 17 November 2000.

² Interview with Mr. Hans Blok and Mrs. H. de Wijn, from the Government Building Agency (VROM), 18 November 2000.

³ Source : BNA (*Bond van Nederlandse Architecten*). *BNA jaarverslag 1999* (BNA annual report, 1999), p.16.

⁴ VROM presentation brochure (Ministry of Housing, Land use management and the Environment. Building the future : environment, space, housing and public amenities. The Hague, August 1997.

The information we have compiled on public contracts open to project consultants is largely focussed on the practices of the Government Building Agency (VROM ministry) which handles the majority of State public commissions through its dual role of partial project consultant and client. This latter role also includes the management and operation of amenities. This centralisation within a large body (950 persons) tends to overshadow the practices of local authorities, although we know that their fields of action are limited (educational, sports and cultural buildings, social housing) and that their contracts are being increasingly attributed to concession contracts signed with private real estate developers.

Insofar as the Government Building Agency is concerned, it has, over the last four years, opted for a global procedure that, by a single call for tenders notice in the OJEC, covers all works for which it is responsible for the year in hand. It uses a restricted procedure that is spread over three phases : a very open preselection among the candidatures received for all or part of the building programme that results in the selection of approximately 300 architects; then, a case by case second preselection among these 300 listed teams to arrive at a total of five to seven candidates; finally, and depending on the importance of the project, the attribution of the contract to a winner designated by a commission either on the basis of written declarations, a brief oral interview, or more or less detailed design sketches or preliminary design works. Throughout this procedure, and more generally in the national architectural policy, there is one person that plays a predominant role, being the Chief Government Architect who runs the Agency, chairs the selection and attribution committees and represents the VROM ministry in most national think-tanks.

A detailed analysis of the methods used to select an architect, which differs little below and above the European threshold, shows the importance given by Dutch public clients to direct exchanges with the candidates prior to the attribution of the contract. The success of the *visiepresentatie* procedure is proof of this and is probably the greatest hindrance to the organisation of Directive-based competitions which require that candidates remain anonymous. It would seem that, in the Netherlands, the attitude of the client when choosing its project consultant(s) swings between two concerns : on the one hand, that of knowing and believing in the “philosophy” and the work methods of its service supplier and, on the other, being able to come to an agreement on a preliminary definition of the project prior to the attribution of the contract. This is what is provided by the “multiple commissions” (*Meervoudige opdracht*) procedure which allows the client to judge invited candidates on the basis of sketch designs for which the architects have been remunerated. It is also what is provided by the Government Building Agency which, as well as the programme, also produces design sketches and even preliminary designs for the operations that it contracts with private project consultants.

PORTUGAL

By Lupicino RODRIGUES
(May 2001)

A. THE NATIONAL STATUTORY AND OPERATIONAL CONTEXT

1. The nature of public building works, the public client structure

The public client on State level

If one is to believe Mr. Santos Costa¹, until 25 April 1974 (day of the Carnation Revolution), public commissions were exemplary. Precise rules existed and were applied in an equally precise manner by a specialised structure, the Ministry of Public Works, which centralised all State commissions.

But for the past fifteen years, each Ministry has been responsible for attributing its own contracts in its own areas of competence and, as there is no coordination, the State does not have an overall view of the contracts.

According to the IMOPPI², these tasks, now decentralised, have been placed in the hands of badly prepared agents and inefficiently organised departments that are increasingly externalising the preparation of programmes. One of the great challenges currently facing the State is to organise itself to improve the efficiency of public commissions, particularly where projects are concerned. Emphasis is going to be placed on training personnel in the State technical departments in bid analysis methods and ascertaining the best offer. To this end, the IMOPPI plans to draw up a convention with the universities in order to provide this training to the concerned persons.

During the interview that we had with one of its representatives, we learnt that the IMOPPI, observer and client advisor, was also particularly concerned by other areas connected with works contractors which could reflect on the management of sites by designers, architects or engineers.

1. Given that a substantial majority of public works contractors are small and medium-sized firms, it is necessary for the IMOPPI to explain the practice of subcontracting. The fact is that clients do not know how, when or where subcontractors work, nor at what price. This is

¹ Interview with Mr. Pedro SANTOS COSTA, general secretary of the Order of Architects, 14 December 2000.

² Interview with Mr. Vasco Martins, of the IMOPPI (institute of public, private and real estate contracts), 14 December 2000. The IMOPPI is a public entity created in 2000 and is responsible to the Ministry of Social Amenities (previously the Ministry of Public Works). It is an institute that 1) qualifies public and private works contractors as well as real estate agents, 2) intervenes in the standardising process of regulations for public works contracts, 3) represents a public works contracts observatory covering the entire country, 4) provides public clients with advice concerning the interpretation of laws on competitive bidding procedure for their works, the stated aim being to harmonise practices between public buyers to ensure that contractors are treated in the same manner throughout the country (particularly those aspects concerning qualification requirements and the presentation of bids) to ensure an optimal competitive bidding framework.

why a law was voted which makes the declaration of subcontractors obligatory through the use of a short written contract. This law stipulates that a contract-holder cannot subcontract more than 75% of its contract. For the IMOPPI, the real contract is the subcontract and an understanding of the subcontractors is necessary for the works to be carried out in a satisfactory manner; this also avoids a spreading of responsibilities and makes it possible to fight against the use of illegal manpower.

2. On the other hand, the IMOPPI has also specified that it is the architectural projects that determine the quality of the works. For example, this Institute has noted that a large number of works are badly prepared on the project level, leading to an imperfect competitive bidding procedure and high extra costs to the State. Its attention is increasingly focused on the beginning of the procedure and the definition of the project prior to the attribution of the works. Consequently, the IMOPPI questions the qualifications of architectural “firms”. In many cases, the project is prepared by in-house client teams. According to the IMOPPI, the project is often a mixture of architecture and “specialities” (civil engineering, etc.) which are either handled internally or placed in the hands of external practitioners. Each practitioner then assumes its share of responsibility and signs the project. This demands that the contract be well drawn up, especially since the State is increasingly using competitive systems for its projects. Consequently, it is now necessary to clearly disassociate the responsibilities of the person or body responsible for the design of the project from those of the person or body responsible for the decision-making process.

Financing rules have also changed. Due to the fact that the country has fallen far behind in the construction of infrastructures (in Portugal, public and private works contracts represent 10% of the G.D.P.), the State has made extensive use of the private sector (a large number of motorways have been financed by private investors), with the many problems that this can represent. This is the situation with public works concessions. Mr. Vasco Martins explained that what is becoming important in this type of concession is the provision of services subsequent to the construction. However, those involved in the construction sector in Portugal have shown that they do not always have the abilities to manage these services in an efficient manner.

The public client on local authority level

Concerning local authorities, there is a strong integrated project consultant tradition which goes back to the 1974 Revolution and the subsequent years during which a large number of architectural design studies were carried out by architects working within the administrations. Mr. Santos Costa explained that this trend was brought to a halt in the early 1980s by the coalition government (PS-PSD). Nonetheless, there continue to be many projects developed within town halls, especially town planning projects and the rehabilitation of small buildings. This point was picked up by the Porto contact¹ who explained that the private sector does not always consider the problems and the solutions to be provided in the same way as a competent public sector. For him, the public sector needs to have a technical department to allow it to establish its requirements. However, the most significant case appears to be that of Lisbon where there is a Housing Department responsible for developing the social housing stock. To do this, this Department has a team of municipal architects that prepare projects within the city's other departments. Similarly, there is a Town Planning Department that prepares in-house architectural and town planning drawings. Generally speaking, when private project

¹Interview with Mr. Nuno LOPES, legal head of the structure responsible for urban renovation and regulations concerning the rehabilitation of rented buildings, at the Porto town hall, 15 December 2000.

consultants are called on, the preliminary programmes are carried out internally by the city departments.

The above is representative of what takes place in the large towns. At the other end of the scale, the IMOPPI informed us of the lack of skills existing in the technical departments of the smaller municipalities and the plans now underway to provide them with technical assistance. However, no less than 60% of architects are civil servants either employed by the State or by local authorities.

2. Main characteristics of the project consultancy

Culturally, the date retained by one and all is 25 April 1974, the day of the Carnation Revolution. The corporatist regime that existed until then had a policy that was highly unfavourable to the architectural profession which was considered as politically suspect due to the contacts that it held abroad. In addition, the elitist recruitment system meant that little was known of the profession by the population. In 1974, there were only 1,000 architects in Portugal.

The educational system has now become largely democratised. Mr. Santos Costa explained that there are now nearly 10,000 architects in Portugal (being the highest rate in Europe according to population level), of which 70% are under 40. At the beginning of the 1990s, there were two schools of architecture (Lisbon, Porto). There are now 23 architectural training establishments spread across the country, five of which in public universities. This rapid growth is explained by the fact that this training, highly sought after by students, was easy to introduce in educational establishments.

In parallel with this phenomenon, the profession is increasingly recognised by the population which, especially in coastal regions, aspires to a better quality of building design. As a result, a large number of private developers who in the past considered the intervention of an architect as a luxury and a nuisance when it came to site organisation, have realised that an architect's signature "sells apartments"¹. This explains why 30% of private buildings are now architect-designed as opposed to 1% just a few years ago. Inland, builders and their target clientele are less demanding and the use of an architect is less frequent.

Nevertheless, the architectural profession is having to deal with the competition represented by building construction engineers. This is because, until 1963, building construction engineers were entitled to be project consultants. It was only as from then that a specific qualification was required from them. But, even now, they have the right to provide architectural services, on condition that the building does not exceed four storeys. The Order of Architects obviously wishes that only registered architects be able to carry out architectural missions and is currently negotiating with the government in view of issuing a decree to this effect. However, when answering calls for tenders issued by clients, this rivalry does not represent an obstacle to the constitution of groups that comprise both architects and engineers. This, in fact, is the most commonly used approach. Mr. Nuno Lopes, of the Porto town hall, insisted on the fact that, for him, the existence of several contracts simply spreads the responsibilities : the architect should be the coordinator and responsible for the design team as, by definition, an architectural project includes specialty sectors (structures, networks,

¹ Interview with M. Pedro SANTOS COSTA, general secretary of the Order of Architects, 14 December 2000.

etc.)¹. Mrs. Sampaio follows the same line of thinking when she explains that an experienced architect should call on an engineer during the architectural design sketches stage in order to have his proposed solutions technically validated².

In Portugal, there is an intervening party included in the building process that does not exist in France, being the “fiscal”. This is a type of assistant to the client to whom the contract is passed immediately after the choice of project consultant and who is fully responsible for supervising the works³. By administrative contract, the client delegates his powers to the “fiscal” who then represents the client on site. The contents of this contract are set by law and can provide for the “fiscal” being responsible for technically managing the site or simply provide him with the role of checking payments. In liaison with the client, the architect and the “fiscal” analyse the proposals submitted by candidate contractors. Certain administrations have permanent contracts with “fiscals”.

In any event, the architect has the right and the obligation to provide technical assistance : he visits the sites, ensures that the works comply with his project and can refuse any changes to this latter during site works⁴. “Not a screw can be different from what has been specified in the project without the architect’s approval”⁵.

There is also a new way in which the architect can intervene, in which the local authority chooses architectural project and then launches a design-built procedure for the technical specialities : the studies are then carried out by the contractor and the architect checks the quality of the proposals and their compatibility with the projects.

3. Regulatory control of public contracts before and since the Services Directive.

Services Directive 92/50 dated 18 June 1992 was transposed into Portuguese law by two regulations : executive enactment 55/95 dated 29 March 1995, then executive enactment 197/99 dated 8 June 1999 which repealed, replaced and increased the complexity⁶ of the preceding enactment.

Executive enactment 55/95 stated that architectural services could only be bought through the use of open or limited ideas competitions, no matter what the amount of the contract. However, the application of this condition raised a problem as clients were essentially obliged to use open competitions and were only able to check the tax and social status of candidates at the end of the procedure, once the submissions were ranked.

Executive enactment 197/99 thus limited the need to use open or limited competitions for contracts where the fees exceeded 25 million Escudos (approximately 800,000 Francs or

¹ Interview with Mr. Nuno LOPES, legal head of the structure responsible for urban renovation and regulations concerning the rehabilitation of rented buildings, at the Porto town hall, 15 December 2000.

² Interview held 14 December 2000 with Mrs. SAMPAIO, architect with the Lisbon local authorities and member of the Order of Architects competitions team as well as member of its executive council. She is responsible for town planning management within the Lisbon local authorities and the appraisal of architectural projects for a sector of the city.

³ Interview with Mr. Vasco Martins, 14 December 2000.

⁴ Interview with Mr. Pedro SANTOS COSTA, general secretary of the Order of Architects, 14 December 2000.

⁵ Interview with Mr. Nuno LOPES, head of legal affairs at the Porto town hall, 14 December 2000.

⁶ There was an increase from 109 to 230 articles. Interview with Mr. Nuno LOPES, head of legal affairs at the Porto town hall, 14 December 2000.

127,000 Euros). The organisation of these competitions respects the anonymity of the proposals. For contracts below this threshold, it is the rules of general law governing public procurements that apply (open and restricted procedures, negotiated contracts, order forms). In this case, the public buyer does not require a design sketch or preliminary studies. It establishes its selection on the basis of price criteria (economically most advantageous tender or, very rarely, lowest price), the candidate's CV, the specialists surrounding him, and the amount of proposed fees. In the case of calls for tenders for town planning projects, the judgment is made on the basis of project methodology and a fee proposal.

4. Methods to ensure the legality of procedures and contracts. Recourse for project consultants and contractors who believe themselves wronged. Recommendations, penalties

In Portugal, there is no department responsible for checking legality (a posteriori checking to ensure that procedures have been respected) as there exists in France. However, there is a body, the "tribunal de contas" (the court of accounts), which is responsible for ensuring the regularity of government expenditures by checking the accounts. Once contracts are signed, with the exception of those of very little importance¹, they are subject to the approval of this court which may take six months or more. Consequently, institutional control is relatively limited and administrative control does not exist (with the exception of internal controls carried out within the authority).

This is the reason that the Order of Architects, one of whose missions is to defend the promotion of architectural quality, is highly attentive to the legality of the procedures used to choose project consultants. When the Order of Architects detects an irregularity, it alerts the press and informs architects through its professional magazine. In addition, the Order of Architects competitions department (structured into two zones: North and South) has prepared specifications for competitions and, when the client invites a representative of the Order of Architects to sit on the jury, this latter will only accept on condition that the rules governing advertising, transparency, anonymity and the majority presence of architects on the jury are respected. As a result, and within the profession, there is an important distinction between competitions where there is a representative of the Order and those where the Order has refused to sit on the jury. This has led to certain competitions receiving a seal of approval².

Any disputed claims introduced by architects are rendered inefficient by the slowness of the administrative courts.

5. Methods for establishing the amount of fees

Portugal has what is called an "Instruction for the calculation of fees for public works projects". It existed before the Carnation Revolution and remains in force today. This document sets the contents of the project consultant contract, establishes a remuneration percentage based on the cost of the works, and the cost limits.

Consequently the contents of the project consultant contract are as follows :

- basic programme.

¹ Interview held 14 December 2000 with Mrs. SAMPAIO, Lisbon local authorities architect and member of the Order of Architects competitions team as well as member of its executive council.

² Interview with M. Pedro SANTOS COSTA, general secretary of the Order of architects, 14 December 2000.

- preliminary studies.
- preliminary design.
- works project.
- technical assistance during the works phase.

“The instruction for the calculation of fees” varies the remuneration according to a percentage grid which makes adjustments for both the amount of the works and complexity of the works (there are four works categories ranging from the simplest to the most complicated projects). Thus, for works costing 25 million Escudos (being approximately 800,000 Francs or 122,000 Euros) the rate is 12% which, according to the Porto town hall, is highly advantageous to architects. In practical terms, the architects submit a proposal on the basis of the Instruction, and then negotiations are carried out between the architect and the client (fees, work methods, completion times)¹. Naturally, the Order of Architects considers this rate as a minimum, but it is often considered by clients as a maximum. However, and according to Mr. Nuno Lopes, its reference function is real inasmuch as if the price criteria were exceptionally to be used in a call for tenders, the attribution would never be to the lowest price as there would be strong temptation for candidate architects to violate the rules of ethics. The rate defined by the Instruction is applied to the entire commission and, in the case of grouped designers, concerns the entire team; consequently, it is equally applied to services provided by engineering contractual partners for their technical specialities (networks, structures).

The Order of Architects stated that there have been cases where the project consultant has reimbursed the public client part of his remuneration as, on completion of the operation, the works proved to be less expensive than initially anticipated.

However, there are no Portuguese regulations concerning the attribution of responsibilities to authors of projects in the case of errors or oversights. In the case of these latter, it is the general law governing civil liability that applies : it is up to the public client to prove that there is prejudice.

6. A policy aimed at distributing public commissions and supporting the profession?

Public commissions represent the largest proportion of architectural contracts for project consultancy. However, access to these commissions is difficult and it would appear that clients show little inclination, given the lack of statutory regulations providing any incentive, to favour the development of new talent.

This explains the specific nature of the profession’s structure in Portugal : nearly 60% of architects work as civil servants in town halls or in a State department, either on an operational or teaching level. Given that civil servant salaries in the public sector are not high, a large number of civil servant architects seek to increase their income by also working in the private sector.

Conversely, many newly qualified architects having graduated over the last ten years launched out by themselves in the competitive sector but have since decided to hold down a job in the public sector to ensure a minimum level of income.

Finally, over the past few years, many young architects have taken jobs as consultants and salespersons in building materials firms, supplies, furniture and home decoration shops.

¹ Interview with Mr. Nuno LOPES, head of legal affairs at the Porto town hall, 14 December 2000.

This situation, similar to that to be found in Italy, where there are many architects and little work, is beginning to worry professionals¹.

B. PROJECT CONSULTANCY CONTRACT ATTRIBUTION PRACTICES

1. Most used procedures for choosing project consultants

In most cases, the preliminary programme specifying the client's commission is drawn up by this latter. This document defines the subject of the commission, the phasing of the project, and provides surveying information and the applicable town planning rules, as well as the building's operational requirements and its cost limits.

Because there is no control body, each public buyer appears to have a fairly wide-ranging freedom in choosing the designation procedures.

For example, the Porto municipality has several times used an open competitions procedure adapted from the Directive text. In order to ensure that anonymity is fully respected, the procedure used only checks the regularity of candidates with regard to their tax and social status once the jury has ranked the projects. In certain cases, this has led to the elimination of candidates having been ranked by the jury for errors in the preparation of their files. This would appear to have been the source of numerous controversies.

To correct this, the Porto authorities doubled up the commission intervening within the framework of the open competitions procedure : a first commission, subject to an obligation of confidentiality, checks the administrative documents and excludes those candidates that do not comply; in a second phase, a jury comprising a majority of architects checks and ranks the anonymous works of those candidates that administratively comply with requirements.

However, most public buyers practice "ajuste directo" which can be translated by "direct attribution". Although this procedure is provided for by the regulations, it theoretically only concerns commissions representing a small amount. In Portugal, the procedure is also used for works representing large amounts. An example of this can be seen in the contract for the building grouping all the Lisbon administrative departments where the project consultant was designated using this *ajuste directo* procedure. This same procedure was also used following the fire in 1987 which devastated the historic Baixa district in Lisbon. The local authorities considered that the urgency of the situation justified the lack of use of the competitive bidding procedure and the architect A. Siza Vieira was directly engaged by the local authorities to act as project consultant for the reconstruction of the district. Although this took place before the publishing of the Services Directive, the approach taken is indicative.

Evora, a town with a strong historic heritage, is another interesting example as it unites all the different potential situations. There are three major public clients in Evora : the town hall, the Heritage Institute which has its own in-house architectural teams, and the University Rectorate which is responsible for historic buildings as well as a large real-estate portfolio. This administration organises anonymous competitions for student residences, libraries, etc.

¹ Interview held 14 December 2000 with Mrs. SAMPAIO, architect at the Lisbon city hall.

The Evora local authorities have an in-house architectural department. This is why the town has such a high quality of town planning and heritage maintenance. But the procedures used to choose architects are misleading : small projects (crèches, etc.) are designed in-house by the municipal departments and only emblematic buildings are subject to public contracts and then the town contracts with star architects who use these commissions to increase their references and their influence.

The Porto authorities believe that the competitions procedure is expensive for the client. As a result, it can be justified for emblematic buildings but is not deemed appropriate for provisional or utilitarian buildings built to meet the urgent requirements of the population (such as a bath-house in an underprivileged district). “A city is a set of social issues, and urgency is incompatible with competition procedures and the time they take”¹. As far as the Porto local authorities are concerned, the complication of the regulations and the time required to see projects brought into fruition is incompatible with the need to respect the operational imperatives of delivering the amenities required by the population. The Directive itself is seen to be badly prepared and not adapted to the building sector : “Design services are seen as being works of art. It is difficult to combine idea competitions and the concept of quality. The subjectivity of the former is opposed to the objectivity and responsibility for design errors of the latter”.

This position runs counter to what is defended by architects. According to Mrs. Sampaio, most works carried out by the towns are small operations of less than 1,000 square metres, for which the local authorities do not use competitions. But “it is these types of operations that constitute a town”. Her opinion is shared by the Order of Architects : in order to encourage as much competition as possible, the Order upholds the use of anonymous open competitions. Where these types of procedures exist, there can be up to 50 submissions. Although this system is very expensive for the participants as only the first three are compensated, it retains a high level of equality between the candidates. However, given the worrying level of indebtedness of a large number of architectural practices, the Order is becoming increasingly favourable to the idea of limited rather than open competitions, but given the delays inherent in this procedure, public clients have become discouraged and there are very few that use this procedure.

In any event, according to the Order of Architects, public clients have not realised that there are two major advantages attached to competitions :

- they offer a wider range of proposals than the *ajuste directo*.
- they symbolically enhance the competition organiser by the cultural emulation he creates if care is taken to ensure media coverage of the resulting works.

In Portugal, State public clients try to shorten the time taken to choose an architect in order to counterbalance the general slowness of decision-making processes and the obligation to use the aids provided by the European Union within strictly defined time limits. To achieve this, and particularly in the case of major public building or infrastructure programmes, the government adopts executive enactments (approved by the Parliament) that creates private companies responsible for studies and which have the right to select their project consultants by *ajuste directo* (attribution by private agreement).

¹ Interview with Mr. Nuno LOPES, head of legal affairs at the Porto town hall, 15 December 2000.

This is the system that was used for the construction of the Expo 98 facilities as well as for the “Porto 2001, European cultural capital” event. It is also being used for the works necessary to organise the 2004 European Football Cup (Euro 2004) for which the client is a collection of municipalities : the executive enactment taken by the Government on 29 February 2000 permits the use of *ajuste directo* for contracts to be signed with designers.

As a result, parallel clients, subject to private law and escaping the Services Directive, are set up by the State as soon as this latter wishes to see the rapid completion of a major operation. This has led to heated debate in Portugal. For Mr. Nuno Lopes, “we are seeing the creation of a veritable parallel administration with its own specific operational rules, but the administration itself is not making the necessary reforms that would allow it to operate in accordance with its own rules”. This point of view is shared by Mr. Pedro Abrantes : “Large operations should be exemplary, the law should not simply apply to small operations. If the law is bad, it should be changed”.

2. Dominant criteria in the choice of project consultant(s)

In Portugal, those responsible in the public sector do not take risks. This fact, linked to the need to do things quickly, is a potential explanation of why the *ajuste directo* is so popular, despite its complete contradiction with the regulations. For example, in Evora, a competition was not followed through due to problems encountered during negotiations. Since then, the authorities in this town have favoured the use of the *ajuste directo*¹.

What appears to be important for public buyers is the speed of the commission process rather than the architectural debate. According to Mr. Santos Costa, this is demonstrated by the fact that the payments allocated within the framework of competitions are underestimated and the fact that few exhibitions take place once the competition results have been given (despite systematic requests by the Order). This situation reflects a certain intolerance of clients in the awarding of public commissions : by attributing *ajuste directo* contracts to the most well-known architects, they reinforce the poverty of architectural debate in the country.

For Mr. Nuno Lopes, “the imagination of architects is a major contribution to estimated costs not being respected”². Paradoxically, legislation does not provide for the project consultant being penalised should he exceed the estimated cost of the works. This is why certain clients provide for penalty measures in their contracts. For example, in their competition rules, the Porto authorities specify that the works project shall be subject to revision works carried out by a specialist recruited for this purpose in order to detect any errors or omissions in the project. If the percentage of detected errors does not exceed 3%, the authorities accept the cost of this revision. If it exceeds 3%, the project consultant shall be responsible for financing these revision works.

The lack of confidence that seems to exist between clients and project consultants is also translated by the development of design-build procedures in which it is criteria concerning the works completion period and cost that are considered as paramount, rather than architectural quality. This procedure is used by the Lisbon local authorities Housing Department. The Order of Architects regrets this situation. “From a quality point of view, it is disastrous as the

¹ Interview held 14 December 2000 with Mrs. SAMPAIO, architect at the Lisbon city hall.

² Interview with Mr. Nuno LOPES, head of legal affairs at the Porto town hall, 15 December 2000.

architect's client is no longer the client but rather a public works contractor. This procedure has changed the working environment of architects : due to the increasing number of architects, those that choose to participate in this type of procedure are not necessarily those that best understand the intrinsic ethical problems"¹.

3. Methods of exchange between the client and the project consultant

Because of the lack of interest that clients show for architectural debate, exchanges between clients and project consultants seem to be limited. As a result, ideas competitions are rare in Portugal and essentially concern external spaces. The authorities in the town of Cascais have used them for the laying out of public squares, the Lisbon local authorities have used them for street furniture, with prizes attributed to the ranked architects. While the town of Sintra used an ideas competition for the rehabilitation of its historic centre, the project was then given to an architect other than the winner, given that ideas competitions do not necessarily lead to contracts being attributed.

The desire to engage in real architectural debate appears little developed in Portugal.

The Order of Architects, like the Portuguese government, is opposed to competitive dialogue. Similarly, candidates are not interviewed.

4. Forms and contents of the negotiations

Clients often admit that in terms of intellectual services, price is a bad criteria and should therefore be negotiated with the chosen architect for reasons other than his financial bid. Negotiations are nevertheless governed by the previously mentioned Instruction which sets the contents of the contract and defines the elements of the mission. Consequently, in all consultation procedures other than calls for tenders, the candidates submit a basic proposal prepared in view of a preliminary programme which falls under the client's responsibility. The most widespread situation is one of a single contract signed by the client with a group of designers or with an architect who has decided to associate with engineers. Negotiations then take place on the fees, with the rates serving as a basis of discussion also being set by the Instruction.

Once the contract is signed, the negotiations also concern the finalising of the project, with the client able to further detail its demands as the studies are submitted².

5. Attitude regarding young architects and/or young practices

Given the youth of the professional group (70% of architects are under 40), this is an important area

It should first be noted that no national procedure aiming to promote the access of young architects to public commissions exists in Portugal. On a local level, the Porto authorities once worked in this direction by trying to favour young architects within the framework of small operations subject to the *ajuste directo* procedure³.

¹ Interview with M. Pedro SANTOS COSTA, general secretary of the Order of Architects, 14 December 2000.

² Interview with M. Pedro SANTOS COSTA, general secretary of the Order of Architects, 14 December 2000.

³ Interview with Mr. Nuno LOPES, head of legal affairs at the Porto town hall, 15 December 2000.

According to the Order of Architects, the only procedure permitting young architects to have access to public commissions is the open and anonymous competition. Clients using this procedure may have the “surprise of finding themselves with a young team”¹. This was the case for the Santa Clara monastery in Coimbra, where a young architect was declared winner and given the contract despite the presence of more prestigious teams in the competition. The client was completely satisfied with the resulting renovation works.

This procedure also allows foreign architects to be awarded important contracts, such as Vittorio Gregotti who was selected as project consultant for the Belem cultural centre in Lisbon.

The Order considers that the open and anonymous competition procedure is the best way of respecting the equality of treatment of architects in the public commissions sector. But it is also aware of the limitations inherent in this procedure, especially in terms of the financial impact on the profession : only the first three candidates are compensated, the other open competition participants lose out. “There is no ideal situation, even with anonymity”².

In any event, as noted by Mr. Nuno Lopes, this procedure appears to be the only one able to break down the star-system : “Every architect wants to see the quality of his work recognised, but once he has attained a certain level of reputation, it is the person and not the design that is the most important”³. This is reiterated by Mrs. Sampaio : “Everything depends on the architect’s social networks – a diploma is not enough”⁴.

6. Priority goals given by clients to project consultants

According to Mr. Vasco Martins, from the IMOPPI, the main concern of the public authorities at the present time is the large number of projects that exceed the initial budgets programmed for public building operations : “The cost of a bad competitive bidding procedure is expensive for the State. It is necessary for the buying process to begin well if all the rest is to work out in a satisfactory manner. This is why the architectural project is so important if additional works are to be avoided”.

On a strictly operational level, the IMOPPI has drawn up a law that forbids contract amendments for additional works if they represent more than 25% of the initial value of the contract. For the IMOPPI, this new law should place greater emphasis on the quality of the architectural project, and this Institute is already working on a draft text that, over and above the strict technical requirements that already exist, defines what an architectural project that complies with good practices should be.

On reading the Bulletin Européen du Moniteur dated 22 January 2001 (n° 510), this interpretation would thus seem to be a logic closer to that of cost control than the quality of the architectural gesture. The Bulletin states that “the observed lack of quality, both on social housing and private sites, results in an average 20% additional cost on the price of the building works... It would appear that minimum requirements concerning building standards are not taken into account and that, fairly often, contracts signed with contractors represent no

¹ Interview with Mr. Pedro SANTOS COSTA, general secretary of the Order of Architects, 14 December 2000.

² Interview with Mr. Pedro ABRANTES, head of the Order of Architects competitions team, 14 December 2000.

³ Interview with Mr. Nuno LOPES, head of legal affairs at the Porto town hall, 15 December 2000.

⁴ Interview held 14 December 2000 with Mrs. SAMPAIO, architect with the Lisbon local authorities and member of the Order of Architects competitions team as well as member of its executive council.

more than a single sheet of paper which only indicates the number of units to be built, their typology and the number of square metres of surface area... Finally, and according to the chairman of the Building Institute, this drift in building quality results from the lack of on-site supervision and inspection”.

FEATURES OF THE NATIONAL SITUATION AND CHANGES TAKING PLACE

This study reveals that the practices acquired prior to 1974 have been entirely reappraised and accompanied by an in-depth modification to the institutional structures.

The current context is very encouraging for building contracts (housing, public buildings, etc.) and has led to the creation of a large number of practices. However, given that the rules governing public commissions have only recently been applied, the system is not yet in place and favours the use of anonymous open competitions that are either not or insufficiently remunerated as well as the *ajuste directo* procedure. Consequently, given the type of public operations and the remuneration of project consultants, the application of the European regulations remains limited in practical terms.

The situation in Portugal is characterised by the lack of architectural debate accompanying public commissions : clients seem to consider it is far more important that the procedure for choosing project consultants be as rapid as possible. To this end, they avoid the use of competitions which are considered to be too complicated and attribute the most important operations to well-known architects.

If necessary, the government uses executive enactments to create private entities that escape the application of the Services Directive rules : this is what happened for Expo 98, Porto 2001 European Cultural Capital and Euro 2004.

A few competitions have been organised and provided young architects, especially in the anonymous open competitions procedure, with access to major commissions. This is why the Order of architects prefers this procedure, despite being well aware of its limitations (due to the lack of compensation for non-ranked candidates).

The architectural profession seems to suffer from a certain number of problems : difficulty in having access to public commissions, indebtedness, competition from engineers for the most common operations. This may well explain the particular structure of the profession which has 60% of architects working for the State civil service or in local authority departments.

THE UNITED KINGDOM

Véronique BIAU
(May 2001)

A. THE NATIONAL STATUTORY AND OPERATIONAL CONTEXT

1. The nature of public building works, the public client structure

For many years, the PSA (*Property Service Agency*) was the body responsible for building and maintaining the State's property holdings. Approximately a third of design missions were carried out by its in-house project consultant services and the remaining two thirds were given to external consultants. In 1990, the Ministries were made responsible for their own property holdings and no longer obliged to use the PSA to select and remunerate their external consultants¹. In 1992-93, the PSA was privatised and the State public client saw its structures undergo an in-depth overhaul. The PACE (*Property Advisers to the Civil Estate*) temporarily assumed the management and rental of civil buildings as a paid service provider for those Ministries requesting this service. It was then merged, on 1 April 2000, with the OGC (*Office of Government Commerce*), a body dependent on *Her Majesty's Treasury* and whose main goal is to make savings in the supply of public assets in a sector ranging from the ordering of office supplies to the setting up of PFI projects (*Private Finance Initiative*²) for public amenities³. The OGC is run by Peter Gershon, who wrote a report in 1999 recommending the centralising of public commissions to better manage the public budget⁴.

The public buying rationalisation policy obviously had a strong impact in the building and development sectors. In July 1994, a report by Sir Michael Latham "*Constructing the Team*" laid out 30 recommendations for rationalising the building industry, reducing litigation, preventing cost overruns and improving quality. This report had the effect of mobilising industrialists in the building sector and led to the creation of the *Construction Industry Board* (CIB) which represents these industrialists, and then the *Construction Client Forum* (CCF) which groups together their main clients. Following on from this, a campaign was officially launched on 4 October 2000 aiming to substantially modify public client practices. This campaign is based on the publishing and widespread distribution of a brochure called "*Better*

¹ BRESARD (D.), FRADIN (C.). *La commande publique; étude comparative sur le contexte institutionnel et les modalités d'attribution de la commande publique d'architecture*. Paris, MIQCP, 1991.

² See DANARADJOU (K.). *Le partenariat public-privé au Royaume-Uni*. London, Economic Expansion Post, September 2000. 105 p.

³ The OGC groups together all government institutions intervening in public contracts, among which : 1) The Buying Agency (TBA) created in 1991 to assist local and national authorities in passing procurement contracts with the private sector, 2) The Central Computer Telecommunications Agency (CCTA) specialised in the purchase of technical equipment, 3) The Property Advisers to the Civil Estate (PACE) specialised in the management of real estate funds, 4) The PFI Unit, in charge of public-private partnerships in the building and infrastructures sector.

⁴ GERSHON (P.). Review of Civil Procurement in Central Government, April 1999. 13 p. , can be downloaded from the OGC web site (<http://www.ogc.gov.uk>).

Public Buildings; a Proud Legacy for the Future” issued by the Prime Minister’s departments. This document, prepared by a commission chaired by Lord Falconer and bringing together the main concerned administrations¹, picks up the conclusions of the report requested from Sir John Egan by Tony Blair, when he came to power, to rationalise the building industry and simultaneously improve prices, construction time and the quality of services provided by this sector². This report resulted in a set of ideas and operational measures aimed to change the existing procedures in order to obtain this improvement. The key principle of the report is that to obtain the best value for money, it is necessary to set up project teams that integrate, in the form of long-term partnerships, the client, designers, building contractors, subcontractors and suppliers of materials. The report evaluated that a saving of 10% a year could be obtained in this way, both in cost and in construction time. Since its creation, 170 pilot projects have been launched or completed³ and the main government clients are currently preparing a set of goals, procedures and evaluation criteria under the name of “*Achieving Excellence Program*” which should be completed by early 2002.

This policy in favour of *partnering* has been accompanied by a growing number of new bodies, thoughts on procedures and information brochures. Among the bodies most directly implicated in this action, it is worth citing the CABA (*Commission for Architecture and the Built Environment*⁴) created in 1999, the *Movement for Innovation* (M4I), created on 3 November 1998, and the GCCP (*Government Construction Client Panels*), created on 12 March 1997, which groups together State public clients (the Ministries, their agencies and non-ministerial public services which jointly represent an annual investment budget in buildings, new construction works, rehabilitation and maintenance, of approximately £ 7.5 billion a year⁵).

On a local level, the public client was substantially restructured when Mrs. Thatcher came to power in 1979. At this time, approximately 40% of British architects worked as project consultants in the public sector, particularly in local authorities. These services, criticised for their inefficiency, were placed in competition with private firms and most have since disappeared or been privatised. Currently, there are virtually no architects working in local authorities (53 counties, 36 boroughs, 333 districts) and there seem too few of them to even carry out the necessary programming and public client tasks incumbent on them in a satisfactory manner. Local authorities retain a public client competence for certain types of buildings, such as schools (through the 150 *Local Education Authorities*), hospitals and police stations.

¹ The Prime Minister’s Cabinet, the Ministry of Culture, Communications and Sport, the Ministry of the Environment, Transport and the Regions, the Office of Government Commerce dependent on HM Treasury, the Ministry of Defence, the Ministry of Education and Employment, the Ministry of Social Security and the Commission for Architecture and the Built Environment (CABA).

² “Rethinking construction”, a report published by Sir John Egan in July. It can be consulted in the Ministry of the Environment’s web site (<http://www.construction.detr.gov.uk/cis/rethink>).

³ A presentation in the form of a data base can be found in the Movement for Innovation web site (<http://www.m4i.org.uk/projects/>)

⁴ Among other sectors, the CABA is responsible for promoting quality in public buildings. Through its « project enabling » measure, it provides the public and private clients who so wish with a commissioner or representative to assist them, for instance, in the drafting of specifications, setting out the procedure and criteria for choosing project consultants, or improving the methods used to attribute contracts. For further information concerning this Commission, see its web site (<http://www.cabe.org.uk>).

⁵ Source : GCCP web site : <http://www.ogc.gov.uk/gccp>.

However, the main trend in the current development of the public client is the increasing power of the concession system, being a disguised form of privatisation that takes its source in the PFI programmes (*Private Finance Initiative*). These were launched by John Major's government in 1992 in view of reducing the public deficit to 3% of GDP to meet the requirements of the Maastricht agreements. This policy, although renamed PPP (*Public-Private Partnership*) was not questioned when New Labour came into power. This recourse to private financing was the only way that the socialists could raise the funds necessary to carry out the social buildings programme (essentially schools and hospitals) promised during their political campaign while retaining a certain rigour in government spending. Taking all sectors into consideration, the PPP projects represented 14% of public sector investments over 1999. In regulatory terms, they depend on the Works Directive¹.

2. Main characteristics of the project consultancy

The concept of "project consultant" does not exist in the United Kingdom. It is replaced by "consultancy" which has a much wider definition. The roles of this consultancy cover client adviser, value manager, risk manager, project manager, general or specialised design manager, surveyor, contract administrator, construction manager and partnering facilitator².

As far as the 30,600 architects in the United Kingdom are concerned, they benefit from the protection of their title (only architects registered with ARCUK (*Architects Registration Council of United Kingdom*) can bear this title) but have no protection covering their functions. Consequently, in each of their tasks, they find themselves in competition with other practitioners in the building sector. Their global turnover which was £ 1.5 billion in 1996 (being approximately 13.5 billion FF³) was in fact lower than that of French practices for which the INSEE announced a global turnover of 22.4 billion FF for the same year (it should be noted that although 26,500 French architects are registered with the Order, there are probably between 30,000 and 35,000 practicing the profession⁴). British architects have a higher level of export activities than their French counterparts : 16% of their turnover, especially in Hong Kong and Southeast Asia (as compared with 2% for French architects).

Another characteristic is the relatively large size of their practices : companies such as WS Atkins Architects have a total of 6,500 employees, the RMJM practice employs 270 qualified architects, etc⁵. Given that different project specialists are in the habit of working together, there are a great many salaried architects.

The relations between project consultancy partners often take the form of limited liability companies with which clients sign comprehensive contracts; naturally, contracts are even more all-encompassing within the framework of the "partnering" currently recommended to

¹The study report by K. Danaradjou provides a great deal of information and thinking on the practice of public-private partnerships in the United Kingdom. In particular, the author has studied the case of new hospitals and that of a number of major transport infrastructures. See DANARADJOU (K.). *Le partenariat public-privé au Royaume-Uni*. London, Economic Expansion Post, September 2000. 105 p.

² See the brochure : "Appointment of Consultants and Contractors". HM Treasury, Procurement Guidance n° 3. Also see "glossary" at the end of this report.

³ These figures are extracted from the report by CARR (B.), GREZES (D.), WINCH (G.). *Stratégies et organisations des agences d'architecture à l'exportation : une comparaison franco-anglaise*. Paris, PUCA, 1998.

⁴ For further details concerning these figures, refer to the two articles by N. Nogue, then responsible for the CNOA *Observatoire de l'économie de l'architecture* : "Architectes inscrits à l'Ordre et population professionnelle; une étude comparée" and "Agences d'architecture : devenir de véritables entreprises de maîtrise d'oeuvre".

⁵ *Architects Journal*, 15 May 1996. "The 100 biggest practices in UK".

public clients, because as well as associating client and project consultants, they also bring in building contractors along with the subcontractors and suppliers of materials and equipment intervening in the works.

3. Regulatory control of public contracts before and since the Services Directive

In legal and statutory matters, the United Kingdom has two strong particularities : 1) a logic based on results and the satisfaction of the client, 2) a highly pragmatic way of attributing contracts which places overriding importance on the very concept of the contract.

There are different legislations in the various nations forming the United Kingdom, but none of these have codified public contracts or administrative law. To build, a client must obtain two administrative authorisations : the *planning permission* to begin works, and the *building control* to check the completed building¹.

Insofar as public contracts are concerned, the only rule in force prior to the Directive was that all public contracts had to be attributed on the basis of potential service providers entering a competitive bidding procedure. Although the regulations governing the competitive bidding procedure did not require a selection exclusively based on the cost of the services, they were often interpreted in this manner.

The transposition of the Services Directive into national British law was carried out through the law known as the "*Public Services Contracts Regulation 1993*", presented before Parliament on 22 December 1993 and which came into force on 13 January 1994.

4. Methods to ensure the legality of procedures and contracts. Recourse for project consultants and contractors who believe themselves wronged. Recommendations, penalties

There are, in the United Kingdom, a considerable number of centres, bodies and recommendation documents concerning both clients (public and private) and project consultants². The *Procurement Group* in *HM Treasury* and then the OGC published a series of nine "*Procurement Guidances*", each of which devoted to a highly specialised theme. The ones particularly concerning the theme of this study are Guidance n° 5, "*Procurement Strategies*", Guidance n° 4, "*Teamworking, Partnering and Incentives*", Guidance n° 3, "*Appointment of Consultants and Contractors*" and Guidance n° 2, "*Value for Money in Construction Procurement*". This series represents an update of the CUP (*Central Unit on Procurement*) Guidances, fifteen of which concern building contracts. It is published in parallel with those of the *Construction Industry Board* and the CIRIA. These guides are accompanied by the very widespread distribution of information and files in the web sites of the concerned organisations³. Partnering techniques are included in the obligatory continuous training programmes for architects organised by the RIBA⁴. All this represents a considerable investment in terms of thinking concerning procedures and management tools for project

¹ BIPE-Conseil. *Les facteurs de différenciation de la rémunération des missions de maîtrise d'œuvre en Europe (France, Allemagne, Royaume-Uni)*. Study carried out for the PCA, 1996.

² More detailed information can be found in the bibliography and the appendix ("list of web sites") on the brochures and information sites available to all on the Internet which provides a great deal of information and recommendations on this theme.

³ The appendix includes a "list of interesting web sites", being the addresses of these information and recommendation sites aimed at clients and service providers.

⁴ Interview with J. Wright, Vice-president of the RIBA responsible for international affairs, December 2000.

procedures and site organisation, backed by organisation charts, diagrams, programmes, indicative preparation and criteria rating tables.

Relations between partners in the building sector are governed by the 1996 *Housing Grants, Construction and Regeneration Act* which establishes a framework for contracts and the relations that tie them together. It requires that contracts include clauses dealing the attribution and payment of the attributed contract. If these are not included, the clauses are by default those to be found in the *Scheme for Construction Contracts Regulations* published in 1998. It is the *National Audit Office* (NAO) which is responsible for checking the public contracts signed by the administrations and for analysing and evaluating the efficiency of government expenditures made on State level. In October 1999, this body published a report¹ which recommends the use of “*supply chain management*”, being procedures aimed at integrating the design-build system in the building sector. The Audit Commission carries out the equivalent role for local authorities and the decentralised health authorities.

5. Methods for establishing the amount of fees

Despite the unfavourable view of the government, the RIBA prepared an architectural services estimation method but this document has no statutory value or any great operational coverage. This eight page document, the “*Guidance for clients on fees*”, published in 1994, provides contract models and recommendations favouring negotiations which it recommends should not be limited to simply exchanging letters. The fee scale proposes a distribution of fees according to a breakdown of project progress stages, but presupposes that the architect is responsible for the entire mission. It is presented in the form of two charts (new building works, rehabilitation), with variants for each of five building types, and proposes fee percentages that vary according to the cost of the works².

The highly influential *Best Value for Money* principle leads to the choice of consultants not being too heavily restricted by the cost of their services. The understanding that, within the ensemble formed by the cost of construction, and the operation and maintenance of an amenity throughout its working life, the cost of consultants represents no more than 2% and that this largely conditions the remaining 98%³, means that careful attention is paid to the qualities and references held by the consultants rather than the amount of their fees.

It goes without saying that, for the clients, the question of defining the project consultant fees depends largely on the overall procedure adopted. Depending on whether the client chooses a traditional procedure, a *design and build* procedure, a PFI or a “*prime contracting*” procedure, a large number of variables will intervene : separate contracts with different consultants or a single contract with an organisation responsible for the entire design (where separate contracts are used, it is the role of the *project manager*, nearly always present in British projects, that needs to be reinforced); remuneration for specific missions, for the total duration of the project or for a period that can be terminated; lump sum remuneration, at an hourly rate or as a percentage of the cost of the works (it is the combination of lump sums for highly defined missions and hourly remuneration for less certain tasks that is recommended to obtain the *Best Value for Money*). Within the framework of *partnering*, it is during the overall negotiation of

¹ NATIONAL AUDIT OFFICE. *Modernising Procurement*. London, October 1999.

² BIPE-Conseil. *Les facteurs de différenciation de la rémunération des missions de maîtrise d'oeuvre en Europe (France, Allemagne, Royaume-Uni)*. Study carried out for the PCA, 1996.

³ This argument, presented to us by Deryk Eke (OGC) and Mike Keatinge (Department for Culture, Media and Sport), in our interview held 7 December 2000, is also developed in the brochure “Appointment of Consultants and Contractors” by HM Treasury (Procurement Group), page 7.

the partnership contract by all the parties (client, design consultants, building contractors, material and equipment suppliers) that the sharing of profits and risks are discussed.

6. A policy aimed at distributing public commissions and supporting the profession?

One of the effects, whether or not voluntary, of the new *partnering* policy is probably the long-term establishment of collaboration-based relationships between public clients and private project consultants. A partnership that has been successful for a given operation is retained using a virtually unchanged partner configuration for a new operation by a same client. However, the client's search for guarantees favours large companies with significant references, personnel levels and turnover. Small and medium sized architectural practices are concerned that this segmentation of public contracts will make it impossible for them to be attributed these types of contracts. This subject has led to dissent running through the RIBA, and an increasingly strong opposition is making itself felt between the large practices (which, incidentally, are often pro-socialist) and small and medium sized practices which tend to be of a more conservative bent. The RIBA strongly recommends mergers or cooperative measures between small and medium sized practices but these latter, represented within the RIBA by a "vice-president responsible for small practices", have shown themselves to be particularly reticent. It is possible that this body, whose aim is to represent all British architects, could envisage a quota or type of operation within the public contracts sector where small and medium sized practices would have priority over large firms¹.

B. PROJECT CONSULTANCY CONTRACT ATTRIBUTION PRACTICES

1. Most used procedures for choosing project consultants

Competitions have never been appreciated by public clients in Great Britain and no more than twenty are organised a year for exceptional operations². There is a great desire to be "*comfortable with your architect*"³ and clients are worried that an architect chosen through a competition would establish a power relationship unfavourable to them : "an architect should be a servant, not a master"⁴.

Four contract attribution procedures are recommended by *HM Treasury*⁵ :

- 1) public/private partnerships (often called PPP);
- 2) the design-build procedure (potentially associating the maintenance and management of equipment or premises);
- 3) prime contracting (a sort of turnkey development contract);

¹ Interview with J. Wright, Vice-president of the RIBA responsible for international affairs, December 2000.

² See our preceding report : BIAU (Véronique), in collaboration with Marie Degy and Lupicino Rodrigues. *Project consultant competitions in the European Union : application of the 92/50/CEE Directive dated 18 June 1992 and respect of candidate anonymity*. Report for the DAPA, December 1998.

³ According to the formula used by Deryk Eke, Construction Director, Office of Government Commerce (HM Treasury), in our interview held 7 December 2000.

⁴ Tony Edwards, Head of Buildings and Estate Management Unit, Home Office (Ministry of the Interior), in our interview held 8 December 2000.

⁵ Procurement Guidance n°5, "Procurement Strategies", HM Treasury, June 1999. Can be downloaded from <http://www.hm-treasury.gov.uk>.

4) framework agreements, which can also cover design-build or development operations.

The traditional forms of contract, in which the project is virtually completed when the building contractors, their subcontractors and specialist suppliers are consulted, are strongly discouraged for use by public clients in the *HM Treasury* guides and can only be envisaged when they are favourable to the best value for money.

Most recommended procedures make use of the restricted system. The answers to the questionnaire reveal that from 85 to 95% of contracts use this procedure (see table at the end of this chapter). However, most of these, by bringing together design and construction (and, potentially, with the addition of investment, maintenance and equipment management), fall under the jurisdiction of works contracts rather than services contracts.

Nonetheless, public client practices are not yet fully aligned with *HM Treasury* policy. For example, the Ministry of Agriculture, Fisheries and Food whose property holdings essentially comprises offices and research premises, continues to use the separate contracts system. Its approach is as follows: initially, the Building and Estate Management Division of this Ministry prepares the specifications and a feasibility study (whose level of detail is similar to that of the French scheme design). Then, on this basis which allows it to make a fairly accurate estimate of the cost and the time required to carry out the works, it issues three contract notices, generally in the form of restricted procedures: the first two are services contracts with the first aimed at acquiring a project manager and the second an architect which the project manager assists in selecting; in a second phase, once the project is finalised, a works contract is signed with a building contractor, itself assisted by an architect. In addition, a separate contract is often signed with a quantity surveyor¹.

Clients can make use of the “*Construction Line*” data base managed by the Ministry of the Environment and Transport (DETR) which also brings together information and references on both contractors and project consultants. To a certain extent, this data base, which includes a certain number of foreigners, guarantees individuals and companies that it mentions.

2. Dominant criteria in the choice of project consultant(s)

The criteria used to evaluate the quality of the design, as explained in the guides and compilations of “*best practices*” issued by government bodies promoting the new programme are as follows, placed in order of importance²:

- the incorporation of user requirements. This incorporation must appreciate changes to come in the future and the flexibility that the building will have with regard to these changes, as well as the daily detailed management of the produced amenity,
- the global nature of the design process, which means an understanding of how each component is manufactured, transported and assembled on site. The design must also envisage repair or replacement methods for the components,
- a care for detail in all the elements, whether they be prefabricated or manufactured on site,

¹ Interview with Richard BOOTH, Ministry of Agriculture, Fisheries & Food, Building & Estate Management Division, 7 December 2000.

² Procurement Guidance n°5, "Procurement Strategies", HM Treasury, June 1999.

- the incorporation of the environment in the building to be built, in terms of use, maintenance and operation of the amenity, as well as its relationship to the external environment. Safety and health are criteria that must increasingly be taken into consideration, as well as the potential changes that might take place over the working life of the amenity.

In the British recommendation documents and in the comments made by interviewed clients, it is clear that the respect of initial objectives in terms of cost and construction time are essential for all those intervening in the process. Organisation and control over procedures are considered as far more important than the resulting aesthetic and technical qualities of the building when the a-posteriori evaluation is carried out¹.

In no case does the lowest price serve as a criteria in the choice of the project consultant(s). Nor do the British use the Directive's "*economically most advantageous tender*", which they feel has the same connotation as the "*lowest price*". This is why the key term used is "*best value for money*"², being the "best combination between the overall cost of the building and its adaptation to the client's requirements"³. And when this concept is applied to design, it is translated by "the pertinence of the choice of components, the interface between components and the system, the integration of mechanical and electrical equipment into the overall design, the quality of the project's definition at the moment that site works begin"⁴.

3. Methods of exchange between the client and the project consultant

Traditionally, the British make much use of a type of restricted procedure which takes the form of a *competitive interview* between potential service providers or teams of service providers. This is particularly the case of the *Quality-Based Selection* (QBS), inspired by American procedures developed in the 1930s and widely introduced into Great Britain during the 1970s. This often provides the client with two interviews : an initial interview with all the tenderers and then, during the contract attribution phase, an interview with 3 to 7 short-listed candidates.

Generally speaking, rather than basing its choice of project consultant on the services required to achieve the built result, the British client prefers to make a choice based on the professional, organisational and even personal qualities of the consultant, such as his references, accounts documents, internal work organisation, and a personal presentation. Apart from the exceptional use of competitions, two systems are currently used for the attribution of public commissions :

- either the client opts for a traditional procedure but calls on a project consultant at a stage of the project's development that does not leave the consultant much flexibility in the building's architectural design;

- or the client sets up a team of partners very early on in its project and thus instigates a series of long-term multilateral exchanges between the different service providers and suppliers, the final users and the client itself. In this situation, exchanges are continuous and wide-ranging given that the stated goals of each party, the various means used to attain these

¹ For further details concerning this subject, refer to Construction Procurement Guidance n° 8, "Project Evaluation and Feedback", OGC-HM Treasury, 2000.

² Interview with J. Wright, Vice-president of the RIBA responsible for international affairs, 7 December 2000.

³ According to the official definition provided in Procurement Guidance n°2, "Value for Money in Construction Procurement", HM Treasury, December 1997.

⁴ Procurement Guidance n°2, "Value for Money in Construction Procurement ", HM Treasury, December 1997. p.22.

ends (and any failures to do so), the commitments, the proportion of risks and profit that each wishes to assume for the operation, and the methods that each of the parties intends to use to resolve the different types of contingencies with which the project procedure can be discussed. Clients are often advised that these exchanges be subject to the advice of a *partnering facilitator* or a *partnering coach*, trained to manage inter-personal work relationships.

4. Forms and contents of the negotiations

The use of the negotiated procedure, as defined by the Directive, is rare (5 to 10% according to the estimates provided by our contacts). However, negotiation forms an integral part of all service provider and supplier selection procedures, the attribution of the contracts and then the design and construction of the planned building. A great deal of importance is placed on the fluidity and efficiency of the procedure¹ : minimising conflicts, avoiding the “duplication” of tasks resulting from dual checking procedures between partners, and providing each party with physical and symbolic remuneration according to the success of the group work. These are the main concerns of the partnership negotiations that take place within the “*virtual company*”² formed, at least for the entire duration of the operation and without possibility of withdrawing from the initial contract, by the ensemble represented by the client + designers and consultants + suppliers and building contractors.

5. Attitude regarding young architects and/or young practices

Neither in the documents we were able to acquire, nor in the interviews we were able to hold, either with clients or with the RIBA, did the situation of young architects and/or young practices reveal itself to be of particular concern to the Ministry responsible for architecture or to large public clients. The only initiative brought to our attention was that of the *Architecture Foundation* which, among the measures it has taken in favour of architectural quality, has published a guide presenting a selection of 83 young British architects³.

6. Priority goals given by clients to project consultants

The incorporation of the immediate and long term requirements of the operation’s final users is one of the dominant quality evaluation criteria in determining the “*Best Value For Money*”. In the enlarged partnership procedures that architects are increasingly obliged to join, it is clear that it is less their creative capacities that will be privileged and more their ability to integrate and “physically apportion” the various operational and technical requirements. These are provided by the client and/or final users of the building as well as those required by the other economic, technical and organisational consultants, the contractors, and the suppliers of materials, components and equipment.

Thinking concerning “*whole-life costs*” is progressively introducing environmental imperatives liable to apply more or less specifically defined concepts of “*sustainability*”. This, in any case, is the goal of the BREEM Programme (*Buildings Research for Energy*

¹ Among the benefits of this work method, the brochure concerning partnerships lists both the interest of the applied intellectual and material synergies as well as the positive repercussions of a successful operation on the personal and professional reputations of the concerned individuals and firms.

² According to the terms of J. Wright, Vice-president of the RIBA responsible for international affairs.

³ ARCHITECTURE FOUNDATION. *A Guide to Britain's best young architectural practices*. London, 1998.

Efficiency Management) developed by the DETR (Ministry of the Environment, Transport and the Regions).

FEATURES OF THE NATIONAL SITUATION AND CHANGES TAKING PLACE

The United Kingdom is currently undergoing both a massive and as-yet unfinished reorganisation of its public client structures and a highly marked change in procedures and thinking concerning the production of public buildings and infrastructures. Basing itself on theories aiming to rationalise production in sectors such as the aeronautics and automobile industries, Tony Blair's government launched an ambitious public buildings improvement policy essentially based on improved efficiency of public investment in the sector through improvements in the production process. The intention is to integrate three new concerns in the approach taken by public clients :

- a globalisation of economic thinking to consider the costs generated by a building throughout its existence, using the "*Whole-life building cost*" concept,
- a globalisation of the project process by reinforcing the integration between upstream and downstream missions : taking into account, from the very beginning of the project, constraints linked to construction, maintenance, and flexibility with regard to potential uses and operation of the building,
- a globalisation of the partner team using the "*partnering*" method, being a contract that, throughout the design and construction period, links the client, the designers, the building contractors and, where applicable, the suppliers of materials and components.

This policy is added to what had already been initiated by the Thatcher and Major governments (which the Blair government has not fundamentally questioned) concerning public-private partnerships. The result is that public clients are increasingly being led to use private investments for their buildings and even for the maintenance and operation of their amenities.

Concerning the issues being examined here, the British situation evokes four types of questions : 1) To what degree does this policy, incorporated in the rules of the European directives, respect the principles of transparency and market openness required by these regulations? 2) What is its impact on the structure of the professional project consultant environment and, in particular, what access can be retained for small and medium sized practices to public commissions governed by these methods? 3) What impact do these new operational methods have on completed buildings and, in particular, what is the resulting level of standardisation? 4) What impact does this *partnering* organisation method have on the competences required by project consultants (negotiation and organisational competences, reorganisation of work procedures within practices)?

PART TWO

COMPARATIVE ANALYSIS

PART TWO : COMPARATIVE ANALYSIS

A. The public client in the main European countries : national structures and overall trends.

The nine countries forming part of this study have different public client structures, each marked by the history of its administrative institutions and by the economic policies applied by recent succeeding governments.

However, several strong points of convergence can be noted in recent changes and those still taking place within these public client structures :

- In nearly all the countries studied, the commission, design and/or works supervision of public buildings were, until recently, centralised in the hands of specific public agencies : central State (and/or Royalty) property and building management agencies, central agencies and decentralised levels of powerful Ministries of Public Works, etc. The general movement is towards the reduction and even the disappearance of these agencies in favour of either a higher level of outsourcing of these assignments and the regrouping of the skills they held within the private sector, or a partial or complete decentralisation of all or part of the building and development competences to local authorities.

- In parallel with this development, there has been a deep-rooted change in the ways that the public property holdings are managed. The trend is towards the rationalisation of expenditures linked to the building and operating of public amenities and setting up a lease system that links the administration occupying the premises to a public property management service or department, itself subject to clear rules regarding the balanced equilibrium of its building and maintenance resources and expenditures.

- The central State building agencies often carried out project consultancy missions on behalf of administrations and even local authorities. Depending on the given country, these missions were more or less extensive. An increasing proportion of this project consultancy is now being handled by the private sector.

- Finally, and even if the fragmentation of local town planning and building responsibilities is less extensive than in France, the other European countries are aware of the great disparity that exists between the central government level and that of local authorities when it comes to the methods used to attribute public commissions. The skills available within client departments, the procedures adopted, and the different process supervision tools often appear to be less tested and less “efficient” on a local authority level than on State level. This has led to the former being provided with various training programmes, technical assistance and sets of recommendations.

1. TREND TOWARDS THE DECLINE AND DISMANTLING OF STATE BUILDING AGENCIES

a. From royal heritage to the State property holdings : the State building departments and agencies

Royal traditions remain very strong in the northern European countries and this leads, among other aspects, to the wish to have a specific and competent buildings department to carry out the management and maintenance of Crown palaces and properties. This same department is often also made responsible for building and managing State property holdings (administrative headquarters, State amenities) whether or not they are of historical interest.

This, for example, is the case in Denmark with the SES (*Slots - og Ejendomsstyrelsen*, Palaces and royal properties agency, dependent on the Ministry of Housing and Urban Affairs) whose main function is to ensure the maintenance of historic monuments. To carry out this task, it has traditionally used the competences of five Royal Inspectors whose recruitment, a matter of great prestige, is made on recommendation from the Danish Royal Academy. For a time, the SES saw its missions enlarged to incorporate the role of building and maintaining nearly all State buildings. But following the reattribution of the public client function to the main ministries, an ongoing process over the last twenty years, the work of the SES is once again focused on listed monuments, although it continues to provide advice to the building departments of the different administrations. Although Norway and Sweden were not included in our survey, these countries have similar types of structures. In Sweden, the *Byggnadsstyrelsen* (National Buildings Department), created in 1918, provides a similar role to that of the SES¹.

The royal hallmark is less apparent in the Netherlands, Belgium and the United Kingdom although the government building structures share characteristics fairly similar to those of the SES. In the Netherlands, the *Rijksgebouwendienst* (Government Building Agency), operating from within the Ministry of Housing, Land use management and the Environment (VROM), is responsible for the management of public buildings. This Agency is the result of a number of organisational changes made to the Public Buildings Department which was created in 1922 to manage the royal palaces and approximately 700 historic monuments, as well as assume the building and maintenance of buildings for Ministries, central services, State councils and assemblies. Like Denmark, the agency's work is based around the prestigious profile of Government Architect; but in this case, the position is held by a single person named for a five year period, the *Rijksbouwmeester*, who has more wide-ranging prerogatives than the Danish Royal Inspectors.

¹ Source : BRESARD (D.), FRADIN (C.), *La commande publique : étude comparative sur le contexte institutionnel et les modalités d'attribution de la commande publique d'architecture*, Mission Interministérielle pour la Qualité des Constructions Publiques, June 1991. p. 44.

	GERMANY	BELGIUM	DENMARK	SPAIN	FRANCE	ITALY	THE NETHERLANDS	PORTUGAL	UNITED KINGDOM
Volume indicators for public contracts carried out by project consultants	Total of building and public works contracts in 1999 : €264 billion of which €42 billion for public contracts (source : <i>Institut der deutschen Wirtschaft</i> , Köln)	?	Danish public commissions represent 10% of building activity and 15 to 18% of engineering contracts in the country (source : survey)	A public building policy revitalised in 1975 by the introduction of democracy	Public commissions represented 35% of building activity in 2000 and 37% of architects' income in 1998 (Source : DAEI-SES, METLTM)	In 2000, public buildings represented €99 600 million, of which €481 million for "architecture and engineering services (Source : OICE)	Around €36 million a year of fees for State public commissions (including civil servant salaries) (source : VAN DER HAAS (Eric), TATIBOUËT (Yves), <i>Les architectes aux Pays-Bas op. cit.</i>) Around 20% of assignments carried out by firms of architects (in terms of building costs) are provided by public bodies (source : Centraal Bureau voor de Statistiek (CBS), 1999)	Public and private works contracts represented 10% of GDP. Public buildings represent 30% of economic activity in the building sector. A large number of public project consultancies	
Main public clients	Communes and groups of communes represent around 50%	The <i>Régie des Bâtiments</i> (1,500 employees) for the State properties. The Regions.	Refocusing of the SES (Palace and royal properties agency) on historic monuments	Regional bodies and, increasingly, the <i>sociedad mercantil</i> that they finance and which are not subject to public law	Regional bodies (45% of contracts in terms of volume), ministries involved in building activities, etc.	Regional bodies (regions, municipal authorities, mountain communities), Ministries, <i>Sovrintendenze</i> for government buildings, etc.	Few decentralised public commissions. Influence of the Government Building Agency (<i>Rijksgebouwendienst</i>)	Administrations, local authorities. Creation of private companies (not subject to the rules of public law) by executive orders for exceptional operations.	Central administrations and local authorities
Characteristics of the client	Frequent use of lease-purchase option by investors competitions	Privatisation of the <i>Régie des Bâtiments</i> underway		Trend towards the creation of <i>sociedad mercantil</i> to waive the rules of public law	Dispersed, in the hands of a large number of awarding bodies	Dispersed, in the hands of a large number of awarding bodies. Important role of the Ministry of Public Works for State buildings.	A highly centralised State client in the hands of the Government Building Agency (<i>Rijksgebouwendienst</i>). Few clients among local authorities	Main problem encountered : the lack of training found among State technical agency personnel	Strong rationalisation policy for public purchases on a government level. Increasing use of concessions and public-private partnerships

Table 7 : Characteristics of the public client in the surveyed countries

In 1989, a royal decree made this person responsible for the public buildings programme within the Public Buildings Department (selection of architects, architectonic quality of buildings, their integration into the urban fabric); this person is also responsible for ensuring the quality of the maintenance works to historic monuments and advises State clients in all their utilitarian projects¹. The reach of the discretionary power held by this architect, as well as the lack of clarity in his nomination, has led observers to cite the legendary “Dutch consensus” that legitimises this centralisation, although the occupant of this post is changed sufficiently often for the different professional preferences to be successively represented².

In Belgium, the *Régie des Bâtiments* which, in its current form, was created in 1971 but whose existence goes back to 1946, is very reminiscent of the agencies described above. It is also responsible for making sites and buildings available to State departments but to do this, has a greater administrative, accounting and financial autonomy and a para-governmental status.

In the United Kingdom, it was the PSA (*Property Service Agency*) that, until its privatisation in 1992, held this status of being the central building and maintenance agency responsible for all the State’s property holdings. We shall subsequently return to the system that took over from this public client governmental body, but it is worthwhile noting at this point where we are concerned with the salience of royal institutions, that the centralisation of procurement for public assets (within which facilities continue to represent a large proportion) is still carried out by the *Office of Government Commerce*, a body dependent on *Her Majesty’s Treasury*.

Over the past 30 years, client structures in southern Europe have been especially marked by political history. In Portugal, up to the Carnation Revolution and the fall of Salazar in 1974, there was a high level of centralisation of State public architectural commissions within the Ministry of Public Works. The overthrow of the dictatorship considerably modified the nature of public commissions and led to a different administrative approach and, since then, each Ministry has been responsible for building and maintaining its own specific buildings. However, it would seem that the administrative and legal competences required for this activity have not yet been developed within these various administrations. Like Portugal, Spain has a lot to make up in terms of infrastructures, public facilities and urban development. The 1978 Constitution that followed the fall of Franco gave extended powers to the Autonomous Communities in these areas. As a result, the Ministry of Public Works (now the Ministry of Promotion, *Ministerio de Fomento*) which, much like its Portuguese equivalent had played a central role in commissioning and supervising public building operations, has largely lost its prerogatives. Now taken up by local authorities, urban development and public buildings have assumed a more political role and often reflect the desire of elected representatives to provide a concrete solution to the needs of their fellow citizens. In Italy, the Ministry of Public Works has retained a strong technical role : through its central Directorates and its *Provveditorati alle Opere Pubbliche*, being the decentralised administrations of this Ministry on a regional level, it assures the building and maintenance of the State’s building stock. This extends from the diagnostic of requirements through to the handover of the completed works to the commissioning administration , and includes design, construction, works management and technical checking. The same applies to the Ministry of Culture which uses its *Sovrintendenze*, generally on the level of the *province*, to carry out maintenance and

¹ Source : VAN DER HAAS (Éric), TATIBOUËT (Yves), *Les architectes aux Pays-Bas*. Direction des Relations Économiques Extérieures, Notes des Postes d’Expansion Economique, La Haye, June 1999. 64 p.

² This is based on the study by Y. Tatibouet, Transport and Planning attaché, Economic Expansion Post, French Embassy in The Hague (interview dated 17 November 2000).

other works on historic buildings, being an important aspect of the architectural activity in Italy.

Germany's federal structure has led to a substantial decentralisation of client structures. This decentralisation operates over five superimposed territorial levels, to which must be added, at each level, a dispersion of agencies, some of which being responsible for urban development and others for building. It is this type of complexity, resulting from the loss of power of the large State building agencies, that seems to have developed in a large number of European countries. Public interest and, as a result

b. Fragmentation and privatisation of the State building stock

The process of reducing the field of intervention and budget allocations of the large government structures previously responsible for public building works has taken place in a relatively concomitant manner over the past ten to fifteen years in the various countries where this field of intervention exists.

On the one hand, it has been by the removal of specific areas of property holdings under their management that the Agencies have seen their influence reduced. In most countries, military buildings and installations have been considered separately. They have, from the very beginning, been excluded from the field of competences of the Dutch governmental building agency and the Belgian Buildings Bureau; in Denmark, they were the first to be removed from the areas covered by the SES; in Germany, they are one of the very few prerogatives still held by the Federal State. It is often the case that these buildings are designed by Ministry of Defence's own building departments to ensure that their locations remain confidential and that their organisation makes as little use as possible of private service providers. For other reasons, all levels of teaching establishments have also been subject to specific treatment. In Denmark, the large number of educational establishments built in the 1960s led to them being withdrawn from the SES activity sector and the subsequent creation of building services specific to the Ministry of Education in 1974. Then, in 1997, these properties were transferred to the Ministry of Research and Information Technologies, where the *Byggedirektoratet* (this Ministry's buildings agency) was already responsible for higher education and research laboratory establishments. In Belgium, educational buildings fall outside the competences of the Régie des Bâtiments. Similarly, in the United Kingdom, it is specific authorities, the *Local Education Authorities*, dependent on the local authorities, which are responsible for educational establishments. Since Tony Blair's government was elected, they have been responsible for a very ambitious building and rehabilitation programme aiming to compensate for the relative level of dereliction resulting from the policies of preceding governments¹.

Belgium, which one tends to forget is a Federal State, is based on three linguistic communities (the Flemish-speaking Community, the French-speaking Walloon-Brussels community, the German-speaking community), and on four regions (the Walloon region, the Brussels-capital region, the Flemish region and the German-speaking region). The reform of the institutions that took place in the 1980s took the form of a large number of competences being decentralised to these communities and regions, and was accompanied by the transfer of a

¹ The modernisation of British educational amenities mobilised a budget of £ 6.2 billion between 1998 and 2001, representing approximately 10% of the value of these property holdings; a further £ 7.8 billion will be provided up to 2004. (source : interview with Mr. Patel, *Department for Education and Employment Schools Capital & Buildings Division*, 8 December 2000.

large number of buildings previously held by the State to these federal authorities. This has resulted in the Régie des Bâtiments having a reduced field of intervention.

But, above all, it is the changes in the logic underlying the economic management of the administrations and their amenities that have upset the traditional structures of the centralised State public client. In a large number of European countries, the combined effect of the economic crisis and the clause imposed by the Maastricht treaty requiring that the public deficit be reduced to 3% of GDP, led to sharp cuts in public investment budgets. Confronted with the need to maintain existing buildings and, often, to continue their adaptation to changing requirements, the public authorities have, in different forms made use, on the one hand of a policy of rationalising government spending in this sector and, on the other, developed more or less extensive partnerships with private investors. We are seeing a general move towards the privatisation of the construction of amenities and infrastructures and consequently a reduction in the global amounts represented by public contracts open to project consultants and in the amount of works being carried out.

In Germany, for example, the introduction of tax provisions favouring private investment is accelerating the privatisation of the public sector. This has led the proportion of public contracts among all building and public works contracts (*Hoch- und Tief-bau*) falling from 25% in the mid-90s¹ to 16% in 1999². Regional disparities means that in a Land like Brandenburg, the proportion of building contracts has fallen to 11%³. This privatisation also takes place by the Länder creating publicly-owned companies governed by private law which are majority financed by the public authorities and which generally assume the functions of the building departments in these regional administrations⁴.

There are a growing number of situations, particularly within local authorities, where a leasing system is operated, being where the building and financing of a project are put out to competition among one or more private operators. The public authorities see this as a way of limiting their short-term debts and of simplifying their tasks, given that should the competences of the public client prove unsatisfactory, they only have to deal with a limited number of contacts and, for example, not have to organise architectural competitions. However, this has led professionals involved in the design field, as well as those controlling the use of public funds, to express reservations on the capacity of local authorities to express their short and medium term interests.

Portugal is also undergoing this movement towards concession operations, although more particularly in the infrastructures sector where the country has accumulated a considerable delay, and the same questions are being asked concerning the medium term future of works resulting from this procedure. While concession-holders generally have the necessary abilities to construct infrastructures, they often leave much to be desired in the maintenance and operation of the completed works.

But the United Kingdom is probably the country where the experience of public-private partnerships has existed for longest and where the system is most established in the

¹ Source : IFO München – Euroconstruct.

² Being 84 billion DM out of a total building and public works activity of 527 billion DM. Source : *Institut der Deutschen Wirtschaft*, Köln.

³ Interview with Andrea Stelzig, director of the department responsible for the basic principles underlying contract law concerning public buildings within the Ministry of Finance in the Brandenburg Land.

⁴ A public client can, if it retains the financing responsibility, transfer its public client prerogatives to a mixed or private company.

operational methods used by public decision-makers and professionals. It is interesting to note¹ that the PFI (*Private Finance Initiative*) type of partnership policy, launched in 1992 by John Major's liberal government, has not been fundamentally reappraised since *New Labour* came into power. Although now called the PPP (*Public-Private Partnership*), it is in fact the same policy as before and has allowed the Labour Party to bring together the necessary financing for its social buildings programme : in 1999, PPP projects represented 14% of public sector investments across the board. It is generally accepted in the United Kingdom that this type of system results in substantial operational savings over the short and medium term. A report prepared on this issue noted savings of over 5% on the design, construction and operation of housing, school and health facilities and over 20% for transport infrastructures².

2. CHANGES IN THE STATUS OF PUBLIC PROPERTY HOLDINGS.

Forming a certain continuity with the above, most European countries are also developing thinking whose effect is less to reduce the influence of large State public client structures than to modify their missions. What is being seen is a desire to optimise the investment and the management of public property holdings.

Once again, it is the British who have done most in this area, using the omnipresent concept of "*Best value for money*" which has led them to create a system of performance, criteria and quality reference indicators alongside procedure supervision and evaluation management reports. We shall subsequently return to all these management ideas. Concerning the public amenities themselves, a certain "truthful cost evaluation" is being sought in some areas. Public authorities are tending to divest administrations and public services of the ownership and maintenance of their premises and place these responsibilities in the hands of specialised departments, generally public but based on a private property management company model. The administrations are then obliged to pay these property management departments the rents or monthly payments corresponding to the depreciation and the maintenance and operational costs of their premises. In consideration of this, they receive an allocation intended to cover these expenses. It is easy to understand the interest of this transfer of ownership and centralisation of property management in terms of public financing : from the point of view of the administrations and user services, the payment of rent means that they are aware of the cost of their accommodation and makes them increasingly responsible for the maintenance and operation of their premises and thus potentially lead to reduced wear and tear, energy waste, etc.

From the point of view of management services, this virtually commercial logic means that the policy incites them to greater financial vigilance both at the moment of the investment

¹ Which is very clearly shown in the study report by K. Danaradjou on the practice of public-private partnerships in the United Kingdom. DANARADJOU (K.). *The public-private partnership in the United Kingdom*. London, Economic Expansion Post, September 2000. 105 p.

² Construction Industry Council. *The Role of Cost-Saving and Innovation in PFI projects*. London. T. Telford, 1998.

	GERMANY	BELGIUM	DENMARK	SPAIN	FRANCE	ITALY	THE NETHERLANDS	PORTUGAL	UNITED KINGDOM
Project consultant characteristics	Public companies ruled by private law in the <i>Länder</i> which represent nearly all public commissions	1939 law, obligatory use of an architect for the building permit and works supervision	Titles of architect and engineer are not protected	Traditionally strong power of the Colleges of Architects. Less so since 1997, but continuation of the <i>visado</i>	The title and, to a certain degree, the exercise of the architectural profession, protected by the 1977 law. No protection for engineers	Alongside small architecture and engineering structures, an increasing number of <i>Società di ingegneria</i> with large amounts of capital	Protection of the architect's title since 1988. No protection of the architectural practice. Trend towards the creation of firms integrating architecture and engineering	Development of the architectural profession (staff levels, contracts, social recognition) but high level of competition from engineers	
Number of professionals and characteristics of their structures	Architects : 90,000 in 2000 (source : BAK) Town planners : 4,350 70 to 80% of architectural and engineering structures have less than 5 staff	10,500 architects registered in 2000 (source : Archieuro)	6,500 MAA architects, 6,000 architect-builders. 85% of Danish architectural agencies have less than 9 staff. Few but large engineering firms.	26,800 architects registered in the Colleges in 2000 (source : Archieuro) It is necessary to create a team or a UTE for public contracts.	35,000 architects of which 27,000 registered with the Order. 66% of agencies have no staff	78,000 architects in 1999. A bonus (<i>incentivo</i>) for the in-house production of <i>progettazione</i>	7,500 architects registered in 2000. 42% of single-person agencies and 14% of agencies listed by the BNA have 10 or more staff	Considerable increase since the end of the dictatorship : 1,000 architects in 1974, currently 10,000. 60% of architects are civil servants employed by the State or local authorities.	30,600 architects registered, often working in mixed firms (architects-engineers)
Integrated project consultancy	Considerable for infrastructures. In the building sector, trend towards smaller staff numbers and increasing number of works supervision without design contracts.	Traditional (small operations, specific programmes such as prisons) but is dying out with in the <i>Régie des Bâtiments</i> .	Little	Little	Not much used for building works (except transport facilities). Used for engineering.	The <i>Sovrintendenze</i> and the <i>Provveditorati ai Lavori Pubblici</i> have in-house project consultants	A little project consultancy within the <i>Rijksgebouwendienst</i>	Strong tradition of in-house project consultancy within large local authorities since the end of the dictatorship. Now decreasing.	Traditionally high level but dismantled by the Thatcher government. Subsists for small works or very specific programmes (prisons).
Relations between architects/engineers/others involved in project consultancy		Strong dominance of architects. Very little importance given to technical partners in the choice procedures.		Debate on the creation of UTE (temporary associations of contractors) between project consultation providers or the use of teams with an agreed leader.	The architects are generally leaders of project consultancy teams that incorporate an engineering firm and surveyors.	Architect-engineer associations with subcontracting to required experts (geologists, etc.).	Move towards British style in-house firms. State procedure : two separately selected lists.	The architects are generally leaders of project consultancy teams that incorporate engineering firms and surveyors.	

Table 8 : Characteristics of project consultants in the surveyed countries

(respect of the provisional budget, quality requirements) and over the long term (*whole-life cost* concept, sustainability, energy savings, etc.).

These central management agencies, while bringing together the best competences in the sector, also simplify economies of scale by grouping and coordinating the purchase of the supplies and services needed to maintain and operate large property holdings. This is what happened in Denmark where the property holdings belonging to the Ministry of Education were transferred to the Ministry of Research and Information Technologies. The buildings became the property of the *Byggedirektoratet* (the Ministry of Research and Information Technologies buildings agency) and the schools, universities and research centres occupying them now pay a rent determined in accordance with a logic similar to that existing in the private sector. The same kind of situation exists in the Netherlands where the Government Building Agency, now relatively financially independent from the VROM ministry on which it depends, is responsible, much in the same way as a property owner in the private sector, for a large public property portfolio that it manages. For providing this service, it receives rents close to those applied in the private sector from the different administrations occupying the premises. However, the agency is obliged to show financial results that are at least balanced and, at best, show a profit¹. In the United Kingdom, this system was only applied for a short period, from 1992, date that the PSA (*Property Service Agency*) was privatised, to April 2000 when the public building policy fell under the responsibility of the OGC (*Office of Government Commerce*). At this point, it was the PACE (*Property Advisers to the Civil Estate*) that, on behalf of the Ministries requesting this service, became the service provider paying for the management and rental of their premises.

Belgium, which suffered the economic crisis and the need to reduce its budget deficit to a greater extent than its neighbours, was obliged to adopt a more radical approach which led to entire sections of its property holdings being put on sale during the 1990s.. Simultaneously, the *Régie des Bâtiments*, which in the past had an annual investment budget of approximately 25 billion FB (approximately 4.1 billion FF), has seen this sum reduced over the last few years to approximately ten billion FB and then, in 1999, to just a few billion FB.

3. REDUCED IMPORTANCE OR ELIMINATION OF PUBLIC SERVICES CARRIED OUT BY PROJECT CONSULTANTS.

The diminishing field of intervention of the large State building agencies and the concomitant reduction of their financial allocations are often accompanied by a redefinition and repositioning of their services. In particular, this has led to a reassessment of the proportion and the nature of the project consultant missions that they were accustomed to carrying out themselves. This reassessment was radical in the United Kingdom where, when Margaret Thatcher came into power in 1979, 40% of architects were employed in the public sector, mostly in local authority building departments. These departments, criticised for their incompetence, systematically had to compete with private practices. Many were privatised, others simply broken up. However, certain Ministries, like the MAFF (*Ministry of Agriculture, Fisheries & Food*), have retained certain internal project consultant assignments, particularly for small redevelopment or building works, or for new buildings answering highly

¹ VROM presentation brochure (Ministry of Housing, Land use management and the Environment. Building the future : environment, space, housing and public amenities. The Hague, August 1997.

specific programmes or requirements where it is worthwhile using specialised designers working for the departments¹. However, as we shall see later, a completely different policy is currently being developed for public buildings in this country.

Within the Belgian *Régie des Bâtiments* where project consultant activities are currently undergoing a deep-rooted reassessment, the separation between what should be handled internally and what could be subcontracted was based on very similar criteria: the *Régie* retained a project consultancy role for highly specific operations, such as prisons, where the *Régie* has a great deal of specialised experience. With its 1,500 employees from all building sectors (civil engineers, architects, landscape designers, interior designers, industrial engineers, computer specialists, legal consultants, etc.), the *Régie* has (had?) the capacity to handle approximately 10% of the works resulting from its investment programme through its own integrated project consultancy team. It should be added that for the remaining 90% subcontracted to private project consultants, it was in the habit of attributing contracts on the basis of very detailed preliminary designs and assumed responsibility for site supervision and the attribution of works contracts. This situation will probably change in the very near future due to the context brought about by the high level of privatisation engaged by the Belgian Federal State. To carry this out, the State introduced a Ministry of Business and State Participation in its last government. The *Régie des Bâtiments* is now responsible to this Ministry and there is a strong possibility that, apart from the massive trimming of the personnel, there will be a radical change in the missions carried out by the *Régie*. Priority will be given to the client's management, legal and economic aspects and the management of the public property holdings (investment planning, programming, legal and administrative expertise of procedures)² to the detriment of the project consultant function. In addition, the missions carried out by the *Régie* for those public departments requesting this service will now be priced and remunerated by the *Régie*'s public department clients in accordance with a logic very similar to that underlying the change in the property holdings status brought up in the previous point.

The trend towards a reduction in project consultant missions carried out within public client structures can also be seen in Germany, although the diversity of structures and public client levels requires a more diversified analysis. Like most of their European neighbours, German administrations had to pay more attention to their expenditures and staff levels, especially since the Reunification and the resulting economic difficulties³. The most usual response has been the externalisation of all or a proportion of project consultant and client missions and placing them in the hands of external service providers (architectural practices, design offices, private companies, mixed companies, public companies operated under private law, etc.). However, a certain number of public clients, either because the size of their departments permitted it, or because they chose to make the global nature of their public client mission a professional and cultural priority, managed to maintain between 10 and 30% of project consultancy missions⁴. On the level of the municipalities, only those best financially funded have been able to retain a few internal project consultancy competences. In these cases, priority has been given to coordination tasks such as project control and site supervision.

¹ Interview with Richard BOOTH, *Ministry of Agriculture, Fisheries & Food, Building & Estate Management Division*, 7 December 2000.

² Source: "La Régie des Bâtiments" brochure published in 1997 on the occasion of its 25th anniversary

³ Interview with Mr. Teicher, *Baureferat München, Verwaltung und Recht*, 8 January 2001.

⁴ Such as the *Länder* in Bavaria, Bade-Württemberg, and Brandenburg.

Portugal had a strong integrated project consultancy tradition within local authorities that goes back to the 1974 Revolution and the subsequent years. It is interesting to note that 60% of Portuguese architects are civil servants employed by the State or by local authorities, even though these professionals combine this “bread and butter” employment with a more prestigious private activity. On the level of the national administrations, the use of internal project consultants was considerably reduced in the early 1980s by the coalition government (PS-PSD). But in the towns, with the exception of the smallest municipalities, many projects continue to be issued by the municipal building departments, particularly town planning projects and rehabilitation projects for small buildings. This, for example, is the case in Lisbon where the Housing Department has a team of municipal architects to prepare the programming and preliminary design for social housing operations.

In Spain, the influence of private architectural practice leaves little opportunity for in-house project consultancy. The trend is for public clients that used to carry out a small amount of design work within their departments to outsource this function and only retain project supervision and management functions. Though the use of highly broken-up assignments, project consultancy is often provided jointly by the client and external providers. Consequently, the client’s technical departments can assume the design of small works¹ but use an external engineering firm to carry out the calculations for technically fairly complex structures. Or the client can separate the process into two separate phases, one for the design (preliminary project and execution project), the other to supervise the works. In this case, it can carry out one of the assignments itself and sign a contract with a private service provider for the other, or sign two separate contracts for each of these phases. This is the approach taken by Bagur in Barcelona for large projects where it becomes highly involved during the intermediary phase by carrying out an exhaustive audit of the documents provided for the execution project.

As can be seen through these five national situations (United Kingdom, Germany, Belgium, Spain and Portugal), the shared trend is towards the more or less active reduction of project consultancy missions integrated within public client structures. However, the situation seems fairly stable in Denmark where traditionally there has been little in-house project consultancy and where it exists, it has been limited to the highly specific fields of Defence (the Ministry carrying out its own civil engineering and architectural studies for its installations) and historic monuments where, as mentioned earlier, the SES (palaces and royal properties agency) calls on a small body of architects specialised in the restoring and maintenance of old buildings. The same applies in France where most project consultancy for building is carried out by the private sector, with the exception of the infrastructures sector where the Ministry of Planning and its decentralised agencies, generally managed by Highways Engineers and State Public Works Engineers, traditionally assume an important design role. The main exception is the design of transport-linked constructions and, as a result, civil airports, *Aéroports de Paris* installations and stations (particularly the new stations linked to the extension of the High Speed Train network) are generally carried out by public sector architecture and engineering departments. However, this remains marginal when compared with the overall production of public buildings in France.

¹ They are therefore exempted from the *visado* procedure, being an inspection by the College of Architects of all contractual and technical documents prepared for the submission of the building permit file.

It is interesting to note that there is an opposite trend in Italy and the Netherlands. In Italy, the Merloni law was passed in 1994 to transpose the Services Directive into Italian law as well as to clean up the awarding of public contracts. Article 18 of this law provides for a maximum financial incitement set at 1.5% of the provisional cost of the works for the preliminary project, the safety plans and works supervision to be carried out in-house. This bonus is distributed between “the person responsible for the procedure” and the employees of the technical departments having assumed these tasks. However, as the law only came into force at the beginning of 2000, it is still too early to evaluate the real effects of this provision on the public project consultant. In addition, a large number of public clients do not have the means to recruit the technicians required for this activity and, as a result, cannot profit from the bonus.

In the Netherlands where the Government Building Agency, which employs 950 persons, will probably find itself with more project consultant missions in the future than it currently carries out. This is because the new Chief Government Architect, Joe Coenen, named for a five year period in November 2000, favours a greater control over the State’s architectural policy (currently being developed around a major justice amenities programme) and intends to develop the preparation of design sketches within the Agency well before the attribution of design contracts and complete project consultant missions to external professional designers, and even carry out complete project consultancy assignments in-house¹.

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4. STATE COMMISSIONS, LOCAL AUTHORITY COMMISSIONS

a. Dispersion and disparity of competences to be found in local client structures

In both Germany and France, one of the main characteristics of the public client is the great multiplicity and disparity of the structures exercising this authority. In Germany, the federal organisation is translated by the distribution of public powers over five superimposed national levels. It is the *Länder* (Regional States) that dominate, both in terms of legislation and the volume of commissions: it is the Land that establishes the Building Code and the development plans in force in their territory, although these follow guidelines set by the Federal State. The *Land* also has wide ranging competences in all fields, including culture and higher education, and can choose to delegate these competences to the local authorities under its umbrella in accordance with the purpose and importance of the building to be built. The local authorities (*Regierungsbezirke, Kreise, Gemeinde*), which are directly responsible for matters concerning early childhood education programmes, primary schools, sports facilities and roadways, control approximately half the public infrastructure and building investments. The Federal State only intervenes in matters of defence and foreign policy. In addition to this decentralisation to five superimposed territorial levels, there is also, at each level, the dispersion of public client activities between generally separated services, some of which being responsible for urban development and others for building, to an intermediary public/private body which exercises a mission in the public interest and, as a result, receives public authority subsidies but is also subject to its controls (hospitals, cultural, social and sports amenities, housing construction bodies, etc.).

¹ According to Mr. Hans Blok, Government Building Agency (VROM), interview held 18 November 2000.

In France, where the decentralisation policy, as yet uncompleted, is only twenty years old, the public client structures are also numerous and diversified. There are over 36,000 communes (25,000 of which with less than 500 inhabitants) exercising substantial prerogatives in matters of town planning, urban development and public buildings (administrative, cultural, sports and kindergarten and primary school educational facilities, etc.). No matter what their size, these communes face the same problems of having to know and respect the legal regulations and procedures, define their requirements, choose their service providers, sign contracts and supervise works, assume responsibilities, etc. The larger communes provide themselves with different types of satellite structures such as semi-public companies, communal statutory bodies and, in the housing sector, social housing bodies. The smaller communes can also call on the decentralised services of the Ministry of Planning in each Department which can intervene as agents or operations managers. As well as this large number of local contract awarders there are a range of inter-communal bodies and, on higher national levels, the General and Regional Councils. On State level and intervening as builder, there are the highly professional client departments that increasingly take the form of statutory bodies or agencies which, although they have the status of a public body, are partially autonomous from their specific administrations.

Even within territorial segmentation contexts that are less extreme than those to be found in France, the other European countries have a wide range of different local public client structures that more or less frequently make use of public contracts open to project consultants (and works contracts). This dispersion is also accompanied by a great disparity between authorities with more or less important decision-making powers over town planning and infrastructures and which are thus held to exercise a more or less important, frequent or occasional public client role, with more or less abundant financial resources, basing themselves on departments that have greater or lesser degrees of competence on issues concerning building and town planning.

Consequently, in all the countries studied, the description of the State public client appears to be clearer and more monolithic than that of public clients on local levels which are more diverse, less well known and less organised than on the central level.

It is the absence of financial and human means, and thus the lack in technical and management competences, that often characterise this client in the collected information and discussions¹.

As mentioned above, over the last two decades in the United Kingdom, local authority structures have changed from being a tightly-knit network of strong local building departments with a large number of staff, to a situation where, after privatisation of most of these departments, there are virtually no architects left in the 53 counties, the 36 boroughs, the 333 districts and the 150 *Local Education Authorities* that exist in this country. Despite this, British local authorities retain a public client competence over certain buildings such as schools, hospital and police stations. However, it seems that there are too few architects to satisfactorily even carry out town planning tasks, the examination of administrative authorisation requests, programming and the client tasks incumbent on them. This situation is similar to that of Austria, and Vienna in particular, where the town planning and architecture

¹ Note a bias, linked to our survey methods, that privileged the questioning of State clients for reasons of simplicity and speed and which might exaggerate these traits.

departments are so reduced that the examination of a building permit can take two years and where, as a result, requests submitted by an architect or an engineer are not examined but automatically granted under the sole responsibility of the professional having designed the project.

In Denmark, the local public client is spread between the 14 counties and 275 municipalities, but it is weak and only justifies the existence of specific departments in municipalities with over 5,000 inhabitants. Social housing is essentially shared between the housing associations that, although independent with regard to the local authorities, are subject to the rules of the Services Directive. These associations are seeing a radical fall in their activity given that while in 1989, 1990 and 1991 they built between 8,500 and 10,500 housing units a year and benefited from generous public subsidies, they are now only building between 3,000 and 4,000 new housing units a year¹.

In Spain and Italy, the public client authority, which is exercised in a fairly balanced manner between the national level and the various regional levels, is based on highly qualified technical personnel. The Ministries in charge of public works and cultural affairs in these two countries have qualified competences in the fields of architecture and engineering to assume their client role and, to a certain degree, their project consultancy role. They mainly intervene in the historic monuments sector : in Spain, the General Directorate of Architecture in the *Ministerio de Fomento* has a fund resulting from a 1% levy taken from all building works carried out by this Ministry (the cultural 1%) and assumes, for the State and for the local authorities requesting it, the client responsibility for rehabilitation and maintenance operations carried out on this built heritage. In Italy, it is the *Sovrintendenze (Ministero dei Beni Culturali)* and the Historic Monuments architects working in these agencies that traditionally held a monopoly over all of Italy's architectural and urban heritage². On a national level as well, apart from very small communes without technical departments, client structures have a fairly high technical and administrative potential. In Italy, on the level of the Regions and the Provinces, locally elected representatives make use of *assessorati* in charge of infrastructures, public buildings and housing. Spain has similar bodies on the level of the *Generalitat* and the Autonomous Communities. The large towns in these two countries have developed a range of organisations. In Madrid, for example, there is the specialised General Directorate of Building which employs nine architects to design, sign contracts and supervise the construction of architectural and town planning projects. In Italy, there are also more specialised structures such as the *Uffici Concorsi*, being small technical groups responsible for organising competitive bidding procedures in the fields of architecture and town planning, that operate with the administrative support of the *Uffici contratti e appalti* (Contracts departments) to be found, for example, in Milan and Rome. But, above all, these two countries have recently and are continuing to develop semi-public or private satellite companies controlled by local authorities that act as client and/or project consultant. These bodies will be examined in greater detail later in this document.

In many cases, the Italian and Spanish client agencies partially assume a project consultant role. In Italy, where there is a fairly powerful client body which will probably continue as a result of the financial incentive provided for by the Merloni law, there are technicians responsible for design and works supervision for certain public constructions carried out by

¹ Source : *Boligministeriet, Bygge-og boligpolitisk oversigt*, data compiled for us by N. Albertsen.

² They have recently seen their role reduced by the European texts : as from now, their services must be subject to competitive bidding alongside the private sector for all project consultant assignments whose value exceeds €130,000.

the Ministry of Public Works, both within its central administration (*Direzione Generale Edilizia Statale e Servizi Specialis*, Directorate General of State Construction and Specialised Services¹) and its decentralised agencies on a regional level (the *Provveditorati alle Opere Pubbliche*). In Spain, the project consultant assignments are highly fragmented and the works by private providers and administrative agencies very intermingled: it is not rare for the technical agencies to supervise site works or the technical design of an architectural project designed by an external provider. More rarely, a certain number of projects are completely carried out by the public client itself. This takes place in Madrid where the in-house architects design certain projects, with others often being placed in the hands of building and public works contractors using design-build procedures.

b. Advice and management provided to local authorities by the State public authorities

In all the different countries, it is interesting to note the recent introduction of federated public structures providing advice and assistance to those local authorities that are, or that feel, the least equipped in terms of knowledge of procedures or of the technical skills to evaluate and manage the missions that they delegate to service providers.

Although the local authorities in the Netherlands, which represent 12 provinces and 650 municipalities, do not have an important building client role, they nevertheless build schools, a certain number of sports and leisure amenities and social housing operations. In this country where State commissions are tightly controlled and standardised, local commissions tend to be disorganised and even irregular. This situation is criticised by the professional organisations: private agreement contracts and competitions with little transparency which encourage local nepotism, increasing use of developer competitions for the building of public amenities, etc. This is one of the reasons for the creation of the *Architectuur Lokaal* foundation in 1993 which defines itself as a platform between the life environment Ministries², elected representatives and professionals. Employing 11 people, half of this body's budget is financed by the VROM ministry. Initially, its role was to be an information centre for the municipalities, but this was later enlarged to cover the large number of private builders (developers and individuals) resulting from the VINEX programme which aims to build 800,000 housing units over a 20 year period, most of which by the private sector³. Its first task was to reform the competitions system by drawing up, with the approval of the public authorities and the concerned professional organisations, a charter published in 1997 under the name of *Kompas*. In parallel with this recommendations text that had no real legal value, the foundation also provided a base for the *Steunpunt*, being the central client information and advice office for the formulation of programmes and the organisation of architectural competitions. But these competitions are little used as clients preferred the less constraining restricted procedure system. More recently, it was the developer competitions that attracted the interest of *Architectuur Lokaal*: a second *Kompas*, exclusively concerning these procedures, was published in September 2000. It gives local authorities the choice of three

¹ This is specifically concerned by emergency situations such as the results of flooding and earthquakes.

² Being the four following Ministries: the Ministry of Housing, Housing, Planning and the Environment (VROM), the Ministry of Culture, the Ministry of Nature and the Ministry of Transport and Waterways.

³ This information is provided from an interview with Cilly Jansen and Tom Idsenga, of Architectuur Lokaal (18 November 2000) and from this body's web site (<http://www.archi-lokaal.nl>).

competitive bidding procedure models¹, develops training measures for the introduction of these procedures and provides a standard contract for contracts attributed to developers by local authorities. These types of measures appear to be highly characteristic of the Dutch approach to architecture : in this country, which was one of the last in Europe to protect the title of architect and which does not always protect the exercise of this profession, interventions aimed at local authorities are also marked by a strong laissez-faire approach. Providing advice and promoting high quality architecture is not based on an ideal, but rather on practices that have been observed, with the intention of amending, controlling and adjusting them without the imposition of statutory constraints. The role of the *Architectuur Lokaal* in the Netherlands can, to a certain degree, be compared with that of the French *Mission Interministérielle pour la Qualité des Constructions Publiques* (Mission for Quality in Public Construction) inasmuch as it provides an information and advice centre for public clients, training courses and the publication of guides and recommendations. On a departmental level, France also has non-profit architectural advice associations (*Conseils d'Architecture, d'Urbanisme et d'Environnement – CAUE – Architecture, Town Planning and Environment Advice Centres*) whose missions include assisting occasional public clients in successfully completing their building or urban development operations.

In Spain, the Law on Public Administration Contracts voted in 2000 and which incorporates a large number of new measures, provides for the creation of National and Regional Administrative Contract Consultative Commissions (*Juntas Consultativas de Contratacion Administrativa*) whose role is to accompany the application of the law by the provision of technical and administrative recommendations.

In Belgium, the Ministry of the Flemish Community has recently provided itself with a public client advisory body to be used by the local authorities under its jurisdiction. This small structure, organised around the Flanders Client, its assistant, a few private practice architects under contract for a five year period and a number of civil servants, helps the municipalities define their projects and develop their programmes. It also assists in the selection of their project consultants as, every year, it organises a European call for tenders for all the public projects carried out by the Flemish Community. This results in a list of short-listed architects among whom the client can pick five teams of its choice for each project and place them in competition against one another². This body can also provide a limited architectural project consultancy role for transformation works, maintenance and small buildings, on condition that the technical aspects do not require any engineering skills.

Public bodies occasionally organise themselves into networks or associations to train themselves, exchange experiences and jointly develop ideas on how contracts should be attributed. This is the purpose of *Itaca (Istituto per la Trasparenza, l'Aggiornamento e la Certificazione degli Appalti)*, a very active association that brings together the representatives

¹ These are only very briefly described as they fall outside the framework of our study. The first supposes the consultation of at least five developers on the basis of a set of specifications. They are asked to provide a programme and a drawing; the selection is made by a Commission. The second only concerns the financial bids made by the minimum of five developers consulted for a specific programme. The third associates the evaluation of a project with a financial proposal. A first jury made up from professional evaluates the project without knowing the financial proposal, which is in a sealed envelope, and establishes a note ranging from 0 to 90. A second jury, made up from elected representatives, opens the financial proposals, ranks them by decreasing order and notes them from 0 to 10. The addition of the two notes establishes the winner.

² Interview with Tony PENNINCKX, Flanders Client Department, Ministry of the Flemish Community, 8 November 2000.

of the autonomous Italian regions and provinces that, among its many other actions, has published a guide for competitive bidding procedures¹.

c. Specific practices used by local authorities in choosing their project consultants

Portugal is the country where the specificity of procedures adopted by local authorities, when compared with those used by State clients, appears to be the most marked. For example, the Porto municipality has several times made use of an open competition procedure that has been altered with regard to the terms of the Directive. To ensure that anonymity is completely respected, the procedure used only checked the regularity of the candidates with regard to their tax and social status once the projects were ranked by the jury. In a number of cases, this led to ranked candidates being eliminated because of the lack of compliance of their documents. This would seem to have led to a great deal of controversy. To correct this, the Porto authorities doubled up the commission intervening within the framework of the open competitions procedure : a first commission, subject to an obligation of confidentiality, checks the administrative documents and excludes those candidates that do not comply; in a second phase, a jury comprising a majority of architects checks and ranks the anonymous works of those candidates that administratively comply with requirements.

However, most public buyers practice “ajuste directo” which can be translated by “direct attribution”. Although this procedure is provided for by the regulations, it theoretically only concerns commissions representing a low amount. In Portugal, the procedure is also used for works representing large amounts. An example of this can be seen in the contract for the building grouping all the Lisbon administrative departments where the project consultant was designated using this *ajuste directo* procedure. This same procedure was also used following the fire in 1987 which devastated the historic Baixa district in Lisbon. The local authorities considered that the urgency of the situation justified the lack of use of the competitive bidding procedure and the architect A. Siza Vieira was directly engaged by the local authorities to act as project consultant for the reconstruction of the district. However, it should be noted that this took place prior to the publication of the European Directive in 1992.

Evora, a town with a strong historic heritage, is another interesting example as it brings together all the different potential situations. There are three major public clients in Evora : the town hall, the Heritage Institute which has its own in-house architectural teams, and the University Rectorate which is responsible for historic buildings as well as a large property holdings portfolio. This administration organises anonymous competitions for student residences, libraries, etc.

The Evora local authorities have an in-house architectural department. This is why this town has such a high quality of town planning and heritage maintenance. But the procedures used to choose architects are misleading : small projects (crèches, etc.) are designed in-house by the municipal departments and only emblematic buildings are subject to public contracts and then the town contracts with star architects who use these commissions to increase their references and their influence.

The Porto authorities believe that the competitions procedure is expensive for the client. Consequently, the procedure could be used for emblematic buildings but would not be

¹ See the association's web site : <http://www.itaca.org>

appropriate for provisional or utilitarian buildings built to meet the urgent requirements of the population (such as a bath-house in an underprivileged district). “A city is a set of social issues, and urgency is incompatible with competition procedures and the time they take”¹. This position runs counter to what is defended by architects. According to Mrs. Sampaio, most works carried out by the towns are small operations of less than 1,000 square metres, for which the local authorities do not use competitions. But “it is these types of operations that constitute a town”. Her opinion is shared by that of the Order of Architects : in order to encourage as much competition as possible, the Order upholds the use of anonymous open competitions. Where these types of procedures exist, there can be up to 50 submissions. Although this system is very expensive for the participants as only the first three are compensated, it retains a high level of equality between the candidates. However, given the worrying level of indebtedness of a large number of architectural practices, the Order is becoming increasingly favourable to the idea of using limited rather than open competitions, but given the delays inherent in this procedure, public clients have become discouraged and there are very few that use this procedure.

B. Regulations governing public contracts open to project consultants : national traditions and European regulations

1. THE STATUS OF PUBLIC CONTRACTS IN DOMESTIC JURISDICTIONS PRIOR TO THE DIRECTIVE.

In most northern European countries (Denmark, the Netherlands, United Kingdom), legal tradition has it that contracts take precedence over the law. It should not be forgotten that in the United Kingdom and like the British Constitution, *Common Law*, whose status is equivalent to the French Code of Civil Law, is not written. Prior to the publication of the European regulations, public contracts in these countries were assimilated into civil contracts and not subject to any particular legislation. Consequently, they were largely based on private agreement contracts between clients and small circles of local architects with whom earlier operations had already given satisfaction. Occasionally, and for exceptional operations, open competitions were organised but these were not necessarily particularly transparent and often strongly criticised by professionals who denounced the role played by political client-oriented approaches, or who criticised the lack of competence of the juries or the large number of competitions that were not followed through by the winning project being built.

In these countries, the first regulation having an effect on public contracts was often the Services Directive. It should also be noted that these countries were the most prompt in transposing the Directive, probably because it was not superimposed and thus did not enter into contradiction with the existing national regulations. In the Netherlands, the Directive was transposed on 21 April 1993 through the use of a Community framework law that, without making any distinction, concerned public works, services and supplies contracts attributed by either State departments or by the local authorities. This law refers to the Directive without

¹ Interview with Mr. Nuno LOPES, head of the legal department at the Porto town hall, 15 December 2000.

making any further additions. Denmark transposed the Services Directive on 22 June 1993, by a decree that quotes the text of the Directive while accompanying it with financial and penal sanction. In the United Kingdom, the Services Directive was applied on 13 January 1994, at the moment that the “*Public Services Contracts Regulation 1993*” law, presented before Parliament on 22 December 1993, came into force. As can be seen, article 44 of the Directive, which provides for Member States taking the legislative, regulatory and administrative measures necessary for its application prior to 1 July 1993 was very little respected in these countries.

The debate resulting from the application of the Directive in these countries was consequently more “cultural” than legal, inasmuch as it led to a certain number of upsets in established professional practices. Most clients felt that the obligation of holding a competition for contracts above the 200,000 Euros threshold and, a fortiori, a Europe-wide competition, was unnecessarily complicated. Given that most clients worked on the basis of often long-standing local relationships with privileged service providers, the competitive bidding procedure did not meet one of basic needs. Although it is probable that certain of these relationships were based on fraudulent relations between service providers and the holders of administrative and political powers (political favouritism, criminal pressure, prevarication), others were simply based on working habits and agreements on shared values and work methods making collaboration that much easier.

In addition, the procedures made necessary by the principle of advertising the tenders and transparency in the choice of service providers appeared to be expensive, long-winded and complex to clients who had only attributed private agreement contracts. This is probably the strongest complaint made concerning the open procedures method. But even the restricted procedures can lead to these types of difficulties, particularly in the definition of the selection and then attribution criteria chosen to carry out the two successive selection stages. This is why Germany and Denmark were in favour of raising the Directive application threshold, or giving a definition of this threshold that instead of being based on the financial amount of the contract to be attributed, would be based on the number of square metres to build, the latter being an indicator that takes better account of the differences between building costs in the different European countries. Our preceding study also revealed the reticence of British clients to publish their notices and attribution decisions in the Official Journal of the European Communities¹ and the attempts to illegally fragment contracts to keep them below the threshold².

When the Services Directive came into effect, Germany, Belgium and France were not in the same situation as the previously mentioned countries because a definition and specific regulations governing public contracts already existed and were being applied to a greater or lesser degree.

¹ We have estimated the proportion of contract notices and project consultant selection results published in the OJEC by British clients as being 25% and 12% respectively. See CHUDLEIGH (J.), “EC Procurement legislation”, in *Architects’ Journal*, 21st December 1994, pp. 46-47.

² V. BIAU with the collaboration of M. DEGY and L. RODRIGUES, *Les concours de maîtrise d’oeuvre dans l’Union Européenne*, Centre de Recherche sur l’Habitat (LOUEST, UMR n°7544 by the CNRS), study carried out for the Ministry of Culture and Communication, Architecture and Heritage Division, 1998. See pages 56 and 111.

In Belgium, the concept of public contracts open to project consultants had existed since 1976¹, but the regulations governing these contracts were not particularly restrictive. If the contract was limited to the study of a project, it could be attributed by private agreement in the same way as private contracts, but “if possible, after consultation with several potential competitors”. This consultation was rarely applied and choice of service provider was based on a clear and much criticised nepotism. From the point of view of most concerned parties, the Directive thus intervened in an unsatisfactory legislative and operational context and led to a debate that resulted in the production of a large number of legislative and statutory regulations : five royal decrees were passed concerning these matters in 1996 and 1997, leading to new legislation concerning public contracts coming into force on 1 May 1997.

In Germany, prior to the Directive, only budgetary control measures concerning public contracts existed and the dominant practice in the private and public sectors was the attribution of private agreement contracts on the basis of lists of architects. The application of the Directive to the project consultant sector is fairly complex. This is because the German definition of service and intellectual work concepts results in public contracts open to project consultants being superimposed on two sets of existing regulations. German partners and professionals find themselves confronted with the difficulty of placing each project consultant contract either among the provision of general services, governed by the VOL², or among professional services, governed by the VOF³. The line separating these two types of services is not particularly clear and is determined by whether the nature of the service to be provided is such that the contract specifications can first be clearly and exhaustively established (in which case, it is the VOL that is applied). If it is impossible to first describe the contract specifications, which is generally considered to be the case when the service incorporates design activities, the legal reference framework is then the VOF. This distinction has major repercussions in terms of procedures : while the VOL leaves the partner the choice between open, limited or negotiated procedures, the VOF makes it necessary to use the negotiated procedure. We shall subsequently return to this particularity.

In France, the regulations governing the awarding of public contracts were strong and had been established for many years insofar as services contracts, project consultant contracts, and works and supplies contracts were concerned. The Public Contracts Code, introduced in the 1960s, led public contract awarders to incorporate the opening up of public commissions, the transparency of service provider selection procedures and the attribution of contracts and the equal treatment of candidates into their methodologies. Concerning project consultants, the 1973 engineering decree, followed by the MOP law (law concerning the client and its relations with private project consultants) in 1985 and its 1993 application decrees led to specific definitions of the roles assumed by the partners in the building process (client, project consultant), the project consultant assignments, the remunerations, and the selection procedures. There are many points where the Services Directive revealed itself to be less “strict” than the legal and statutory framework existing in France.

¹ Law dated 14 July 1976, implemented by royal decree dated 22 April 1977.

² *Verdingungsordnung für Leistungen*, requirements for the attribution of services contracts.

³ *Verdingungsordnung für freiberufliche Leistungen*, requirements for the attribution of contracts for professional services.

	GERMANY	BELGIUM	DENMARK	SPAIN	FRANCE	ITALY	THE NETHERLANDS	PORTUGAL	UNITED KINGDOM
Existence of a national legislative or statutory power	<i>Land</i> : building code and town planning documents.		No	Yes in the Autonomous Communities but not for public contracts	No	Yes in the regions but not for public contracts	No	No	Yes, on the level of the nations making up the United Kingdom
Existence of regulations governing public contracts for project consultants prior to the Services Directive	A few statutory regulations concerning the awarding of contracts. Nothing specific on services. Transposition : 1997	A law in 1976 recommending the consultation of several competitors	None	A few measures taken in 1995	Public Contracts Code (1960s), engineering decree (1973), then the MOP law (1985)	No, a law defining public works and works in the public interest (1865)	No, no legal concept covering the public contract	Very high level of centralisation and control over public contracts until 1974 when the end of the dictatorship led to client diversification	No, no legislation concerning contracts, no administrative law
Practices prior to the transposition	Private agreement	Consultation of several providers (rarely), then private agreement	Private agreement with local architects, « framework agreements» for maintenance, housing, etc.	Private agreement. Consultation (and arrangements) of 3 teams for large operations	Obligatory remunerated competitions for medium and large sized operations, simplified consultations for small operations	Private agreement without competition and essentially concerning works supervision. Large number of abandoned projects and embezzlement	Private agreement or <i>Meervoudige opdracht</i> (sort of simultaneous definition contracts) for the more complex projects	Private agreement and in-house project consultant (especially for local authorities)	Competitive bidding procedure, often based on prices
National regulations implementing the transposition	GWB (1998), VgV (1994), VOF (1997), VOL, GRW95 (1995)	1993 law, royal decrees in 1996 and 1997	1993 decree and ABR in 1989	2/2000 law on Public Administration Contracts	New Public Contracts Code (September 2001)	« Merloni law » (Law n° 109/94, 1994) applied by DPR 554/99 (1999)	Community outline law dated 21 April 1993, direct translation of the Directive regulation	Executive order 55/95 dated 29 March 1995, executive order 197/99 dated 8 June 1999	" <i>Public Services Contracts Regulation 1993</i> " law
Practices above the European threshold	Private agreement	Obligatory advertising, negotiated procedures without advertising for small contracts (less than €62,000)	A circular in 1994 encouraging competitive bidding procedures	Less than €12,000, choice based on estimate. From €12,000 to €30,000, negotiated procedure without advertising	"Negotiated project consultant procedure" for contracts between €90,000 and €200,000	No formalities below €40,000, restricted procedure between €40,000 and €200,000	<i>Meervoudige opdracht</i> and awarding to lowest price (<i>prijsofferte</i>)	Competition obligatory for contracts > €122,000, open and restricted calls for bids, negotiated contract, order letter < €122,000	Generally by private agreement (<i>selective tendering system</i>)
Same regulations for works contracts and project consultant contracts?	No, VOF, GRW95 specific to the project consultant	No, possibility of adjudication for works contracts, not for project consultant contracts	Yes, with different thresholds	No, "consultation, technical assistance and services contracts" for intellectual services	No, art.74 of the Public Contracts Code	No, the Merloni law and the DPR 554 are specific to project consultants	No	Yes	Yes

Table 9 : Characteristics of legislation concerning public project consultant contracts in the surveyed countries

Contracts above the European threshold were in fact closely defined by the national regulations : in a very large majority of cases¹, the only possible procedure was that of the project competition (on sketch or outline proposal level) and the obligation to remunerate those having participated in restricted competitions. Concerning this point, it is the obligation of anonymity in the examination of the provided works, instigated by article 13, §6 of the Services Directive that, by obliging competition organisers to dispense with jury interviews of the competitors, led to an additional restriction to the already very rigid framework of the French regulations and resulted in a great deal of controversy concerning the national transposition of this Directive.

A fourth situation exists in Portugal, Spain and Italy where the introduction of a public contracts legislation initiated by the European Union came on top of major political, administrative and professional reforms. In Portugal and Spain, the introduction of stricter regulations concerning the awarding of public contracts was accompanied by a move towards the deconcentration and the decentralisation of commissions. In Portugal, until the 1974 Carnation Revolution, the main client was the State and the Ministry of Public Works which awarded almost all contracts on behalf of this latter, basing itself on a set of uniform and apparently unwritten rules. The political and administrative changes resulting from this Revolution, and which in the architectural sector were translated by a massive decentralisation of commissions to various State administrations, led to these rules being abandoned and a certain “legal tinkering” brought about by necessity. The Services Directive therefore provided a first unifying base although it was probably too restrictive when compared with the existing practices. It was, in fact, was transposed a first time by executive enactment 55/95 dated 29 March 1995, and then a second time by executive enactment 197/99 dated 8 June 1999 which reduced the field of application of the previous executive enactment. Despite the continuing relaxation of the regulations governing public contracts open to project consultants, it can be seen that they are applied fairly freely with, in particular, a tendency for clients to use the *ajuste directo* procedure (direct attribution, private agreement), being a procedure that is legal in Portugal although only for small commissions, and for major and/or urgent operations where the client wishes to retain the services of well-known architects.

In Spain, the advent of democracy was accompanied by the population voting in the 1978 Constitution which defined Spain as a democratic, decentralised and federal country. Nonetheless, the regulations governing public contracts, much like a certain number of important and sensitive prerogatives, remain governed by national legislation. From 1982 to 1987, the public client body moved from the hands of the State to those of the Autonomous Communities. This transfer made it necessary to develop rules clearly setting out the processes for decision-making and for the building of public facilities². In 1999, law 38/1999, known as the “building” law, continued in the same direction, defining the technical and administrative requirements linked to building but, above all, describing the role and the

¹ The exceptions to obligation to organise a competition above an amount of €200,000 are : the reuse or rehabilitation of existing works, works built for research, testing or experimentation purposes, project consultant contracts without a design mandate, infrastructure works.

² In particular, six stages were defined : 1) project decision, 2) preparation of the *anteproyecto*, basic outline proposal, and cost estimate, 3) approval of the provisional budget by the competent authority and budgeting of the corresponding sum, 4) in-house work or consultation of architects and/or engineers for the preparation of the execution project, 5) submission of the project to the concerned administration and obtention of the *visado*, 6) launching of the call for bids for the works and designation of the contractor (see *La filière construction en Espagne*, PCA, Paris, 1994).

characteristics of all parties intervening in the building process¹ as well as their responsibilities and insurance obligations. It is interesting to note that Law 2/2000 concerning Public Administration Contracts and transposing the European Services, Works and Supplies Directives into Spanish law is not broken down in the same way and is structured according to four types of contracts : works, management of public services, supplies and consultancy-assistance (*consultoria y asistencia*). This latter type of contract, which places architectural and technical project consultancy under the same umbrella as highly qualified economic, technical, industrial and commercial services, is subject to the *concurso* criteria (economically most advantageous bid criteria), as opposed to the *subasta* (awarded to lowest price). This latter can only be applied to contracts whose object can first be perfectly described². In parallel with the introduction of the statutory framework concerning the choice of project consultants and the awarding of public contracts, the traditionally very strong power of the Colleges of Architects was reduced by the 1997 law on the liberalisation of land and the professional Colleges (*ley de liberalizacion en materia de suelo y colegios profesionales*). These latter, which played an important intermediary role between client, architect and the administration responsible for examining building permits, now only intervenes through the *visado* (checking of administrative and technical documents concerning the project) and are now more observers than active participants in the awarding of public and private contracts. But the Spanish reform remains too recent to comment on the way it is implemented and, during the survey, it did not seem that the new regulations governing the awarding of contracts were causing any particular difficulties in the concerned sectors. However, “ways of getting round the law” were cited by our contacts, such as the breaking up of project consultant assignments (into phases or specialities) resulting in a reduction of the contract amounts with regard to the thresholds or, and we shall return to this subsequently, the creation of private companies (*sociedad mercantil*) to act as clients for public operations and thus escape from the field of application of law 2/2000 on Public Administration Contracts.

Italian legislation concerning public contracts for project consultants is also recent as it was almost entirely published alongside the approval of the 1994 framework law concerning public works, known as the “Merloni law”. However, the application of this law had to await the results of litigation resulting from its first application decree (the 1997 Karrer decree), followed by approval of decree 554/99 at the end of 1999. Possibly because the Merloni law only applies to architecture and engineering contracts, it leaves a smaller margin for interpretation than the Spanish law on Public Administration Contracts. For example, the two circumventions practiced in Spain are avoided here by the precision of the document and case law. For the calculation of the amount of the contract with regard to the statutory thresholds, the *Autorità di Vigilanza dei Lavori Pubblici* (Public Works surveillance authority responsible for supervising the application of the law) adopted an extreme position : this amount incorporates the cost of all project consultant services for the three different project levels (*preliminare, definitivo e esecutivo*) and includes geological and topographical surveys, site management, insurance, etc. The delegation of the client role to private companies is permitted but if it concerns major operations in the interest of the public that are more than 50% financed by the State, these private clients are also subject to the Merloni law. Italian regulations show a clear desire to give public commissions the clarity and efficiency that they had lost by reinforcing the State’s control over the entire system. They insist on the budgetary programming procedure, on the designation of a “person responsible for the procedure”

¹ See chapter III of law 38/1999 dated 5 November 1999. This chapter defines the respective roles of architects and engineers according to the types of building to be built.

² See article 208 of Law 2/2000 on Public Administration Contracts.

subject to approval from a “conference of services” (*conferenza dei servizi*) and, paradoxically in an ultra-liberal political and economic context, encourages the development of an in-house project consultancy within the contract-awarding department.

Through these very different national situations that have been modelled by their institutional and professional history, it is clearly revealed, although for different reasons, that the adjudicating powers are very reticent to accept the advertising rule and the need to use a competitive bidding procedure that includes professionals from all Community member States. On a national level, it is not the custom (nor the need) to solicit different types of bids that open the range of choices to unaccustomed service providers, work methods, or architectural solutions. It is clear that the specific obstacles represented by this competitive bidding procedure, when placed on a European level (extended delays, increased number of bids to be examined, linguistic and cultural difficulties), further reinforce this reticence and result in a range of recriminations and even violations of European obligations.

2. METHODS USED TO DISTRIBUTE AND INTERPRET THE DIRECTIVE ON A NATIONAL LEVEL.

a. Interpretations and assistance in applying the Directive

In its current version, the text of the Directive appears to be sufficiently flexible and, on certain points, equivocal, allowing considerable leeway for its interpretation which is in fact made by the persons and institutions responsible for its application. In practice, it is fairly common that an “official” interpretation of the legal documents superimposes or even replaces direct reference to the basic regulations. This interpretation may, depending on the given country, originate from the economy and finances administration, the administration responsible for building, or professional organisations. It can take the form of documents that have been retranslated or Directive principles that have been simplified (such as charters or guidelines) that occasionally provide a platform for continuous training measures or for the production of reference documents (standard specifications, standard contracts, indicative fee scales, etc.) aimed at simplifying the tasks of those placing orders while ensuring that the existing rules are respected.

With its large number of information distribution initiatives and the advice provided on the attribution of public contracts, Great Britain probably provides the most characteristic situation as far as this is concerned. Distribution essentially lies in the hands of the various public bodies, the most important of which being the *Office of Government Commerce*, which depends on *Her Majesty's Treasury*, and is responsible for the entire public contracts policy. This body, which recently took over from the *Central Unit of Procurement*, publishes a very complete series of *Procurement Guidances*. Theme by theme, these develop organisational advice and choices available for the attribution of public contracts. Examples of these themes directly linked to public contracts in the building sector are value for money in the building sector, the remuneration of consultants and contractors, the strategies for attributing contracts, and team work and partnership. Alongside the official measures, there is a great deal of lobbying carried out by various clubs and movements associating different categories of concerned players and representing their specific interests. These bodies are particularly

interested in promoting the new public amenities production policy initiated by the Latham report, and include groups such as the *Movement for Innovation* (M4I), created in 1998 and bringing together 400 major bodies (clients, contractors, project consultants, consultants, and materials and equipment suppliers), the GCCP (*Government Construction Client Panels*), created in 1997 and which groups together the main State public clients, as well as bodies from the building and civil works sector such as the *Construction Industry Council*, and the *Construction Industry Board*. All these bodies distribute brochures promoting the “*Rethinking Construction*” policy, give advice on the introduction of *partnering*, being the main support to this policy and, where required, provide tailored advice and present exemplary operations¹. But, as we shall see further on, this policy is highly particular and has very specific goals and methods which, although they do not formally contradict the text of the Services Directive, nevertheless greatly distance themselves from the founding principles. Consequently, the regulations promoting this policy in favour of quality in public amenities cannot be defined as regulations that explain the Directive or that ensure its distribution.

The role of the *EG-Beraad voor de Bouw* (Dutch Council of European Affairs linked to construction) in the Netherlands, which brings together the main ministries responsible for building and the professional building and civil works federations, is more strictly that of a link between the European institutions and the professional sectors in the Netherlands. The link operates in both directions: on the one hand the Council informs its members of decisions taken in Brussels that could have repercussions on the building sector and, on the other, it acts as the mouthpiece for suggestions and demands made by its members concerning European regulations. The situation is somewhat similar with the Italian *Autorità di Vigilanza dei Lavori Pubblici* which has the dual role of facilitating the introduction of the Merloni law on public works and checking the compliance of awarded contracts. An autonomous structure whose managers are from civil society and named by Parliament, the Authority and the regional network of observatories on which it is based, centralises information on the awarding of contracts, ensures their legality, establishes case law resulting from imprecisions in the regulations, provides public clients with standard documents for drafting a call for bids, the lists of indicative prices, etc.

In several countries, foremost among which being Denmark, it is the professional architectural and engineering organisations that play a key role in this task of explaining or re-translating the European rules. The PAR (*Praktisendere Arkitekters Rad*, Federation of architectural practices) joined forces with the FRI (*Foreningen af Radgivende Ingeniører*, Federation of consulting engineers) to rationalise the contract procedures, especially those attributed by local authorities, and make clients more aware of the inadequacy of the lowest price criteria in the project consultancy sector. To do this, the two associations drew up and distributed a number of manuals and recommendation guides for the use of clients and professionals, particularly aiming them at small local authorities. This approach is similar to the proactive approach taken by the BNA (*Bond van Nederlandse Architecten*, association of Dutch architects) and the *Architectuur Lokaal* foundation which have also occasionally worked together. In their interpretation of the Directive, the BNA and *Architectuur Lokaal* specify the procedures available across Europe and recommend the formulas that, from their point of view, are particularly efficient within the Dutch context. This has led the BNA to recommend that clients make use of the limited procedure, being less expensive and faster than

¹ For further details concerning the organisation and activities of these bodies, refer to their web sites whose addresses are given in the appendix.

competitions and, more particularly, to choose between two restricted procedure formulas that have been practiced in the Netherlands for many years, being the “multiple commission” and the *visiepresentatie*¹. The *Architectuur Lokaal* platform has applied itself to the production of two recommendation guides that, although they have no legal representation, are highly motivating: the *Kompas 1*, which sets out a sort of specifications for architectural competitions and the *Kompas 2*, which provides an equivalent framework for developer competitions. The Belgian Order of Architects has also produced similar types of documents.

The interpretation and distribution of the European regulations is also carried out by a certain number of private and semi-public training bodies. The ESIMAP (*Centre d'Études, de Services et d'Information en matière de Marchés Publics* – Public contract studies, services and information centre) in Belgium, and IMOPPI (*Instituto dos Mercados de Obras Publicas e Particulares e do Imobiliario*, Institute of public, private and real estate works contracts) in Portugal carry out important works in this area.

The interpretation of the European regulations also takes a more targeted form, focusing on public clients through the production of reference documents in the form of standard specifications, standard contracts, software packages to assist the drafting of contract notices, etc. The United Kingdom, with its contract tradition, is accustomed to these types of documents and the RIBA (*Royal Institute of British Architects*) proposes approximately 350 documents of this type, including forms, contracts and guides for the use of these latter. In many cases, it is the administrations themselves that prepare these documents for their own use: in Denmark, the *Byggedirektoratet* and the SES make use of both standard specifications and standard contracts that incorporate the fees recommended by the ABR 89 scale. In the Netherlands, the need to assure the efficiency of the previously mentioned *Kompas* is achieved by preparation of forms and standard contracts to assist clients apply the recommended procedures. We were also informed of the preparation by the Dutch ministerial departments of a software aid tool, EURASBO, to assist clients in the preparation of call for tender notices and the treatment of the received bids.

b. Legal assistance in attributing contracts, checks and possibility of recourse

Depending on the countries, and according to the nature and the number of contracts attributed, clients have either the obligation or simply the possibility of making use of legal assistance concerning the attribution of their contracts.

There are many cases when clients have dealings with a public or semi-public body whose services are free of charge but which have no power to apply coercion or penalties. This, for example, is the case of the *Konkurrencestyrelsen* in Denmark, a Ministry of Trade and Industry department with a staff of approximately 120 which is responsible for supervising all Danish public contracts, no matter what the field of activity. The role of this department is to advise local authorities when they attribute contracts and receive any complaints from contractors or service providers on a national or international level. Although it has no legal competences, the *Konkurrencestyrelsen* receives approximately 3,000 requests for advice by

¹ It should be noted that the multiple commission is, somewhat like the French definition contracts, a contract that is first attributed to several competing teams, while the *visiepresentatie* is a sort of competition without services. The chapter examining the Netherlands within the monograph section provides a detailed description of these two Dutch procedures.

telephone and several hundred written requests a year, as well as around fifty complaints. Its activities are mainly aimed at inciting the respect of the rules and encouraging conciliation in the case of disputes. As such, it participates in the preparation of choice procedures, the drafting of contract notices and, in the case of a complaint being submitted, exercises pressure on the party having breached the regulations. This pressure has revealed itself to be efficient as, out of the 70 or 80 complaints that it has already handled, only two had to be referred to the Public Contracts Litigation Bureau which has judicial jurisdiction. The highly innovative position held by this body with regard to public contracts, which has no a priori or a posteriori checking powers and which only acts when so requested by the concerned parties, has led it to propose a European pilot project (the PPPP) that would network with bodies in other European countries having similar responsibilities. We shall subsequently return to this project. For building and civil works contracts, the Danish adjudicating powers have a different type of contact : the SES (*Slots - og Ejendomsstyrelsen*, Palaces and royal properties agency dependent on the Ministry of Housing and Urban Affairs). Above a threshold of 2 million DK (approximately 267,000 Euros), the various ministries responsible for their own building works must consult the SES for the wording of their call for tenders notices and the general organisation of their project consultant contracts procedures. This consultation can be take place below the threshold, but in this case it is up to the requesting parties. The *Architectuur Lokaal* in the Netherlands has a role somewhat similar to that of the *Konkurrencestyrelsen* but only in the field of project consultant contracts. Concerning these issues, the main contacts of this small structure are local authorities with few legal and architectural competences in their departments. *Architectuur Lokaal* advises public clients on the procedures to be followed (strongly recommending restricted procedures and competitions) and assists them in drawing up the notices.

Given the fairly recent nature of the legislation on public contracts in the different countries covered by our survey and the federal or highly decentralised structure of a proportion of these countries, it is hardly surprising that the means of legal and administrative control governing these contracts are not particularly strong.

In many of the countries, the main control is of a budgetary nature. The Audit Offices in the German *Länder*, the Portuguese *tribunal de contas*, the Italian *Consiglio Superiore dei Lavori Pubblici*, the Belgian Finance Ministry's *Inspection des Finances* and *Service du Contrôle des Engagements*, the French *Trésoriers-Payeurs Généraux* and financial controllers, the British National Audit Office and Audit Commission all have this role of checking that expenditures are well-founded, deciding whether or not to provide the corresponding budgets, and ensuring that competition rules are respected. In addition, France also has a "legality" audit to ensure that the procedures used for the final attribution of contracts have been respected (see monograph). The procedures are checked by other bodies, occasionally a priori and methodically but more often on receipt of a complaint. In Italy, the field covered and the intervention methods of the *Autorità di Vigilanza dei Lavori Pubblici* (created in 2000) are not yet quite clear : does its checking simply concern works contracts or does it cover all procedures and competitive bidding procedures? In any case, it does not seem to carry out systematic checking procedures ; it acts through its own inspection agencies, its correspondents on a regional level or, if required, when contentious cases have been indicated. On the other hand, it has the power to impose penalties on clients breaking the law. In Germany, the splintering of departments acting as public clients makes a methodical a priori control virtually impossible.

	GERMANY	BELGIUM	DENMARK	SPAIN	FRANCE	ITALY	THE NETHERLANDS	PORTUGAL	UNITED KINGDOM
Single project consultant contract /separate contracts for a same operation	Always separate contracts with different project consultancy providers	In general, separate contracts with different project consultants	Move to global project consultancy contracts or works contracts including the project consultant	Trend towards a single project consultancy contract, but continuation of phased contracts	According to the MOP law, obligation of single project consultant contracts with complete mission	Often separated contracts	Often separated architecture and engineering contracts	Often single contracts to avoid the spreading of responsibilities	The two coexist. Development of <i>partnering</i> , a specific form of contract
Nature of any contract breakdown	By field of competence and by project phase	By field of competence	By field of competence	By project phase	No possible breakdown	By project phase (final project, execution project)	By field of competence	By field of competence	By field of competence or occasionally by assignment
Existence of project consultant fee scales	HOAI, obligatory fee scale for public and private project consultant contracts between €25,000 and €25 million	Rules of professional conduct (1985) forbidding architects to compete on a price basis. Minimum fee scale. Nothing for engineers	Obligatory fee scale for architects up to 1989, indicative since then. Trend towards lower fees.	Fee scale developed by the College of Architects in 1977 (obligatory for all types of contracts). Became indicative in 1997	Cancellation of the obligatory fee scale in 1986. Remuneration guides	An obligatory fee scale for public and private project consultant contracts between €25,000 and €50 million	An indicative fee scale, the SR 1997	An indicative fee scale for public contracts. Applies to the entire project consultant assignment	An indicative fee scale developed by the RIBA
Price criteria	No competitive bidding on prices (fee scale)	No competitive bidding on prices (architectural rules of professional conduct)	Always the most economically advantageous tender (EMAT)	<i>Subasta</i> (adjudication) for small contracts. Generally, <i>concurso</i> (EMAT)	Always the economically most advantageous bid	Always the economically most advantageous bid (since the Merloni law)	Mostly the EMAT. According to BNA, 13% of selections going to the lowest price in 1998.	Nearly always the EMAT	Nearly always the EMAT but on the basis of a price equal to the price of the studies + price of the works
Administrative checking authority	No systematic checking. Only in the case of disputes, the <i>Vergabekammer</i> and the <i>Vergabesenat</i>	High level of financial and legal checking, both a priori and a posteriori.	No systematic checking. Supervision of professional organisations and arbitration in case of disputes.	Internal checking by administrative departments and then the Audit Office	Administrative and financial checking, both a priori and a posteriori, check on legality at the end of the procedure and prior to attribution of contracts. Possibility of redress up to the Council of State	Administrative checking : <i>l'Autorità di Vigilanza dei Lavori Pubblici</i> , financial checking : <i>Consiglio Superiore dei Lavori Pubblici</i>	Contracts assimilated to private contracts, very little checking. Arbitration rather than legal procedure in case of dispute	A posteriori checking by the <i>tribunal de contas</i> . Important role played by the Order of Architects in supervising the awarding of contracts	National Audit Office

Table 10 : Characteristics of project consultant contracts in the surveyed countries

NB : This criteria which, in the economically most advantageous bid evaluation, is never taken in isolation, corresponds to the amount of fees for all participants in the project consultant contract(s). Its definition varies from one country to another and may or may not include insurance, discounts, preliminary studies, etc. (refer to monographs).

Within the building departments, legal departments use a self-checking system to ensure that the principles of the Directive are respected and that the VOL and VOF ensuring the transposition into German law are applied. However, this self-checking procedure has its limits. This is why Belgium has set up checking procedures that are external to the administrations and which are used to complete the measures taken by the internal legal checking departments. This takes the form of a senior checking committee that checks the preparation, the attribution and then the implementation of contracts. It is generally when they receive a complaint that the checking bodies carry out checks on the procedure being used.

Under the terms of Directives 89/665/EEC and 92/13/EEC (known as the Remedies Directives), each European Union member State was obliged to provide recourse possibilities for bodies or individuals that believe that they have been wronged in the application of European rules. We have seen that in Denmark, this was the main function of the *Konkurrencestyrelsen*. In Germany, it is the Contract Attribution Verification Bureau (*die Vergabeprüfstelle*) and the Contract Attribution Chamber (*die Vergabekammer*) that share this task. The former, generally to be found on federal and regional levels, has an advice and arbitration role but does not have the power to prevent the client from carrying out its procedure. If the verification bureau does not succeed in having the procedure regularised by arbitration, the plaintiff has the right to refer his recourse to the Contract Attribution Chamber, which has the immediate effect of suspending the procedure. The Chamber, the plaintiff and all the contract candidates jointly examine the reasons for the recourse. If these are judged to be well-founded, the contract is cancelled. This consensual method for resolving conflicts which passes through a conciliation and arbitration phase prior, where required, to the instigation of a legal phase, is also used in the Netherlands: for recourses concerning the building sector, use is made of an Arbitration Committee made up from professionals (the ABBI) which, having interviewed the two parties, pronounces a judgement that can go as far as quashing the decision of a Municipal Council or interrupting the implementation of a contract if it is proven that the Directive is not being respected.

In Portugal, Belgium and France, disputed recourses automatically fall under administrative and civil jurisdictions. In France, recourses for irregularities in the procedure can, after referral to the Administrative Tribunal, very rapidly lead to the cancellation of the contract. In Portugal, on the other hand, the slow progress of these recourses through the administrative courts makes them virtually inoperable. In Belgium, the Council of State is responsible for checking the regularity of administrative acts linked to the attribution of public contracts, while the implementation of the contract lies within the competences of civil jurisdiction. However, in accordance with the “removable acts” principle, the fact that a contract attribution procedure is judged to be illegal does not stop the implementation of the contract.

As can be seen, with a few exceptions, checks and recourses in the studied countries lack power and the professional organisations assume an important role in the individual and collective protection of their members where contract irregularities are concerned. The Portuguese Order of Architects closely surveys public commission attribution procedures and is able to use both the professional and general press to expose any irregularities that it might find. The Italian Order of Architects, dependent on the Ministry of Justice, keeps a close watch to ensure that rules are respected by participating in contract attribution commissions. Like the Danish DAL and PAR, the Portuguese Order also exercises pressure by formulating its competitive bidding procedure requirements in a set of specifications and by boycotting those competitions that do not satisfy these requirements. The Belgian Order of Architects

takes similar measures through the use of a work group made up from architects and legal consultants which systematically checks all the contract notices published every week in the Bulletin des Adjudications.

Faced on the one hand with the flexibility in the interpretation of the European regulations and thus the need to provide a coherent international understanding of the Directives and, on the other, with the general change (much like that observed in the United States) towards a reduced level of confidence and, on the other, an increasing number of contracts and disputes between partners in the building sector, an increasing need has grown among the public authorities responsible for applying the Directives to public contracts, to reinforce their levels of cooperation and learn from each other's experience. This is the purpose of the European pilot project known as the PPPP (*Pilot Project on Public Procurement*)¹. This project was launched in September 1998 by Denmark for a three year period. Five other countries (the Netherlands, Germany, United Kingdom, Spain and Italy) have joined this initiative which could prefigure the body called for by the white paper on public contracts in the European Union dated November 1996, being a body that either exists or which should be created to be responsible for supervising the effective implementation of public contract regulations. The chief interest of this body would be to make it easier for adjudicating powers and service providers to access reliable information and informal advice without having to take the often long official approaches through national institutions that would otherwise be needed. Within the framework of the pilot project, the members concentrate on resolving trans-frontier problems concerning public contracts subject to the European directives and which have been raised by complaints or individual questions. These complaints can, for example, be justified by the unwarranted use of the accelerated procedure, by the lack of clarity in the attribution criteria, or by the non-respect of the obligation to publish a call for tenders notice.

Five types of measures are used to achieve this :

- the search for methods that can rapidly resolve problems; these could initially be varied and provide the possibility of comparing their respective advantages and disadvantages,
- the search for a way to standardise existing complaint and recourse possibilities on a national level,
- an exchange of information on the interpretation and application of the regulations of the three Directives on the basis of real cases in order to be able to suggest clarifications to the legislator. The chosen themes are outline agreements, financial services, "competitive dialogues" and "technical dialogues" and, finally, concessions and other forms of public-private partnership,
- the supervision of specific sectors,
- the production of statistics, based on the results provided by another pilot project launched in 1993 by Greece, Portugal and Eurostat.

The next pilot project deadline should lead to a report on the results obtained as well as, potentially, proposals for subsequent measures.

¹ See the large amount of information available on the SIMAP web site (*Système d'Information sur les Marchés Publics*. <http://simap.eu.int/DA/pub/src/001.html>).

C. SERVICES DIRECTIVE PROCEDURES... AND THEIR INTERPRETATIONS.

The analysis of the procedures used in the nine studied countries shows a surprising diversity in the interpretation of the procedures recommended by the Directive, despite the fact they are few in number and, at least insofar as certain points are concerned, fairly well defined. This is partially explained by the fact that this Directive is often the main if not the only text governing these contracts and allows certain earlier practices to be continued with, where applicable, certain minor adaptations.

To illustrate this diversity, we present six examples representing extreme interpretations of a given aspect of the Directive :

- the use of the limited procedure, in the Netherlands and in the Belgian Flemish Community to prepare a sort of accreditation list for State public commissions.
- the government policy in favour of long-standing client-designer-contractor partnerships in the United Kingdom.
- the legal use of private agreement for major operations in Portugal.
- the extension of the field of application for negotiated procedure in Germany and Belgium.
- the interpretation of restricted procedures as being a more flexible version of a competition in Belgium and Denmark.
- the creation of semi-public companies, client satellites.

1. “ACCREDITED LIST” INTERPRETATION OF THE RESTRICTED PROCEDURE IN THE NETHERLANDS AND IN THE BELGIAN FLEMISH COMMUNITY.

As stated in the monograph on the Netherlands, in 1997, the VROM ministry, which centralises nearly all ministerial commissions in this country, adopted an identical selection procedure for both architecture, divided into five sub-sectors (1. architecture, 2. restoration, 3. interior design, 4. landscape design and 5. town planning), and for engineers.

This annual selection takes place over three phases :

1). Firstly, a “sliding programme” of works to be carried out over the following five years was prepared by the VROM Government Building Agency and a notice placed in the OJEC for those to be performed in the following year, with the list being updated as and when the contracts are attributed. Candidates are invited to present proposals for one or more of the sub-sectors and provide a certain amount of information concerning the means available to them (tools, technical equipment, calculation capacities, internal organisation and management), their workload, the average staff level of the practice over the past three years and at the moment of the candidature, as well as on projects they have carried out, accompanied by written descriptions and photographs. The candidates are then essentially selected on the basis of professional competence, experience and reference criteria (known as “minimal requirements” criteria) and chosen for one or more of the five sub-sectors.

	GERMANY	BELGIUM	DENMARK	SPAIN	FRANCE	ITALY	THE NETHERLANDS	PORTUGAL	UNITED KINGDOM
Above the European threshold, free choice of procedure from among the 4 proposed by the Directive	The VOF requires the use of a negotiated procedure as soon as a design assignment is included	Yes	Yes	Yes	No, obligatory competition above €200,000 (with a few exceptions)	Yes	Yes	Obligatory competition? Few operations exceeding the European threshold	Yes, but the chosen procedure can be discussed
Use of European procedures as per survey discussions 1. open procedure 2. restricted procedure 3. negotiated procedure 4. project competition	1. Very rare 2. Very rare 3. Very frequent 4. Frequent	1. Rare 2. Frequent with submission of work 3. Very frequent (abusive with regard to urgency or contract non-specification clauses) 4. Rare	1. Rare 2. Very frequent (with « solution sketches ») 3. Rare 4. Rare. Increasing? Fifty a year, with multiple winners	1. Frequent 2. Fairly rare, mainly civil engineering 3. Frequent below the threshold 4. Fairly rare	1. Very rare 2. Very rare 3. Below the threshold or following a competition 4. Very frequent	1. Rare 2. Rare 3. More frequent than the listed exceptional cases 4. Increasingly frequent	1. Rare 2. Very frequent 3. Very rare 4. Very rare	1. Very frequent 2. Rare 3. Very rare if at all. A large number of private agreement attributions (<i>ajuste directo</i>) over and above the cases provided for by law 4. Fairly frequent. Remunerated competitions with pre-selection by commission subject to secrecy	1. Rarely 2. Very frequent 3. Frequent 4. Rare
Proportion of the various procedures as per OJEC 1. Open procedure 2. Restricted procedure 3. Negotiated procedure 4. Project competition (Source : FRI, 1999. In parentheses, 1998 figures)	1. 4% (6%) 2. 4% (5%) 3. 82% (79%) 4. 10% (10%)	1. 42% (39%) 2. 17% (19%) 3. 27% (27%) 4. 14% (15%)	1. 8% (6%) 2. 59% (68%) 3. 6% (7%) 4. 27% (19%)	1. 96% (92%) 2. 2% (4%) 3. 2% (0%) 4. 1% (4%)	1. 30% (14%) 2. 22% (22%) 3. 19% (18%) 4. 29% (46%)	1. 32% (28%) 2. 51% (47%) 3. 4% (8%) 4. 12% (17%)	1. 20% (20%) 2. 70% (70%) 3. 9% (8%) 4. 1% (2%)	1. 60% (49%) 2. 5% (2%) 3. 1% (9%) 4. 33% (40%)	1. 4% (3%) 2. 81% (82%) 3. 14% (13%) 4. 1% (2%)
Specific procedures	Cooperative procedure, different types of competitions, including the combined competition (<i>Kombinierter Wettbewerb</i>)	<i>Open oproep</i> in the Flemish community	A large number of design-build procedures	Ranking for candidates participating in public contracts greater than €120,000	Obligatory restricted and remunerated competition. Definition contracts	No	Restricted procedure with pre-selection of annual lists of architects and engineers <i>Meervoudige opdracht</i>	A design competition procedure (technical) – construction after choice of architect and project	The <i>Quality Based Selection</i> (restricted procedure); the PPP and PFI for financial partnership projects

Table 11 : Characteristics of procedures used to choose a project consultant in the surveyed countries

This selection, carried out directly by the Government Building Agency under the authority of the Chief Government Architect, results in a list of approximately 300 architects (among whom we only noted the presence of five foreigners, none of whom being French, over the last few years). During this phase, because the minimal conditions are voluntarily very low, the selection is very wide¹.

2). Then, project by project, 5 to 7 candidates from the list are short-listed under the authority of the Chief Government Architect, according to their level of experience and their architectural competences (contextual awareness, design capacity, capacity for appreciating volumes, structures, light and materials in earlier works). The chosen candidates are then invited to participate in the “adjudication” phase (“*uitnoding aan de gunningsphase*”). They are provided with information on their potential responsibilities, the financial organisation and the global cost of the project, on the computer system they must use to produce their drawings, etc. They are also provided with a list of points from which they must organise their arguments in defence of their vision of the project before the jury.

3). Finally, and depending on the nature and complexity of the project covered by the contract, the short-listed candidates are asked :

- either, for simple projects that are not particularly important, to provide answers to written questions concerning the project,
- or, for projects of moderate importance, to be orally interviewed by the selection commission on their intentions concerning the project,
- or, for important projects, to provide a certain number of drawings, one or more models and an outline building cost estimate. These services are then remunerated in accordance with the conditions previously established by the client.

The attribution decision is taken by a commission chaired by the Chief Government Architect, and includes the *project manager* responsible for the project undergoing the procedure (the Government Building Agency employs a hundred *project managers* who manage the budget of the operations and, on behalf of the agency, sign the various contracts linked to the design and construction of the works), a representative of the local authority and the future use (library, administrative building, etc.).

This procedure was developed by the State departments to avoid a work overload resulting from the procedures imposed by the new regulations and, in particular, the sending and receiving of a large number of forms and files for each operation. However, it has been vigorously criticised by the professional organisations, first among which being the BNA, which have questioned the legality of using a list of architects. In addition, the Dutch Ministry of Economic Affairs finds that this procedure is in contradiction with the principles of free competition. The European bodies in Brussels settled this debate by letter dated 28 May 1998 and sent by the DG XV, which validates the procedure and declares that, with the exception of two minor adaptations, it complies with the Directive :

. the reception of files was imagined as being “continuous” over a 12 month period; however, the restricted procedure imposes a precise deadline with a response period that cannot be less than 37 days (art. 19). To respect this clause, the Government Building Agency has been obliged to adjust its “sliding” procedure to an annual procedure with a set

¹ Interview with Mr. Hans Blok and Mrs. H. de Wijn, of the Government Building Agency (VROM), 18 November 2000.

programme and a single date for the submission of bids. In the case of additions to the annual programme, the DGXV demands that the agency undertakes a separate procedure.

. the restricted procedure described in the Services Directive indicates, in article 27, that the notice must include the minimum and maximum number of candidates that will be short-listed for the attribution phase and set a range of 5 to 20 candidates to ensure a real level of competition. The Government Building Agency notice states that it will choose at least five candidates but gives no indication as to the maximum number of candidates that can be chosen. It must now mention two values between which it will choose the number of short-listed candidates.

A procedure very similar to this was set up in 2000 by the Ministry of the Flemish Community in Belgium. Called *open oproep*, it has the same aim of short-listing the candidates that will be placed in competition with one another for the projects, no matter whether the value of these projects is above or below the European thresholds.

2. THE BRITISH *PARTNERING* POLICY

In the 1990s, a public procurement rationalisation policy was developed in the United Kingdom that had a great deal of impact on the building and development sectors. In July 1994, Sir Michael Latham's report "*Constructing the Team*" listed 30 recommendations for rationalising the building industry, reducing disputes and cost overruns, and improve quality. This was followed in July 1998, by the "*Rethinking construction*" report written in the same spirit by Sir John Egan on request from Tony Blair when he came into power.

In line with this approach, a campaign was officially launched on 4 October 2000 by the Prime Minister's departments aiming to deeply modify public client practices. This campaign was based on the publication and generalised distribution of the "*Better Public Buildings; a Proud Legacy for the Future*" brochure. The key principle of this campaign is that the obtaining of the best value for money requires the setting up of project teams that, in the form of long-standing partnerships, integrate the client, the designers, the building contractors, the subcontractors and the suppliers of materials. These teams, which operate throughout the process as "*virtual companies*", sign a non-conflict acceptance and an agreement on the distribution of profits, as well as accept a risk and contingencies distribution principle. The savings made by such a system are evaluated at 10%, both in cost and construction time. 170 pilot projects have already been launched or completed. Government bodies are the main promoters of this project; they recommend it to local authorities and it is increasingly being adopted by large private developers.

This project process *partnering* measure juxtaposes rather than replaces the financial *partnerships* developed under the governments of Margaret Thatcher and John Major¹.

This has resulted in the development of different contract attribution procedures in the British building sector in which the relations normally held between the public client and the project consultant on the one hand, and between the public sector and private service providers on the other have been fundamentally redefined. In particular, traditional types of contract, in which

¹ These were the PFI (*Private Finance Initiatives*) launched in 1992, adopted without any great changes but renamed PPP (*Public-Private Partnerships*) by the socialist government.

the project is almost entirely completed at the moment when the building contractors, their subcontractors and specialised suppliers are consulted, have considerably reduced in the United Kingdom. *HM Treasury*, which is responsible for national public procurement policies, strongly discourages them and only wants to see them used in the rare cases where proof can be provided that they are favourable to obtaining the best value for money.

In legal terms, *partnering* falls within the framework of restricted procedures provided for by the Services Directive. However, it is clear that its principle is opposed to several of this Directive's expectations : opening of contracts onto a European level, generalisation of the competitive bidding procedure, equivalence of treatment between candidates, etc. The imposed procedure (publication of a notice, reception of bids, short-listing, attribution) becomes more of a hindrance than a means of action as, in an ideal world, clients would like to establish a partnership with partners that are already known and with whom they have worked together on previous operations. Three types of consequences result from this hiatus : firstly, British clients are reticent when it comes to submitting to the obligation of publication and some of them refuse to comply; if a notice is published in the OJEC, it often uses highly demanding terms that strongly limit the number of possible candidatures and in fact gives a preliminary definition of the required type of team; finally, and on a national level, the United Kingdom holds a position with regard to the European institutions that is favourable to increasing the flexibility of the Directives and the procedures proposed to the adjudicating powers.

3. IN PORTUGAL, EXECUTIVE ENACTMENTS FOR EXCEPTIONAL PROCEDURES.

A desire to simplify the procedures used to designate an architect can also be seen among State public clients, especially for major operations and those that strongly contribute to Portugal's image. There are two essential reasons for this : 1) the obligation to consume aid from the European Union within strictly defined periods, 2) the well-known slowness of the decision-making processes in Portugal.

If Expo 98 was finished on schedule, it was because of an executive enactment (approved by Parliament) that created a private company responsible for the studies needed for the construction of the Expo park. This company launched an ideas competitions concerning the Expo's general organisation, with the best ranked participants assured of being provided with an *ajuste directo* contract. This was the case of the architect Santiago Calatrava for the Orient station.

Another example is provided by "Porto 2001, European cultural capital", where the State created a private company that attributed the project consultant contract for the construction of an important cultural centre using the *ajuste directo* system.

The final example to date is that of Euro 2004 where, by executive enactment dated 29 February 2000, the government decreed the "creation of an exceptional system for the acquisition of the projects necessary for the execution of works which fall under the responsibility of local authorities and which enter within the framework of Euro 2004" (article 1). The second and last article of this executive enactment specify that these contracts can be attributed using the *ajuste directo* system. This procedure led to a single architect being chosen for the renovation of seven stadiums.

As a result, parallel clients, subject to private law and thus escaping the Services Directive, are created by the State as soon as this latter wishes to rapidly carry out a major operation. This has led to vigorous debate both in Portugal and within the national and European bodies concerned by public contracts. In Portugal, the systematic use of this overriding rule is considered to be a recognition of an inability to act in accordance with the ordinary rules of law. One of our contacts jokingly pointed out that, through the use of this procedure, “the State issues itself with a certificate of incompetence”. Criticism is also made of the fact that these exception measures do not contribute to resolving real problems. Thus, for Mr. Nuno Lopes, “we are seeing the creation of a parallel administration with its own specific operational rules; but the administration itself is not carrying out the reforms that would allow it to operate in accordance with its own rules”. This point of view is shared by Mr. Pedro Abrantes : “Major operations should be exemplary, and the law should not just be applied to small operations. If the law is bad, it must be changed”. European bodies should take this paradox as a warning, given that when it comes to building operations largely subsidised by European funds; Portuguese public clients adopt procedures that override the European regulations.

4. EXTENSION OF THE FIELD OF APPLICATION COVERED BY THE NEGOTIATED PROCEDURE IN GERMANY AND BELGIUM

In Germany, the transposition of the Services Directive has led to a high level of differentiation between services that do or do not have a “describable” character, each type being governed by different statutory texts¹. As soon as architectural or engineering services include design, they depend on the VOF² because of their “non-describable and creative nature”. However, the VOF excludes works supervision (*Bauleitung*) and the services of technical engineers who do not intervene in the development of the project. Use of the VOF means that only the negotiated procedure can be used : “professional services contracts must be attributed using a negotiated procedure based on the publication of a notice” (Article 5 of the *VOF*). However, and in order to formally respect the contents of the Services Directive insofar as the choice of procedures is concerned, clients are held to state the specific nature of the services for each project consultancy contract to justify the exclusive use of the negotiated procedure. Although the VOF is criticised for its complicated nature and the inconveniences resulting from the inherent right to recourse, clients, accustomed to private agreements, fairly scrupulously apply the obligation to publish notices in the OJEC and the use of the negotiated procedure. In addition, this procedure also allows them to develop a policy of assisting the weaker areas of the profession, to have access to public commissions, and to have a greater flexibility concerning selection criteria and contract attribution conditions. We noted that certain clients favour young architects, female architects or architects from the new Länder.

This situation, for the moment specific to Germany, could well be extended to other member States and even become generalised. The Council of European Ministers of Culture has adopted a resolution defining architecture as an “intellectual, economic and artistic service”,

¹ It should also be noted that the amount of contracts taken for the application of the European threshold is not cumulated with the fees for contracts controlled by the VOF or contracts dependent on the VOL, these being considered as different from one another.

² The VOL (*Verdingungsordnung für freiberufliche Leistungen*) which was published on 12 May 1997, brings together the requirements for the attribution of professional services contracts.

and this means that it automatically enters into the negotiated procedure framework as defined by article 11.2.c. of the Services Directive¹.

In Belgium, there is also much use of the negotiated procedure, with or without rules governing advertising, but based on different procedures. However, the argument stating that “specifications cannot be established with a sufficient degree of precision to permit the attribution of the contract” in order to adopt a negotiated procedure with advertising is easily used. The same situation exists with the German VOF. However, Belgian legal consultants and the Order of Architects are increasingly campaigning against clients making too much use of the urgency argument to adopt a negotiated procedure without advertising. This is made possible because article 11 (3.d) of the Directive leaves a certain interpretive margin for what is meant by urgency² and this has led to a large number of exceptions to the procedure.

5. USE OF RESTRICTED PROCEDURES WITH SERVICES TO REPLACE COMPETITIONS IN BELGIUM AND DENMARK

The poor reputation of competitions in Belgium, as practiced prior to the Directive, has led to a controversial restricted procedures practice in which services are increasingly required, and where these services are increasingly detailed. Clients find that this method, when compared with the compulsory creation of a jury or the respect of anonymity, allows them to form an opinion concerning the overall professional qualities of the service provider and the submitted design sketch of the building that might be awarded to this provider. However, Belgian architects, who hold a very strong position due to the monopoly given to them by law, are highly adverse to this practice which, without giving them any right to compensation, requires that they provide increasingly detailed works. This is why the National Council of the Belgian Order of Architects demands, within the framework of discussions concerning the legislative package, a clearer definition of the “project design sketch” being used and insists on a strict limit to the works that can be demanded from tenderers within the framework of the limited procedure.

In Denmark where, unlike Belgium, there is a well-established tradition of competitions, clients also seem highly prepared to practice a form of restricted procedures with submission of works. The SES (the palaces and royal properties agency), which handles approximately 94% of its projects through the use of restricted procedures, as well as the *Byggedirektoratet* (the building department within the Ministry of Research and Information Technologies), which uses this system for approximately 73% of its contracts (the remainder being through the use of competitions), interpret this procedure by using a method very similar to that of competitions. The 5 to 10 candidates, short-listed by a commission made up from representatives of its departments as well as future users, are asked to submit a fee proposal, a methodology and design sketches expressing their solutions. The bids are then opened by a secretariat made up from departmental representatives as well as, fairly often, a DAL

¹ Information provided by I. Moreau, CNOA (Conseil National de l'Ordre des Architectes).

² “The adjudicating powers can attribute public services contracts through the use of a negotiated procedure without prior publication in the following cases : (...) d. When strictly necessary, when a imperative urgency, resulting from events that could not be anticipated by the given adjudicating powers, makes the contract incompatible with the period required by the open, restricted or negotiated procedures provided for by articles 17 to 20. The circumstances invoked to justify the imperative urgency must in no case be attributable to the adjudicating powers”.

representative. Within the SES, it is the *project manager* who plays a preponderant role in analysing the bid and the decision is taken by the Agency manager. However, in the *Byggedirektoratet*, the decision is unanimously taken by a jury made up from client representatives, future user representatives, independent experts and, where applicable representatives of the local authority and the area around the operation. It is therefore essentially on the composition of the commission (greater representation of users and neighbours when compared with professionals) and on the possibility of organising interviews with the candidates (which currently appear to be little used but which could increase in the near future) that the restricted procedure differs from that of competitions. As in Belgium, Danish professional organisations are generally adverse to this version of the restricted procedure, but the polemic is less intense because competitions remain the method most used for choosing designers for major projects in this country.

These national particularities can be found in the comparative table showing the use made of each of the four procedures proposed by the Services Directive in the countries studied. It is based on the counts made by the FRI (Danish Association of consulting engineers) which, over the last few years, has compiled the architecture and engineering contract notices published annually in the OJEC.

	Number of architecture and engineering contract notices published in the OJEC in 1999	% of open procedures	% of restricted procedures	% of negotiated procedures	% of design competitions
Belgium	95	42	17	27	14
Germany	918	4	4	82	10
Denmark	98	8	59	6	27
France	1474	30	22	19	29
United Kingdom	590	4	81	14	1
The Netherlands	108	19	71	9	1
Portugal	75	60	6	1	33

Table 12 : Relative use of the four procedures provided for by the Directive in the four countries studied, in 1999

Source : FRI.

As explained above, Germany stands out by its great use of negotiated procedures (82%), while Denmark, the United Kingdom and the Netherlands make more use of the various forms of restricted procedures that we have described¹. Competitions, as noted in the preceding study, are frequent in Portugal and Denmark, rarer in Belgium and Germany and virtually unheard of in the United Kingdom and the Netherlands.

6. USE OF “SATELLITE” COMPANIES GOVERNED BY PRIVATE LAW

In several of the surveyed European countries, we were able to note the important role played by client and/or project consultancy companies providing financing and legal services, acting as satellites to large regional public bodies and positioned on the frontier between the public and the private sector. In Germany, certain *Länder* have provided themselves with companies

¹ It should also be noted, insofar as the Netherlands are concerned, that the use of restricted procedures is greater than what could have been imagined by these figures, given that the State procedure concerning the annual works programme only requires the publication of a single notice.

that are majority financed by the government but which act under private law and generally take the place of the building departments in these regional administrations¹. These companies, which can be financed from different sources, are nevertheless held to respect the rules in force governing the clients for the choice of project consultant and contractors as soon as their resources are majority-funded from the public sector. This was the type of company created by the federal State to act as client for the federal government's new district in Berlin. This company, BBB (*Bundes Bau Berlin*), is 100% financed by the federal State and, as a result, is subject to the national and European regulations governing public contracts².

Somewhat like the situation in Portugal where executive orders are used to set up companies governed by private law to act as the client for large operations and thus avoid the constraints incumbent on the public client, Spain has private client companies. These are the *sociedad mercantil*, which take the legal form of limited liability companies or joint stock companies. They can be partially or totally financed by public authorities but are not fully subject to the *Ley de Contratos de las Administraciones Públicas*³. This, for example, is the case in Barcelona where two companies governed by private law were created for the construction of the infrastructures necessary for the Olympic Games (Olympic Ring S.A., Olympic Village S.A.), where the assignment of the Pro-Eixample SA company was to rehabilitate the Eixample district and where Bagur SA, for most of the public operations carried out by the Municipal Town Planning Institute, provided the technical supervision of the project and its execution. This is not just a local specificity as the Community of Madrid, which set up a public contracts supervision commission⁴, established that 60% of public administration contracts were carried out by these types of private companies.

In Italy, it is on the project consultancy side that semi-public companies governed by private law but publicly financed can be found. These are the *società di progettazione* which, in the form of corporations that are more than 50% financed by a public authority, carry out a large proportion of the project consultancy assignments for the given authority.

It can therefore be seen, with these semi-public companies, as well as with the British partnership procedures and the use of private financing for operations in the interest of the public through concessions and investor competitions, that there is a pronounced blurring of the frontiers between the public and private sectors. This development goes hand in hand with the reduced field of application of legislation governing the awarding of public contracts to project consultants, either directly, through the reduced level of public investment in building and urban development, or indirectly through the privatisation of players and procedures while the credits remain public.

¹ A German public client can, if it retains responsibility for the financing, transfer its client prerogatives to a semi-public or private company.

² Concerning this subject, see : Emmanuel Moulin, "Organisation et commande dans un grand projet public en Allemagne : le quartier du Gouvernement à Berlin", in *L'élaboration des projets architecturaux et urbains en Europe* vol. 2. PCA-CSTB. Paris, 1997. pp. 94-111.

³ The text of this law is fairly evasive concerning the conditions of its application to companies governed by private law. Additional provision 6 states that "commercial companies whose capital is majority held by public administrations, autonomous bodies or other bodies subject to public law must ensure that their contractual activities comply with the advertising and competition principles set by law, unless the nature of the operation to be carried out is incompatible with these principles".

⁴ The Community of Madrid web site includes a well-detailed section on "Public Contracts".

D. CLIENT PRACTICES

1. CHANGES IN PRACTICES WITH THE COMING INTO EFFECT OF THE SERVICES DIRECTIVE

a. From private agreements to obligatory advertising and competitive bidding procedures

In very general terms, the introduction of the Services Directive in the various European countries considerably reduced the private agreement contractualisation practices that had previously been used for project consultancy. With the exception of France, whose Public Contracts Code had quite some time ago introduced advertising and competitive bidding procedures, and the United Kingdom where competitive bidding procedures were already used to choose the service provider according to price, all the surveyed countries used private agreement contracts. Only operations of a certain size led clients to consult several service providers. This was the case in Belgium and Spain (where accords between service providers were frequent). It was also the situation in the Netherlands which practiced this type of consultation in the form of *meervoudige opdracht*, a sort of simultaneous definition contract which continues to be frequently used above the application threshold applied by European legislation. The holding of more or less official “lists” of generally local service providers had the same type of effect, as can be seen in Denmark, where a large number of “framework agreements” are awarded for sectors such as housing and maintenance.

With the creation of a single European market, clients were obliged to comply with advertising principles and thus the drafting and distribution of public call for bids notices. It is also interesting to note that when the Directive was transposed into national law, a large number of countries decided to extend, often in a more flexible manner, the advertising and competitive bidding requirements to operations representing amounts below the European threshold. However, it is doubtful that all public operations greater than the European threshold are truly subject to this advertising, especially in the United Kingdom. There is also a great lack of precision and even inaccuracy in the way that these notices are presented. For example, in France, the “restricted procedure” heading includes public call for bids notices issued by clients organising a project competition with pre-selection. There are a sufficient number of examples of this inaccuracy for the weekly *Le Moniteur des Travaux Publics et des Bâtiments* magazine to decide to draw up typical notice forms. However, even this has not resulted in the forms being accurately completed to meet the requirements of the concerned procedure. Initiatives of the same type have been made by the government, professional organisations and groups of clients in other countries. One can only conclude that this is a widespread problem.

b. Increasing complication of selection procedures

Within this new legal and statutory context, most clients we met complained about the complication of procedures. The new selection procedures with European advertising oblige clients to have to handle a considerable number of candidatures and expressions of interest. Naturally, the choice of procedure to be used is above all guided by a desire to reduce the complication of handling these candidatures. For this reason, the open procedure is rarely

used, except in Spain and Portugal. In Spain, the choice of the open procedure seems motivated by confidence : a large number of clients consider that all professionals present on the architecture market have the competences necessary to take on ordinary projects and that there is no need to carry out a pre-selection. In Portugal, it is the concept of urgency that predominates and clients seek single phase procedures (open procedure or open competition) to try and gain time during the selection stage.

Most clients turn towards the restricted procedure, probably for reasons similar to those developed by EFCA (*European Federation of Engineering Consultancy Associations*) in its recommendations. Its competitive bidding procedure guide defines the open, restricted and negotiated procedures and compares these with one another, noting their advantages, disadvantages and the ways in which they should be applied¹. According to EFCA, the open procedure can only really be applied to large projects when the specifications are simple, when the extent of the works and services can be pre-defined and when the required competences are relatively shared. Its main advantage is to increase the chances of finding a competent provider at a price lower than that obtainable using the restricted procedure. But it demands that the requirements definition phase be well detailed and, because of the large number of submissions, the procedure often makes it difficult to evaluate all the aspects of the various submissions. EFCA believes that the restricted procedure, simply using the aptitude criteria (without taking price into consideration), should be the basic procedure in both private and public contracts below the European threshold. Pre-selection would be made on the basis of a standard questionnaire to facilitate comparisons for the commission and also to reduce the candidature formalities for the service providers. Selection would simply be made on the basis of a technical bid and the price negotiation with the chosen team would only take place just prior to the signature of the contract. This is in fact the restricted procedure, but including the technical bid and the price bid used in most European countries, always with the evaluation being made in terms of the most advantageous economic bid. However, this procedure also results in the widest range of applications : there is the British *competitive interview*, the Dutch annual pre-selection procedure and the Belgian and Danish restricted procedures with submission of a sketch or an outline proposal. However, the (project) competition is now taking the place of a certain number of restricted procedures in both Denmark and Italy. Clients complain that the restricted call for bids procedure is not sufficiently flexible for evaluating costs, to allow for changes from the initial project (especially in Denmark where the technical bid often takes the form of a solution sketch) or to provide the necessary margins for the accompanying negotiation.

In certain European countries, such as France and Germany, the client is not able to freely choose the project consultant selection procedure : in Germany, the VOF has made the negotiated procedure obligatory as soon as there is a design component; in France, the Public Contracts Code has established the principle of an obligatory competition above a certain threshold. However, in countries where the client can choose, the choice of procedure that most of them use is somewhat linked to the types of expectations that they have from the project consultant team.

¹ EFCA (European Federation of Engineering Consultancy Associations). *Guidelines on Effective Competition between Engineering Consultants*. Bruxelles, 1994. EFCA is a non-profit association created in May 1992. It is the federation of 24 national consultant engineer associations from 17 different European countries and represents around 8,000 companies and over 200,000 employees.

2. WHAT THE CLIENT EXPECTS FROM ITS PROJECT CONSULTANT

There is a very close relationship between professional cultures and the architectural representations in the various European countries and the different approaches taken in the methods chosen to designate designers. At the risk of oversimplifying, these approaches take one of the two following forms :

- a management approach, in which the expected service provider must present as high a guarantee level as possible and be fully involved in the production process, with its cost, completion time and technical reliability constraints,
- an emblematic approach in which the client expects the project consultants to have designed a significant work able to enhance the client's image, notwithstanding the risk of partially losing control over the cost, completion times and the formal characteristics of the building.

a. A management approach

It is in the United Kingdom and, to a lesser degree, Belgium and the Netherlands that the first approach – the management approach – can be most clearly seen. The British *partnering* represents the contractualised version : the architect, the engineer as well as the various *design consultants* share the financial risks and profits linked to the operation with clients and other partners in the operation, through the use of a mutual responsibility contract in which the sharing rules are fundamental to the partnership contract established at the outset of the construction initiative. It is interesting to note the criteria stated as determining factors for a “quality” architecture in the “*best practices*” guides currently distributed in the United Kingdom : 1) the incorporation of user requirements, flexibility of the building, its cleaning and daily maintenance, 2) the global nature of the design process, with a reflective approach that starts with the way in which each component is manufactured, its site assembly and how it is to be repaired or replaced, 3) a care for detail in all elements, whether prefabricated or not, 4) the incorporation of the environment of the building to be built in terms of use, safety, health, maintenance and operation.

In the United Kingdom, the approach taken by public and private clients is to surround themselves with providers having a strong technical potential and who have already proven themselves, a factor that goes hand in hand with contracts being limited to small number of providers. While aware of this trend, the RIBA is riven by conflicts between representatives of small as well as medium-sized agencies and architects from large combined architecture-engineering firms that, because of their financial, technical and organisational capacities, are naturally far better placed for large contracts.

In Belgium and the Netherlands where this aspect of Anglo-Saxon culture is also present, the situation is tempered by the continuing major role played by State structures in the client body and, as we have seen previously, in public project consultancy. In Belgium, the search for a guarantee insofar as the reliability of service providers is concerned plays an important role and this is criticised both by lawyers and professionals : on the one hand, clients tend to make use of the financial, economic and technical criteria twice in their judgment, firstly as a selection criteria and secondly as an attribution criteria, despite the fact that in this second phase of the restricted procedure only the bid should be evaluated. In addition, concerning the team's references, the requirements often seem exaggerated given the object of the contract (the example cited by those interviewed was the need to have designed five public swimming pools over the preceding three years). The same type of drift can be found in the Netherlands

where the organisation representing architects, the BNA, has called on clients to show a greater degree of moderation when it comes to the minimum turnover demanded from the candidate and the fact that he/she is all too often evaluated on a single type of building. In this country, as well as the United Kingdom, it can be seen that sizeable architecture and engineering firms are awarded a predominant number of large contracts and that, consequently, the professional sectors are having to reorganise themselves to adapt to these types of structures.

b. An emblematic approach

The second identified approach, the emblematic approach, is more to be found in the Latin cultures : Italy, France, Spain and Portugal as well as, paradoxically, Denmark. In this approach, it is the project that is chosen and not just a team, and the procedures used by clients are project competitions or the restricted procedure, with a very extensive definition of the technical bid that can often go beyond a methodological note to include sketch or even outline proposal level graphic documents. France is probably the clearest example of this position, even though not all clients individually subscribe to it ; in any case, the competition obligation imposed by national law confirms the predominant place held by the project in the choice of designer. France is also the country that can most justifiably invest public finance into “risky” architectural projects : the risk of calling on a young team with little experience or with few staff, the risk of undertaking the construction of a technologically or aesthetically innovative structure, the risk of not entering into the budget estimate, etc. On the other hand, their British counterparts take great care to justify their use of public funds and obtain the *best value for money* by all means, such as *Quality Based Selection*, *Key Performance Indicators*, *best practices references*, etc. French clients are the only ones, given the results of our survey, to have developed a rationale concerning their role in the structuring of markets : existence of contract distribution observatories, the aim of “launching” young talent and renewing the professionals being awarded public commissions, the aim of providing a model to be used for private contracts, encouragement of cooperation between young and experienced professionals, between small architectural agencies and large technical engineering firms, etc. This same concern to open up commissions also exists in Portugal, but within the context of a very strong and recent development of the architectural profession. Consequently, there are two parallel processes highly focused on the “signature” : a private agreement recruitment process to bring in famous Portuguese and foreign designers for exceptional operations (taking a certain degree of freedom in interpreting the regulations), and an expression of the need to pick out young architects who might be able to take the place of these famous names, through the use of open competitions for smaller operations. In Italy and Spain, where the architect has a prestigious social image and where there are a large number of architects holding well-placed political and administrative positions, there is a high degree of expectation insofar as public buildings are concerned. The growing use of competitions and well-known national and international architects by large towns and, increasingly, by smaller towns, has accompanied an important socio-political change. Local decision-makers want to remove the public construction and urban development activity from the administrative sector on which it depended, and which for various reasons has been discredited in these two countries, and place this activity on a local political level which has become more dynamic as a result of decentralisation and/or democratisation. While it might seem surprising to see Denmark here, our Danish contacts, who defined their country as “the most Latin of the Scandinavian countries”, are aware of their ties with the architectural concept that we have

broadly described above. Within a political and professional context that is fundamentally different from those just mentioned, and with a long democratic tradition on the one hand and a virtually total professional deregulation on the other, Denmark has developed a very wide definition of design and a marked interest in architecture. As a result, Danish clients logically make use of project competitions and restricted procedures, with these latter being interpreted once again as requiring the submission of sketch or outline proposal types of submissions, both of which representing a great deal of work.

It is difficult to position Germany in this somewhat schematic duality. From the point of view of a strong technical and statutory control jointly exercised by the administration and the profession, Germany is a little similar to Spain; seen from the angle to attempting to rationalise processes and seeking to minimise the risks linked to the operation, there are, naturally, parallels to be found with the British approach. But it is undoubtedly the importance given to the concerted aspect of the architectural and town planning projects that give their specificity to German procedures. And while project competitions are used in this country, rather than being carried out to decide on the architectural object, they seem to be seen as a means of helping the client, project consultant(s) and user or citizens to jointly participate in the development of a project or, if applicable, a programme.

In fact, depending on what clients expect from their project consultants, different types of functional relationships develop that have consequences on the distribution of tasks, on contracts, on the client's means of negotiating and validating the different project consultancy stages.

3. CLIENT / PROJECT CONSULTANT INTERACTIONS

a. The breakdown of tasks

The nature of design and works supervision missions given by public clients to external service providers changes enormously from one country to another. The single project consultant contract with a complete assignment, as exists in France in the areas covered (buildings and infrastructures) by the MOP law, is rarely found in other countries. Single contracts are dominant or are becoming so in Portugal, Denmark and Spain, with the aim of creating a level of solidarity between architectural and technical designers and to avoid the dispersion of responsibilities. But in Spain, Italy and the Netherlands, it is frequent to see the separation of contracts into a design phase and a works supervision phase. This strong differentiation between design assignments and works supervision assignments is also one of Germany's characteristics, where the assignments are defined in great detail by the HOAI. Another of this country's characteristics is to almost always break down project consultant contracts into specialities (architecture, engineering, landscaping, interior design, etc.) in order to have a better control over costs and works, to spread the commission and to fight against corruption. In addition, given that these works are not considered to be of the same nature, the reference to thresholds is to be taken on a contract by contract basis.

It should be noted that this fragmentation of contracts by field of competence and/or by process phase often corresponds to a sharing of tasks between the contract awardee and the external service provider. On the one hand, as is often seen in Belgium and Spain, the client assumes responsibility for the design of the building up to outline or detailed proposal stage, then subcontracts the structural calculations and the working drawings for the works and then

once again assumes responsibility for awarding the contracts to contractors and for carrying out the site supervision. On the other hand, as in Portugal, the client retains the technical control and checks payments, with or without the technical assistance of the design architect, through the intermediary of its *fiscal*. Spain has a system that permits the fragmentation of assignments and provides the client with an intermediary validation phase : in Barcelona, once the final drawing has been prepared and prior to launching the call for bids, the projects are subject to two evaluations. A first commission states its position regarding the architectural quality of the project, while another reviews its constructive quality. This latter evaluation establishes whether or not the *baja*, a sort of reserve fund covering potential site problems, should be used. Yet another fragmentation approach is used in Italy where, to obtain the bonus of 1.5% of the amount of the operation, clients are encouraged to carry out the “preliminary project” within their agencies, but can then have the final project and the execution project carried out by external service providers.

b. Organisation of the project consultancy

Surprisingly, there is no perfect match between the nature of the contracts signed and the structure of the professional environments. For example, it is not because France now has a long tradition of complete project consultancy assignments with single contracts for public commissions that the professional environment has structured itself into stable, multidisciplinary teams. The architectural and engineering environments are broken up into small structures that work together on the basis of temporary partnership associations or, more rarely, as a subcontracted structure where the leader is usually the architect. The Spanish and Italian project consultancy environments that, like the French environment, are characterised by a multiplicity of small structures, are also concerned by the debate on the different types of temporary associations. Spanish law provides for the creation of Temporary Associations of Companies, but professionals, generally working alone, are more favourable to temporary associations of individuals having signed a flexible team work agreement.

In Italy, it is the competition represented by the *Società di ingegneria* that poses a considerable threat to self-employed professionals, despite the fact that the law rather inefficiently restricts the access of these companies to the market. Often backed by a high level of capital and, as a result, with the capacity of taking out insurance and thus providing commission awarders with an additional level of security, these companies employ a large number of technicians and an architect or engineer with the authorisation to sign building permit applications.

The people we interviewed in the Netherlands explained that a transition was currently taking place from an environment represented by small agencies specialised in architecture to one of large Anglo-Saxon type multi-disciplinary firms that are better placed on the export market. Consequently, changes are taking place, partially under the influence of clients in terms of organisational potential and built references, that would seem to be leading to mergers between small architectural structures and, more rarely, their organisation into semi-public companies incorporating the various project consultancy facets.

c. Negotiations and contracts

Negotiations between the client and the project consultant(s) cover two aspects : either the nature of the work to be provided or the amount of the fees. Concerning this latter point, the situation varies from one country to another. In Belgium, Germany, and Italy, there are

obligatory fee scales that apply to all contracts (Belgium) or to certain of them (contracts of between €25,000 and €25 million in Germany, between €25 000 and €50 million in Italy). But even with obligatory fee scales, the setting of the price remains negotiable and generally in a downward direction : in Belgium, for example, where architects are linked by rules of professional conduct to a minimum remuneration fee scale, it is the project consultant partners that might see the proportion of their share being discussed. While the fee scales in Italy apply to architects, engineers and other concerned designers, they can also be subject to “rebates” based on the compensation of expenses.

In the other countries, and following a trend that will probably become generalised due to free competition, the fee scales that existed prior to the European regulations have become indicative and are generally used as a basis for concessional negotiation. In Spain, for example, where the fee scale developed by the College of Architects ceased being obligatory in 1997, the bids made by project consultants often incorporate a rebate that is based on the fee scale. Concerning this, a discussion is currently taking place between the European Commission and the large Spanish public clients on the notation of the “price” criteria in open and restricted procedures : while clients gave the best note to the price closest to that of the scale, Brussels demanded, in order to stimulate competition, that it be given to the lowest price. This downward trend also exists in Denmark where the introduction of the Directive and the resulting increased competition has reduced the remuneration of architects from 15 to 18% prior to 1992 to the current 12 or 13% of the cost of the works. However, it should be noted that in many countries the attitude with regard to the project consultant’s price is very different among the large State clients that often stick to the fee scales and negotiate very little on rebates, than among local clients with tighter budgets.

Concerning the nature of the service, the negotiations between the client and the project consultant(s) can concern a number of different parameters : they can cover the general definition of the assignment, the potential partners within the project consultant team, the work methods to be developed between the client and the architect, completion times, methods, etc. The British *partnering* system is very particular as all these negotiations take place simultaneously and are not just discussed between the client and the project consultant, but also with all partners involved in the building process (including contractors and suppliers). This consensus and contract culture can also be found in the Netherlands where the competitive bidding procedure is initially very wide ranging. In this country, negotiations begin with the pre-selected candidates and both methods and prices are vigorously discussed. Conversely, the French survey revealed the difficulty encountered both by clients and project consultants during this contract development phase : a large number of clients only have a superficial understanding of what is involved in the design process, and designers are ill at ease when it comes to the evaluation of their works and expressing their competences. In addition to these handicaps, there are all the problems linked to the context, the site, etc. As a result, clients are caught between wishing to retain a certain flexibility to adapt to these potential problems and wanting to control the main parameters of the operation : the components of the project consultant team that they might want to choose separately, the estimated budget, completion times, etc. The methods they use to achieve this end vary greatly : in a large number of countries, the contracts are highly fragmented, allowing the client to carry out parts of the assignment itself, to separately select its service providers, and to carry out intermediary validations (Germany, Italy, Spain) ; but there is also the strategy that aims to obtain the greatest level of coherence through a global contract that includes all service providers contributing to all phases (France, Great Britain).

CONCLUSIONS

An analysis of the ways in which the main European countries have reacted to the requirements of the Services Directive reveal the distance that remains to be covered to establish a real single European market for project consultant services. To be sure, certain convergences have developed between the clients in the countries studied as to the way in which project consultant projects are considered. However, while there is a certain adherence to the principles of the Directive, there is a great deal of inertia when it comes to its full application. Contracts remain very nationally-based and even, in many cases, very localised and highly concentrated on several dozen professionals or companies.

The most important of the convergences is the virtual elimination of selection based on the lowest price. At least this is what is revealed by the interviews. State public clients are becoming aware (this is less apparent among local authorities) that architectural services are complex and incorporate major issues, and that the competence of the designer can have serious consequences (including financial) on the quality and the medium to long term operation of the building. In the United Kingdom, which is governed by the *Best Value for Money* concept, arguments are presented in favour of carefully supervising the design and execution of the building by placing the following ratios in parallel with one another : for a building worth 1 Unit, maintenance and long term management are worth 5 and the global cost of operating the amenity (including the cost of operational personnel) represents 200. This, naturally, is a calculation that marginalizes the very relative savings that the client can try to make on the “design” sector which is only worth around 0.15 Units.

Price negotiations are firmly conditioned by the virtually universal existence of fee scales applicable to project consultant missions¹. These fee scales are increasingly optional and their application depends on the contracts and the strength of the professional groups. Germany is the country with the most strictly governed remunerations : they are controlled by the HOAI regulations which cover both public and private architectural and engineering contracts² using a very precise definition of the missions to be contracted. The Italian system is very similar to this, with fee regulations applying to a certain range of both public and private contracts. In Belgium, the respect of the fee scale introduced by the Order of Architects for all contracts signed with architects (the “project authors”) is not a matter of law but one of professional ethics : architects, who hold a monopoly over building operations, must avoid any situation where they might be in competition with their colleagues over fees. The fee scale acts as an economic regulator for this professional group.

¹ Concerning the formulation of project consultant fees, see : BIPE-Conseil. *Les facteurs de différenciation de la rémunération des missions de maîtrise d'œuvre en Europe* (France, Germany, United Kingdom). Study carried out for the PCA, 1996. 47 p.

² Above 50,000 DM (approximately 25,000 Euros) but below 50 million DM (approximately 25 million Euros). In other cases, there is no restriction on the negotiation on the amount of fees.

The fee scales in Portugal, Spain, Great Britain, the Netherlands, Denmark, and France, are either prepared by the responsible administration or by professional organisations. They are respectively the Instruction for the calculation of fees, the *tarifa*, the RIBA fee scale, the SR 1997 and the ABR 1989. The *Guide à l'intention des maîtres d'ouvrage publics pour la négociation des rémunérations de maîtrise d'oeuvre* published in June 1994 in France only provides indicative approaches to fees, to be negotiated according to the complexity of the works and the missions to be carried out. However, they are not obligatory and are mainly used as supports in the negotiations between the client and the project consultants chosen on the basis of competence criteria. In all cases, a certain flexibility exists in setting the remunerations : by negotiation, naturally, when this is openly possible, but also by more indirect mechanisms when the fee scales have a certain application force. In Belgium for example, where there are no fee scales for engineers, clients negotiate global project consultant fees with the architect-consultant engineer team, considering that engineering forms part of this negotiation. In Germany, we noted a restrictive interpretation of the Directive application threshold definition : in this country, the design and works supervision missions are not considered to be of the same nature and, consequently, the corresponding fees are not added together. As a result, a certain number of contracts are brought below the threshold and escape the rules of the Directive.

Another constant is the reticence, which is more or less marked in the different countries, to place potential project consultants in competition with one another (even on an intra-national basis) given the private agreement habits which were deeply rooted prior to the introduction of the European regulations. Private agreements still largely continue to be used below the threshold, although above in the case of Portugal and Spain, and this seems to fairly clearly indicate that the public authorities passing contracts have difficulties in abandoning their previous all-encompassing power. This power was used to place importance on proximity, confidence and even collaborative experience, rather than on opening the choice range, experimenting with other methods or finding other ways of working with providers.

Above the threshold, clients show a preference for restricted procedures. They feel that competitions are risky : it is like choosing “a cat out of a bag” (to quote a Belgian expression) given that the jury might impose a partner or a project chosen for architectural or technical qualities that the client feels is inappropriate. Competitions precede the project but do not allow the client to fully know the team with which it will be holding discussions and negotiating. They feel that they are long and difficult to organise and require the preparation of detailed specifications, the constitution of a commission, respect of anonymity, and lead to the attribution of prizes or premiums. Open procedures are generally considered to be too complicated : they often require an analysis of too many bids and lead to the problem of defining and applying attribution criteria. It is therefore the restricted procedure and, a-fortiori, the negotiated procedure when its use can be successfully argued, that most easily and in the shortest period permits a comparison of the competences and reliability of teams that have first been short-listed in accordance with a more or less demanding set of criteria¹. This leaves the need, more or less strongly felt depending on the clients, national professional cultures and the envisaged programmes, to also choose a project consultant in accordance with the characteristics of the project that this latter intends to develop. In applying this logic, clients

¹ It is the restricted procedure that is highly recommended by the EFCA (European Federation of Engineering Consultancy Associations,) in its recommendations guide for the application of the European directives to engineering contracts. See EFCA, *Guidelines on Effective Competition between Engineering Consultants*. Brussels, 1994.

are tempted to base their final decision on works supplied by the candidates in the form of more or less detailed “solution design sketches”. These sketch designs are the subject of a debate to which we shall later return.

In most of the studied countries (with the exception of Portugal and Denmark), the choice of project consultant(s) is essentially based on his professional reliability. Very little account is taken of his media reputation or the probable architectural image of the operation, being a criteria that in France carries a lot of weight in the attribution of public commissions. It is interesting to note that French clients, be they institutional or able to act on a wide range of commissions, say that they are concerned with the need to renew candidatures, given that the restricted competitions policy has resulted in a number of distorted specialisation effects. However, in actual fact, it would seem that the influence of the public commission’s legal framework is leading to a reduction of this effect and a return to less committed attitudes. This attitude is also present, although to a more limited degree, in Portugal, Spain, Italy and Denmark. In overall terms, European clients place particular emphasis on prudence and control over the greatest possible number of parameters. The most exemplary example of this second attitude is probably that to be found in the United Kingdom where it is less the project than the process leading to the design that focuses concerns, and where the role of the designer is very little differentiated within a partnership organised around performance criteria and precise profit and risk management methodologies. This is fully coherent with the characteristics of the Anglo-Saxon project consultant which generally takes the form of large companies integrating a wide range of skills, thus reducing the “signature” effect which is so well known in the Latin countries where the architectural activity is often centred on a single person¹.

But in order to minimise the risks being run in attributing major contracts and to be assured of guarantees that are at least as solid as those provided by the private agreement procedure, clients tend to increase the requirements incorporated into their selection and attribution criteria. Certain among them establish criteria that are so detailed that they appear to target one or more teams known to the client during the short-listing phase, or so demanding that only very large practices can satisfy the requirements. In many countries (the Netherlands, Great Britain, Belgium) a major debate is taking place on selection and attribution criteria. Belgium is particularly concerned that these criteria do not become redundant, which is often the case for references. The shared goal is to make the use of these criteria as objective as possible and/or anticipate the disagreements of candidates that have not been chosen by providing them with detailed accounts which, at least in appearance, are indisputable. As a result, particularly in the recommendation documents prepared by administrations and professional organisations for public clients, we are increasingly seeing lists of indicative criteria, acceptability rating coefficients, grading ranges, standard evaluation tables, etc.

All these measures taken by clients to provide themselves with the best guarantees when choosing their designers have led to public contracts becoming more restrictive. This restriction, which is even applicable to medium-sized contracts, eliminates professionals that do not have sufficient building references, particularly public buildings : young practitioners, young practices, practices concentrating on private commissions, etc. This problem is only rarely taken into consideration, few measures are taken by the professional organisations to

¹ Concerning this, it is worthwhile reading : HAUMONT (Bernard). "Etre architecte en Europe", *Cahiers de la Recherche Architecturale et Urbaine* n°2-3, November 1999. pp.75-84.

remedy the situation, and clients take little initiative to give these professional categories a chance to enter this sector. This restriction is accompanied by a national and even regional restriction on public contracts, even for those above the European threshold. Although no statistics are available concerning this phenomenon, it is generally recognised that very few foreign designers are awarded public contract works based on the Services Directive. There are many simple reasons for this : the legal and administrative obstacles encountered during procedures by bidders who are not from the country having issued the call for tenders notice, the self-censorship to which these bidders subject themselves, especially in national supply and demand situations where local opportunities might be sufficient, the language barrier, the knowledge of written and unwritten professional rules, etc.

Finally, the survey carried out across the nine European Union countries reveals the strength of national resistance to the legal framework being imposed by the European Directives concerning public contracts and services in this particular area. Taking a closer look, this resistance takes a number of different forms : there are first of all the practices that, although complying with the European regulations, do not favour the spirit in which they were prepared. One might ask, for instance, if the loyalty goals of a team of service providers, as interpreted by the British *partnering* policy, are compatible with the opening up of contracts and the respect of the principles of equality of treatment, non-discrimination and transparency mentioned in the Directive's foreword. More particularly, we have previously mentioned the very specific interpretations of the four procedures that aim to homogenise the methods for choosing providers and awarding contracts : the Dutch and Flemish approval list procedure, the very extensive definition of the negotiated procedure framework applied in Germany and Belgium; to which could be added the French example of competitions which, in many respects, are more regulated than required by the European regulations. There is also the surprise of encountering practices whose legality is more debatable : in particular the more or less misappropriated means used to extract works in the public interest, most of which carried out using public funds, from the legal framework governing public contracts. This process either operates by the adoption of executive orders that remove major public operations from the common legal framework (Portugal), by the use of private status client companies that are majority financed by a State body (Spain), or by certain clients awarding nearly all their study contracts to monopolistic service providers that are financially controlled by these same clients, as in the case of the Italian *società di progettazione*. And there undoubtedly exist provider selections and the awarding of public works to project consultants on a private agreement basis despite the fact that the contracts exceed the European threshold.

Time, as well as the reciprocal adaptation of the European and national regulations, are probably the best remedies to this discordance and we anticipate that these various obstacles to a real internationalisation of the architectural activity will only very progressively be removed at the same rate, from all points of view, as the construction of a unified Europe.

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SYMES (Martin), ELEY (Joanna), SEIDEL (Andrew D). *Architects and their Practices ; a Changing Profession*. Londres, Butterworth Architecture, 1995.

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Architects Journal, 15th May 1996. "The 100 biggest practices in UK".

Architects' Journal, 11th August 1993, pp. 28-29. "How EC Rules Affect Architects", by B. Richardson.

Architects' Journal, 27th October 1993, pp. 56-57. "Access to Public Sector Work", by G. Stow.

Building, 11th March 1994, pp. 30-31. "EU Public Services Contract Rules", by M. Lane.

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APPENDICES

PERSONS INTERVIEWED

GERMANY

Annett ARLT, bureau of public commissions
Bundesministerium für Wirtschaft und Technologie (Federal Ministry of the Economy and Technology)

Frau GAEBEL
Bundesministerium für Verkehr, Bauwesen und Wohnungswirtschaft (BMVBW) (Federal Ministry of Transport, Building and Housing)

Klaus GROTH and Detlef MEINHARDT
Land Berlin - Senatsverwaltung Für Stadtentwicklung (Regional Berlin Government)
Contracts department concerned with building and surveying

Herr OSTENDORFF
Land Berlin - Senatsverwaltung Für Stadtentwicklung (Regional Berlin Government)
Town planning and project department, section responsible for choice of procedures, competitions, artistic expression in the urban space

Iris Andrea STELZIG
Land Brandenburg, Ministerium der Finanzen (Regional State of Brandenburg, Ministry of Finances)
Department responsible for the application of the principles underlying contract law concerning the construction of public buildings

Werner HOFFMANN, ministerial councillor
Freistaat Bayern Innenministerium (Regional Free State of Bavaria, Ministry of the Interior)

Michael TEICHER
Landeshauptstadt München (Munich, capital of the Regional State of Bavaria)
Building department responsible for administrative and legal affairs

Thomas MAIBAUM, legal advisor
Bundesarchitektenkammer (Federal Chamber of Architects)

Tillmann PRINZ, legal advisor
Bund Deutscher Architekten (Association of German Architects)

Michael KEMMER and Ekkehard SEYSEN
IABG Industrieanlagen-betriebsgesellschaft mbH, Niederlassung Berlin (Engineering consultancy (AMO) for the attribution of public or private contracts for industrial and business sites)

Arno PLUSCHKE, project leader
DSK Deutsche Stadt- und Grundstücksentwicklungsgesellschaft, Büro Berlin (Urban and real estate development company, Berlin banking group)

Jorinde BEHRENS, architect
TLG agency, Technical planning department

BELGIUM

Claude DARDENNE,
Attaché to the Prime Minister

Mark SANTENS,
Assistant to the Flanders client authority, Ministry of the Flemish Community
and Tony PENNINCKX, architect
Ministry of the Flemish Community

Claude COURIVAUD
Economic Expansion Post
(Building sector)

Martine PONCHAU, architect
Régie des Bâtiments

Hugo SPITAELS, head engineer
Ministry of the Brussels-capital Region
Régie Foncière
Buildings department

Pierre SAUVEUR, architect
CNOA national president, CAE and UIA delegate

DENMARK

Keld MØLLER, architect
Danish Council of Practicing Architects (PAR)

Dora BENTSEN, Pia SKOV and Merete RASMUSSEN
Ministry of Commerce and Industry
Konkurrencestyrelsen (Competitions Department)

Marianne K. LARSEN
Ministry of Housing and Urban Affairs

Mr Michael JACOBSEN
Byggedirektoratet (client body for Ministry of Research and Information Technology buildings)

Dorte KJOER-KNUDSEN
Slots- og Ejendomsstyrelsen (palaces and royal properties agency)

SPAIN

Enrique XIMENEZ DE SANDOVAL
Legal advisor, Spanish Colleges of Architects Council (Madrid)

Serafin SARDINA, Architect – Town planner
(Madrid)

Juan MARIN
Ministerio de Fomento, Directorate of Architecture, Public Contracts Department (*Area contratacion*) (Madrid)

Arturo ORDOZGOITI BLAZQUEZ, Manager, Architectural Departments

Madrid municipal authorities

Ana HERNANDEZ, Director of the Public Contracts Departments
Community of Madrid

Ricardo Vicent FERNANDEZ DE HEREDIA
Chief engineer, General Administration of the Community of Madrid

Immaculada RIBAS
General Directorate of Housing, Catalonia *Generalitat*

Jaume BARNADA
Municipal Town Planning Institute, Barcelona Municipal Authorities

Ana ORTONOBES
Municipal Town Planning Institute, Barcelona Municipal Authorities

Jordi Henrique MONRAS
Public Spaces Department, Barcelona Municipal Authorities

FRANCE

Jean-Claude DUMONT, Luc TESSIER, Olivier HACHE
EMOC – Etablissement public de maîtrise d’ouvrage des travaux culturels

Michel ZULBERTY, Managing Director
Client works agency, Ministry of Justice

Patrick MILLE
Department of Programming, Financial and Property Affairs, Ministry of the Interior

Claude DORIAN, Manager
Yonne Departmental Planning Department

Marie-Claude BERTHOMME, head of the Building and Development department
Université Paris 8 –Saint-Denis

Marc BOURGEOIS, assistant CEO
Hautes-Alpes General Council

Eric BAZARD, development manager
SEM de la Cité Internationale

José SANTAMARIA, Manager, Technical Departments
Lyon municipal authorities

Loïc JAUVIN
St-Nazaire region development delegation

Guy BERNFELD, Manager, Heritage and Logistics Department
Assistance Publique / Hôpitaux de Paris - AP/HP

Henri SARDA, Technical Manager
Ville-Evrard hospital centre

Thierry DILLIES, head of the new buildings department
Nord-Pas-de-Calais region – Heritage Department

Jean-François MUNIER, Manager
Office Public des HLM de la Somme

Isabelle MOREAU, head of the International Department
Conseil National de l'Ordre des Architectes - CNOA

Jean FELIX, Daniel BOUSSEYROUX
Chambre syndicale des Techniciens de la Construction, SYNTEC Ingénierie

Gilbert RAMUS
Union Nationale des Syndicats Français d'Architectes – UNSFA

Jean-Claude GILBERT, Manager
Conseil en Architecture, Urbanisme et Environnement (CAUE), Somme region

Martine PATTOU
Architect and consultant architect

ITALY

Silvia GARRO, Paola VELLUTO
Ufficio concorsi di progettazione, Milan Commune

Maria Luisa CHIMENTI
Autorità per la Vigilanza sui Lavori Pubblici, Affari istituzionali e giuridici

Margherita GUCCIONE
Ministero dei Beni Culturali, DARC Direzione generale arte e architettura contemporanea

Francesco GHIO
Ufficio Concorsi, Rome Commune

Massimo GALLIONE, Consiglio Nazionale degli Architetti

Maurizio MEIATTINI
Sezione regionale dell'Osservatorio, Lazio Region

7) Servizio di Lavori Pubblici
Rome Commune

THE NETHERLANDS

Yves TATIBOUET, assistant to the manager, Transport and Planning attaché,
Economic Expansion Post, French Embassy at the Hague

Emiel LAMERS, architect
Delft school of architecture
and VROM Ministry (Habitat, planning and environment)

Hans BLOK and Herma DE WIJN
Government Building Agency (Rijksgebouwendienst)
VROM Ministry (Habitat, planning and environment)

Cilly JANSEN and Tom IDSINGA
Architectuur Lokaal

Agnes EVERS, legal advisor
Bond van Nederlandse Architecten (BNA)

PORTUGAL

Dr. Nuno LOPES, legal advisor
Porto local authorities
Direcao municipal de equipamentos e serviços gerais da camara municipal do Porto.

Suzana OLIVEIRA SAMPAIO, architect
Lisbon city authorities
Departamento de gestao urbanistica da zona ocidental.

Pedro SANTOS COSTA, General Secretary.
Carlos ABRANTES, Responsible for the competitions sector.
Ordre of Architects

M.Vasco MARTINS.
Instituto dos Mercados de Obras Publicas e Particulares e do Imobiliario. (IMOPPI)

UNITED KINGDOM

Richard BOOTH, Ministry of Agriculture, Fisheries & Food,
Building & Estate Management Division,

Mr Dickon ROBINSON, director
Peabody Trust

Mr Deryk EKE
Construction Director,
Office of Government Commerce

Mike KEATINGE
Head of Architecture Branch
Department for Culture, Media & Sport

John WRIGHT, Vice-president of the RIBA, responsible for international affairs

Mukund PATEL, Divisional Manager, Architects & Buildings,
Department for Education and Employment, Schools Capital & Buildings Division,

Tony EDWARDS, Head of Buildings and Estate Management Unit,
Home Office (Ministry of the Interior)

WEB SITES

EUROPEAN SITES

SIMAP, Système d'Information pour les Marchés Publics (Information system for public contracts)

<http://simap.eu.int/>

Recent publications concerning public contracts.

<http://ted.eur-op.eu.int>

PPPP (Pilot Project on Public Procurement)

<http://simap.eu.int/DA/pub/src/001.html>

French Ministry of the Economy, Finances and Industry. Theme : public contracts

http://www.finances.gouv.fr/minefi/publique/marches_publics/index.htm

UNESCO

<http://www.unesco.org>

Recommendation concerning International Competitions in Architecture and Town Planning.

CAE (Conseil des Architectes d'Europe) [European Council of Architects]

<http://ace-cae.org>

Recommendations concerning better public contract practices for architectural services.

UIA (Union Internationale des Architectes) [International Union of Architects]

<http://www.uia-architectes.org>

EFCA (European Federation of Engineering Consultancy Associations)

<http://www.efcanet.org/>

Economic Expansion Posts

<http://www2.dree.org/pee/>

Data bank on European architects (Catalonian College of Architects)

<http://www.c.oac.org>

Data bank on European architects (Order of Italian Architects)

<http://www.archieuro-archiword.it>

EUROSTAT (European statistical service)

<http://europa.eu.int/comm/eurostat/>

GERMANY

Bundesministerium für Wirtschaft und Technologie (Federal Ministry of the Economy and Technology)

<http://www.bmwi.de/>

Bundesministerium für Verkehr, Bauwesen und Wohnungswirtschaft (Federal Ministry of Transport, Building and Housing)

<http://www.bauministerium.baunetz.de>

Bund Deutsche Architekten

<http://www.bda.baunetz.de> (see the “Politik und Recht” theme)

Berlin Chamber of Architects

<http://www.BauNetz.de>

Access to the professional DAB magazine linked to the chambers of architects (information on professional practice / thematic research)

<http://www.forumverlag.de>

Journal publishing notices of all calls for tenders

<http://www.wettbewerbe-aktuell.de>

Information on directives and regulations (legal news commented by the North Rhineland – Westphalia chamber of architects)

<http://www.akns.de>

Data banks on 7,000 significant buildings and architectural projects in Germany

<http://www.Archinform.de/start.htm>

Bavarian office of statistics and data handling

<http://www.bayern.de/lfstad>

Free research data bank in the building and building products sector

<http://www.db.bauzeitung.de>

BELGIUM

Régie des Bâtiments, Regie der Gebouwen

<http://www.regie.fgov.be/>

ESIMAP (Studies, services and information centre for matters concerning public contracts and connected sectors)

<http://www.esimap.be/>

Cour de Cassation (supreme court of appeal for civil matters)

<http://www.cass.be>

Ministry of justice

<http://www.just.fgov.be>

List of acts concerning public contracts

<http://www.raadvst-consetat.be>

DENMARK

The Danish Council of Consulting Architects and Engineers

<http://www.ai-raadet.dk/>

Byggedirektoratet (Building department, Ministry of Research and Information Technologies)

<http://www.byggedirektoratet.dk>

Konkurrencestyrelsen (Danish competitions authority, Ministry of Business and Industry)
<http://www.ks.dk>

PAR (Praktiserende Arkitekters Rad), Danish Council of Practicing Architects
<http://www.par.dk>

By og Boligministeriet (Ministry of Housing and Urban Affairs)
<http://www.bm.dk>

DAL (Danske Arkitekters Landforbund), National Association of Danish Architects
<http://www.dal-aa.dk>

AAR (Ansatte Arkitekters Rad), Council of Salaried Architects
<http://www.arch.dk>

Slots- og Ejendomsstyrelsen (SES)
http://www.ses.dk/ses_web/html/generelt/default.htm

Kommunernes Landsforening (National Association of Local Authorities)
<http://www.kl.dk/>

SPAIN

Ministerio de Fomento
<http://www.mfom.es/>

Arquinex; portal to Spanish architecture and construction sites
<http://www.arquinex.es/>

Col.legi d'Arquitectes de Catalunya
<http://www.coac.net>

Derechofacil, generalist legal site
<http://www.derechofacil.net/>

Law 38/99, Building Act, 5 November 1999 :
<http://www.mfom.es/vivienda/loe/loeing.doc> (English version)

Public Administration Contract Law :
<http://www.boe.es/boe/dias/2000-06-21/seccion1.html#00000>

Spanish Colleges of Architecture Council :
<http://www.cscae.com/>

FRANCE

Public contracts portal
<http://djo.journal-officiel.gouv.fr/MarchesPublics/>

Légifrance, public legal information dissemination service
<http://www.legifrance.gouv.fr/>

New Public Contracts Code
http://www.finances.gouv.fr/minefi/publique/nouv_code/index.htm

Ministry of Planning, Transport, Housing, Tourism and the Sea
<http://www.equipement.gouv.fr/>

Ministry of Culture and Communication
<http://www.culture.gouv.fr/>

MIQCP (Mission Interministérielle pour la Qualité des Constructions Publiques)
<http://www.archi.fr/MIQCP/>

Conseil National de l'Ordre des Architectes (CNOA)
<http://www.architectes.org/>

Syntec-Ingénierie, French engineering association
<http://www.syntec-ingenierie.fr> :

French Chamber of Consultant Engineers
<http://www.cicf.fr>

UNTEC (Union Nationale des Economistes de la Construction et des Coordonateurs)
<http://www.untec.com>

ITALY

Autorità di Vigilanza dei Lavori Pubblici
<http://www.autoritalavoripubblici.it>

ISTAT, *Istituto Nazionale di Statistica* (includes statistical data on public works)
<http://www.istat.it>

Ministry of Public Works
<http://www.lavoripubblici.it>

Ministero dei Beni Culturali
<http://www.beniculturali.it>

CNAPPC, *Consiglio Nazionale degli Architetti, Pianificatori, Paesaggisti e Conservatori*
<http://www.archiworld.it>

National Engineers Council
<http://www.cni-online.it/>

OICE, *Organizzazioni di Ingegneria di architettura e di Consulenza tecnico-Economica*
<http://www.oice.it>

Rome Municipal Authorities Competitions Office
<http://www.comune.roma.it/dipterritorio/concorsi>

Edilportale, the building portal :
<http://www.edilportale.com/>

Europaconcorsi, information site for European competitions
<http://www.europaconcorsi.com/>

Editions Simone, legal site concerning building and public works
<http://www.simone.it/>

Infoappalti, public contracts information and advice site
<http://www.infoappalti.com/>

The local authority sites are standardised as follows :

For towns : [comune.\(name of town\).it](http://comune.(name of town).it) (for example, comune.roma.it)

For departments : [provincia.\(name of department\).it](http://provincia.(name of department).it)

For regions : [regione.\(name of region\).it](http://regione.(name of region).it)

THE NETHERLANDS

Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Ministry of Housing, Spatial Planning and the Environment (VROM))

<http://www.minvrom.nl/minvrom/>

Rijksgebouwendienst (Government Building Agency)

<http://www.rijksgebouwendienst.nl/>

EG-Beraad voor de Bouw (Dutch council of European affairs linked to the building sector)

<http://www.eg.beraadbouw.nl>

ArchiNed, the Architecture Site of the Netherlands

<http://www.archined.nl/endex.html>

BNA, Bond van Nederlandse Architecten (Dutch Association of Architects)

<http://www.bna.nl>

Architectuur Lokaal (local architecture)

<http://www.arch-lokaal.nl/main.html>

Architectenkeuze (data base on 2,300 Dutch architects)

<http://www.architectenkeuze.nl>

Nederlands Architectuur Instituut (Netherlands Architecture Institute)

<http://www.nai.nl>

PORTUGAL

Présidence du Conseil des Ministres (Presidency of the Council of Ministers)

<http://www.pcm.gov.pt>

UNITED KINGDOM

DETR, Department of Environment, Transport and the Regions

<http://www.construction.detr.gov.uk>

Her Majesty's Treasury

<http://www.hm-treasury.gov.uk/index.html>

Office of Government Commerce

<http://www.ogc.gov.uk/OGC/isisite.nsf/default.html>

RIBA

<http://www.architecture.com/>

National Audit Office
<http://www.nao.gov.uk>

The Knowledge Exchange
<http://www.rethinkingconstruction.org>

Movement for Innovation (M4I)
<http://www.m4i.org.uk>

Construction Best Practice Programme (CBPP)
<http://www.cbpp.org.uk>

Change the Face of Construction
<http://www.change-construction.org.uk>

Commission for Architecture and the Built Environment
<http://www.cabe.org.uk/>

Construction Industry Board
<http://www.ciboard.org.uk>

Construction Industry Council
<http://www.cic.org.uk>

Rethinking Construction Report
<http://www.construction.detr.gov.uk>

Peabody Trust
<http://www.peabody.org.uk/index.htm>