

## **Decision on whether a requirement in a call for tenders for architectural services organised by the European Foundation for the Improvement of Living and Working Conditions (Eurofound) was unnecessarily restrictive (Complaint 521/2021/LM)**

Decision

**Case 521/2021/LM - Opened on 28/04/2021 - Decision on 22/06/2022 - Institution concerned** European Foundation for the Improvement of Living and Working Conditions ( No further inquiries justified ) |

A call for tenders for the procurement of architectural services, organised by the European Foundation for the Improvement of Living and Working Conditions (Eurofound), included the requirement that one member of the team that would provide the service be an architect registered with a specific association in Ireland. The complainant, an Irish architectural firm, contended that such a requirement is discriminatory, as other categories of professionals, such as registered building surveyors or chartered engineers, could provide the services listed in the call for tenders.

The Ombudsman found that Eurofound had not clearly demonstrated why the requirement was justified. However, she closed the inquiry with the finding that no further inquiries were justified because Eurofound has not awarded any contract. She nonetheless made a suggestion for improvement for any future calls for tenders for the provision of architectural services that Eurofound may organise.

## **Background to the complaint**

1. The complainant runs an architectural firm in Ireland. In June 2020, the complainant's firm was invited to participate in a procurement procedure for the provision of architectural services [1] organised by the European Foundation for the Improvement of Living and Working Conditions (Eurofound). In the context of this contract, Eurofound endeavoured to undertake annually at least one building or renovation project in order to improve the working conditions of all users of the premises. As a selection criteria on legal and regulatory capacity, Eurofound required that the team selected to perform the contract have at least one expert in the field of architecture, who should be included on the statutory Register of Architects of the Royal Institute of the Architects of Ireland (RIAI) .



2. After the complainant submitted his tender, Eurofound asked him to clarify whether someone from his team was included in the RIAI and, if this was not the case, the reasons why.

3. The complainant explained that the RIAI had refused to include him on the register because he had not gained sufficient experience in Ireland, and the experience he had gained abroad could not be recognised. [2] The complainant argued that the requirements for registering with the RIAI violate the freedom to provide services in the European Union and that, in the past, he had made an infringement complaint to the European Commission to raise this issue. He stated that he is a chartered architectural technologist [3] , a registered building surveyor [4] and a chartered building engineer [5] , and that Eurofound should accept these other qualifications.

4. In September 2020, Eurofound informed the complainant that it had rejected his tender because no one from his team was included on the RIAI Register of Architects. It added that the procurement procedure had not resulted in any contract being awarded.

5. In January 2021, Eurofound invited the complainant to participate in a new procurement procedure for the provision of architectural services [6] , which also required tenderers, or one of their team, to be registered with the RIAI. The complainant contacted Eurofound again, arguing that this requirement is discriminatory. Dissatisfied with Eurofound's reply, the complainant turned to the Ombudsman in March 2021.

## **The inquiry**

6. The Ombudsman opened an inquiry to clarify whether it was reasonable for Eurofound to require that tenderers include, as part of their team, an architect registered with the RIAI.

7. The Ombudsman received a reply from Eurofound on the complaint. The inquiry team subsequently met representatives from Eurofound, received another reply from Eurofound, as well as the comments of the complainant in response to Eurofound's replies and on the inspection meeting report.

## **Arguments presented to the Ombudsman**

### **Arguments by the complainant**

8. The complainant contends that the Irish legislation on the registration of architects is contrary to EU law [7] and that the call for tenders organised by Eurofound unjustly favours a specific category of economic operators, contrary to EU procurement rules.

9. The complainant contends that the title of 'architect' is protected, that it can be used only by those who are registered with the RIAI, but that this registration is not a legal requirement for



the provision of architectural services in Ireland. He claims that Registered Building Surveyors and Chartered Engineers can also provide architectural services. The complainant believes that Registered Building Surveyors would be particularly suited to provide architectural services to Eurofound, because their speciality is working with existing buildings, which is what is required by Eurofound.

## Arguments by Eurofound

**10.** Eurofound stated that it can only apply Irish law as it stands and that it falls outside its mandate to assess whether Irish law breaches EU law. It said that it required only one member of a team submitting an offer to be registered with the RIAI, and that it rejected the complainant's tender because nobody from his team was included on the register. Eurofound argued that the requirement of having a registered architect complies with the EU Financial Regulation, which enables contracting authorities to require tenderers to hold a particular authorisation to be able to perform the contract [8]. It considered that not including this requirement, and instead using relevant professional experience as the only selection criterion, would have been an insufficient indicator of competence.

**11.** In the course of the inquiry, Eurofound gave different reasons for the requirement of having a registered architect as part of the tender. The **call for tenders** stated that the contract required a qualified architect to assist with internal and external building projects and designs. Specifically this related to (i) assistance in planning applications, (ii) professional advice on internal and external building projects, (iii) building design specification and technical drawings, (iv) assistance in tender evaluations and (iv) signing off on building and renovation projects. In its **initial reply**, Eurofound argued that a registered architect was necessary, as they have the knowledge to guide a building project from start to finish, and have to respect a code specifying standards of professional conduct and practice. Eurofound also pointed out that registered architects are subject to a dispute resolution mechanism in the case of poor service or suspected malpractice.

**12.** In **subsequent exchanges** with the Ombudsman inquiry team, Eurofound acknowledged that registered building surveyors and registered chartered engineers can also certify that the works comply with planning permission and building control regulations. However, according to Eurofound, the training received by building surveyors and chartered engineers is of a shorter duration than that of architects, and focuses on dealing with the practical aspects of building construction. Eurofound argued that only architects have specific training regarding the aesthetic or conceptual component of a building and its environment. Eurofound stressed that the calls for tenders required prospective contractors to complete and deliver *“technical and conceptual drawings related to agreed projects”*. According to Eurofound, registered building surveyors and chartered engineers may be able to provide technical drawings and that can be used for construction and to fabricate or install components of the works. However, only architects can provide conceptual drawings on the design of the building.

**13.** During the inspection meeting with the Ombudsman inquiry team, Eurofound also



emphasised the fact that the building it leases from the Irish Government is a protected structure. It explained that, as a tenant, it has a number of maintenance obligations imposed by the lease, including restrictions on the nature of the works it can perform. This includes the requirement that the local conservation officer approve all modifications to the building. Eurofound additionally argued that architects are better placed to ensure that potential construction projects comply with these restrictions. However, it acknowledged that Irish law does not require that works are performed under the supervision of an architect with a conservation qualification. In case of specific need, Eurofound stated that it could avail itself of the free advice from the conservation officer at the local authority.

**14.** As regards the nature of the contract itself, Eurofound stated that they chose to procure services through a framework contract and not a direct contract because they did not know the exact scope and nature of the works when the call for tenders was launched. A framework contract would have allowed them to have a contract in place to be used when works were needed. However, no contract has been awarded under either procurement procedure [9] and, consequently, no damage resulted to the complainant.

## **The complainant's comments**

**15.** The complainant argued that other professionals, including chartered building engineers and chartered architectural technologists, have the required skills and knowledge to perform the services as described in the call for tenders, are subject to a code of conduct and are subject to dispute resolution mechanisms.

**16.** The complainant said that, in the team proposed in his tender, there were two people (including himself) with a training in architecture and aesthetic design and/or holding a qualification as an architect obtained abroad. Furthermore, both architects and building surveyors have to complete five years of studies and two years practical experience in order to register with their respective representative bodies.

**17.** The complainant also argued that RIAI-registered architects with a conservation specialism are not the only professionals in Ireland who can provide design and project management services for protected structures. Building surveyors may work as project managers/lead designers for restoration or other works to protected structures [10] . In addition, some chartered architectural technologists are also specialised in conservation work and protected structures.

## **The Ombudsman's assessment**

**18.** The legal basis for public procurement procedures organised by EU institutions, bodies, offices and agencies is the EU Financial Regulation. The EU Financial Regulation states that all contracts financed under the EU budget should respect the principles of transparency, proportionality, equal treatment and non-discrimination. All service contracts should be open to the broadest possible group of potential service providers [11] . This means that the selection



criteria in a procurement procedure must be non-discriminatory, proportionate and not unnecessarily restrictive.

**19.** The EU Financial Regulation enables a contracting authority to require an economic operator to hold “ *a particular authorisation proving that it is authorised to perform the contract in its country of establishment or be a member of a specific professional organisation*” [12] . However, such a requirement must be necessary and proportionate for the performance of the contract in question. The preference for a particular category of professionals must be justified in light of the specific nature of the service to be performed, as described by the procurement documents. These documents must provide a complete, clear and precise description of the subject matter of the contract [13] .

**20.** The above also applies to framework contracts, with consideration as to their specificity. Framework contracts shall not be used improperly or in such a way that their purpose or effect is to prevent, restrict or distort competition. This means that the tender information documents in a procedure for the award of a framework contract must specify the subject matter and the maximum range of the services required, but can define the precise quantity of services it needs at a later stage [14] .

**21.** Over the course of the Ombudsman’s inquiry, Eurofound provided different reasons as to why it had included the requirement for an RIAI-registered architect in the call for tenders, some of which were legitimately contested by the complainant [15] . However, two central reasons appear to be: (a) the protected status of the building on which the works were expected to be carried out and (b) the need for an expert on building ‘design and aesthetics’. Neither of the two calls for tenders gives particular emphasis to these two elements.

**22.** Contracting authorities are responsible for ensuring that calls for tenders are based on the correct selection criteria for determining the relevant professional qualifications for performing the contract. To this end, it is incumbent on EU bodies to be familiar with the relevant local provisions concerning the services they require in the context of procurement procedures they organise. However, as noted above, the Financial Regulation also requires them to ensure that a call for tenders is non-discriminatory and open to the widest possible array of eligible service providers.

**23.** Based on the information reviewed by the Ombudsman inquiry team over the course of the inquiry, a RIAI-registered architect may not be the only professional who can perform the tasks required under the proposed framework contract. It therefore appears that the requirement that tenders include at least one RIAI-registered architect may not be necessary and proportionate given the subject matter of the contract.

**24.** As Eurofound has cancelled both procurement procedures, the Ombudsman proposes not to conduct further inquiries. A contracting authority can cancel a procurement procedure without the tenderers being entitled to claim any compensation [16] . However, the Ombudsman considers it appropriate to make suggestions for improvement to Eurofound, with a view to ensuring that future procurement procedures for the provision of architectural services are



based on the appropriate criteria, and include sufficiently clear information for potential tenderers.

**25.** As a starting point, Eurofound should describe in more detail in the tender specifications which works it would like the contractor to perform and the impact that the protected nature of the building would have on the performance of the works. This does not prevent it choosing a framework contract instead of a specific one, if it has a recurrent need to carry out works or renovation projects. However, choosing a framework contract does not exempt it from clearly and precisely setting out its needs and, where this involves the imposition of a requirement that would otherwise restrict competition, also explaining the necessity and proportionality of that requirement. It would also be preferable for Eurofound to indicate an approximate schedule for the initial works to be performed.

**26.** Based on the defined need, Eurofound can then reflect on which qualifications are necessary for performing the procured works from a legal and technical point of view. Once it has established what categories of professionals are legally authorised to provide a certain type of service (for example, whether they need a particular authorisation or to be members of a professional association), it can then reflect on what kind of technical capacity the professional would need to provide the service (for example, training and/or specific experience). The Ombudsman will formulate a suggestion for improvement accordingly.

## Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion [17] :

**No further inquiries are justified.**

The complainant and the European Foundation for the Improvement of Living and Working Conditions (Eurofound) will be informed of this decision .

## Suggestions for improvement

**In any future procurement procedure for the provision of architectural services, Eurofound should specify its needs in more detail and set out clearly the works envisaged having regard to the nature of the building. On this basis, Eurofound should define which authorisation is necessary to perform the service legally and, from a technical point of view, what kind of prior experience would enable the tenderer to perform the service, while striking a balance with the need to ensure the broadest possible competition. This information will allow potential tenderers to decide if and how to submit a tender.**



Emily O'Reilly European Ombudsman

Strasbourg, 22/06/2022

[1] *Procedure 171902/5443, Negotiated procedure relating to the Provision of Architectural and related services at Eurofound.*

[2] This was in line with sections 21 and 22 of the Irish Building Control Act 2007.

[3] Member of the Chartered Institute of Architectural Technologists, CIAT.

[4] Member of the Society of Chartered Surveyors Ireland, SCSi.

[5] Member of the Chartered Association of Building Engineers, CABE.

[6] *211012/5782 Provision of Architectural and related services at Eurofound.*

[7] The complainant submitted several infringement complaints to the European Commission concerning this, such as CHAP(2010)02912 and CHAP(2013)03587, following which the Commission asked clarifications to Irish authorities.

[8] Point 18(3)(b) of Annex I to the Financial Regulation.

[9] Under Article 171 of the Financial Regulation.

[10] <https://scsi.ie/wp-content/uploads/2021/01/SCSIPR1.pdf>

[11] See Article 160 paragraphs 1 and 2 of the Financial Regulation.

[12] Article 18.2(b) of Annex I to the Financial Regulation.

[13] Judgement of 6 May 2013, *Kieffer Omnitec/Commission*, T-288/11, paragraph 25, available [here \[Link\]](#).

[14] Article 160(3) of the Financial Regulation.

[15] For example, the complainant referred to the Code of Practice for Inspecting and Certifying Buildings and Works, which makes clear that professional categories other than RIAI-certified architects may oversee a building project from start to finish.

[16] Article 171 of the Financial Regulation.

[17] This complaint has been dealt with under delegated case handling, in accordance with [the](#)



Decision of the European Ombudsman adopting Implementing Provisions [\[Link\]](#)