



How will the new Procurement Bill affect architects?

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Introduction

Following Brexit, the UK's public procurement laws will change by way of a new Procurement Bill which is currently advancing through the House of Lords. These changes raise fundamental questions for architects bidding for work in the public sector.

First some background; Whilst a member of the EU, public procurement law was derived from several sources; the European Union Policy contained in the European Union Treaties; European Union Directives, in this case the European Public Contracts Directive¹ which was almost directly translated into the Public Contract Regulations 2015² (PCR2105); then European Union Court of Justice decisions and national court decisions.

Having left the EU, the government published a Green Paper, 'Transforming Public Procurement'. The Green Paper is a political document, stating the new rules will prioritise value for money over lowest price, flexibility and simplicity over the EU's restrictive, "complicated and stifling rules."³

Although no longer subject to EU law, compliance will be required with the World Trade Organisation rules on public procurement⁴. Therefore transparency, equal treatment and other principles of public procurement remain. Authorities will still have to demonstrate transparency in the procedure and award of the contract. However, the Bill omits much information or guidance on how procurement should be run to achieve this.

¹ Directive 2004/18/Ec Of The European Parliament and of The Council of 31 March 2004 on the Coordination of Procedures For The Award Of Public Works Contracts, Public Supply Contracts and Public Service Contracts

² 2015, No. 102, PUBLIC PROCUREMENT, The Public Contracts Regulations

³ Cabinet Office, Transforming Public Procurement, 2020, page 5

⁴ World Trade Organisation, Revised Agreement on Government Procurement and WTO related legal instruments, text of the GPA as amended 12 March 2012



This will follow in secondary legislation and guidance documents but is fundamental to understanding how flexibility can be balanced against public procurement principles.

Transparency

“...we were just there to make up the numbers and the outcome of the so-called competition had in reality already been pre-determined...”⁵

The Garden Bridge Review report concludes the procurement exercise to select the architect for the bridge was designed so that only one bidder could win. It goes on to uncover a false evaluation process and finds other bidders were only invited to provide an illusion of fair process⁶. An example of a poor procurement. Against principles of transparency, equal treatment and competition as well as being contrary to the PCR2015. Underlining why decision-making processes must be open and transparent.

Despite the EU aims of transparency, under the PCR2015 it was difficult to find tender opportunities and notices, all in different locations. The Guidance Notes, accompanying the Bill state the Bill will ensure greater transparency of data to make it easier to scrutinize procurement decisions. If these are published in a single centralized digital procurement system as described, it will be easier to access information.

Quality

HKA's 2021 Crux Report records that in the UK, defective design is the primary cause of claims in the publicly funded building sector, and that in this sector, over a billion pounds of claims have been made since 2011⁷. The Hackitt review⁸ states a drive for quality must overcome a focus on lowest price and the importance of quality is now widely recognised across the industry.

The emphasis on selecting quality over the lowest price is reflected in the change in the evaluation requirements in the Bill. s.18(1) moves away from the requirement for contracting authorities to choose the 'Most Economically Advantageous Tender' ("MEAT") to choosing 'Most Advantageous Tender' ("MAT"). However, this contrasts with s.22(5)(d) requiring the consideration of "price, other costs, or value for money in all the circumstances". So, it is not clear how the change from MEAT to MAT will result in any change selecting quality over price.

Assessing quality against cost is typically carried out using a ratio. This is often 60:40 quality to cost but can extend to 80:20. Scoring methodologies for pricing criteria generally award the lowest fee the highest score. The marks of the other bidders are then calculated in relation to how close they are to the lowest fee. This reinforces the 'race to the bottom'⁹ culture that was criticised under the Hackitt review for prioritising lowest price to the detriment of quality. In a quality evaluation, what is judged to be the best design is often not

⁵ The Garden Bridge Review, Appendix 1, paragraph 69, quote from Marks Barfield

⁶ 'The Garden Bridge Review', Appendix 1, paragraph 69

⁷ HKA Crux Report 2021, Integrated research programme on causes of claims disputes on construction and engineering projects

⁸ Dame Judith Hackitt, Building a Safer Future, 2018

⁹ Dame Judith Hackitt, Building a Safer Future, 2018, p. 6.



given full marks but judged against a hypothetical best possible design with no flaws, so this further increases the weighting of cost against quality. Because several bidders are likely to achieve a similar quality score,¹⁰ the scoring will lie in a narrow band, so the price then becomes the distinguishing factor. Therefore, using a simple ratio such as 60:40 does not sufficiently prioritise quality.

Interestingly the Bill sets out in s.22.(3)(b) that contracting authorities must indicate the relative importance of award criteria, not just by weighting or listing in order of importance, but also, they can be ‘described in some other way’. This may permit an improved assessment of quality and cost beyond a simple weighting but does not force authorities to prioritise quality.

Detractors of the current procurement regime criticise the emphasis on process, that we have defaulted to tick boxes and overlooked the consideration of the quality to the end user.¹¹ Considering quality in design involves a subjective evaluation. Subjective qualities are more difficult to measure and so more difficult to demonstrate a transparent process. If the new rules grant authorities improved flexibility and discretion, architecture could benefit. However, this will require authorities to have a level of expertise to assess quality. Public bodies will need to invest in teams who have the necessary skills to consider design and quality. The Public Practice scheme places architects in local councils and so instils design expertise. If similar schemes or educational projects were to accompany the rollout of the new procurement rules this may have the biggest impact on selection of quality.

“One potentially effective change is the creation of a digital centralised system which will hold bidders’ details.”

Innovation and Design Competitions

Tendering for architectural services under the PCR 2015 could be conducted through five procedures. The Bill reduces five to one with ‘1a open procedure’ and a ‘1b new competitive flexible procedure’. Significantly for architects, ‘Design Contests’ are removed. Design Contests are anonymous procedures, the evaluation focused on choosing the best design not the best or most experienced architect. However, these were rare in the UK, because of an aversion to risk and valuing experience over design innovation.

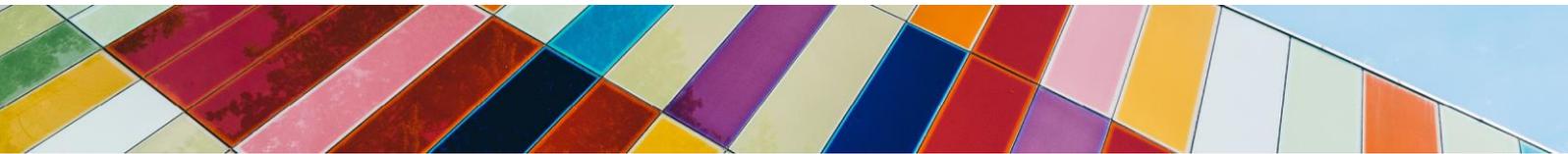
Design Competitions can result in a wide range of innovative designs because a wider range of practices can enter, and a greater discretion and subjectivity is permitted in the evaluation process. Competitions have granted young practices their first big breaks such as Peter Barber’s Donnybrook Quarter in London or Renzo Piano and Richard Rodger’s Pompidou centre in Paris. Although there is nothing in the Bill to encourage running design competitions, the new ‘competitive flexible procedure’ could likely be used.

¹⁰ Construction Leadership Council, Procuring for Value, outcome based, transparent and efficient

A whole life integrated industry will improve productivity and end- user satisfaction and produce wider societal benefits, 2018 p. 13.

¹¹ All Party Group for Excellence in the Built Environment, A Better Deal for Public Building,

Report from the Commission of Inquiry into achieving best value in the procurement of construction work, 2012 25



Opening up public procurement to smaller practices?

The 'Better Deal for Public Building' report warns against putting too high weighting on experience because small firms have many high-quality designers¹². Because there are many smaller firms in the UK, most architectural practices are excluded from tendering for public buildings; Lacking previous experience, turnover requirements or the level of professional indemnity insurance required in the qualifying tender stage. Public bodies should be encouraged to take advantage of this untapped highly skilled resource.

Social value is now a requirement on all public contracts captured by the Bill and could prompt authorities to consider smaller practices. The Government 'National Procurement Policy Statement' (NPPS) published in June 2021 provides a definition of social value as, "creating new businesses, new jobs and new skills; tackling climate change and reducing waste, and improving supplier diversity, innovation and resilience"¹³. Some architects are already engaged with demonstrating social value through tenders by partnering up with smaller practices, providing work experience or otherwise engaging with the wider community.

It is uncertain how the requirement in the NPPS will be interpreted by authorities. It could result in a lowering of requirements for experience or PII. Procedures could be designed that award higher scores to small practices on the basis they are creating new businesses or jobs. Procurement for smaller projects could target small practices. If guidance is provided along these lines, requirements for social value could open up public work to smaller firms.

Another change which could make a difference is s.22(2)(d) of the Bill requiring that award criteria "are a proportionate means of assessing tenders, having regard to the nature, complexity and cost of the contract". However, proportionality was already a principle of PCR2015 so it is not clear if this will have an impact. But the direct wording could prompt authorities to consider what experience, proportional turnover or PPI is practically required from architects.

Proportionally

RIBA research in 2012 revealed architects bidding on public work spent up to 40% of earnings from public work on the tender process. The 'Impact Assessment' accompanying the Bill explains the Bill aims to address disproportionate bidding requirements¹⁴. Proportionality was required by the PCR2015, but the Bill is more direct: s.19(3) specifically requires procedures to be proportionate although proportionality is not sufficiently defined to force authorities to change their practices.

One potentially effective change is the creation of a digital centralised system which will hold bidders' details. The system aims to reduce repetition in submitting information. If all aspects of procurement are managed on one digital system, it may be successful. However, considering the ambition for increased flexibility it is

¹² All Party Group for Excellence in the Built Environment, A Better Deal for Public Building, Report from the Commission of Inquiry into achieving best value in the procurement of construction work, 2012, p20

¹³ Cabinet Office, National Procurement Policy Statement, June 2021, page 3

¹⁴ Procurement Reform Bill Impact Assessment CO2024, 21.04.2022, page27



likely there will be a wider range of procurement procedures. Each tender may have quite different requirements and the benefit of stored information could be minimal.

Conclusion

This is necessarily an initial analysis because of what is expected to be a larger set of information contained within the secondary legislation and guidance documents. It is difficult to understand the full implications of the Bill until these are published. Additionally, the Bill may be amended as it proceeds through the House of Lords. However, at this stage it appears unlikely that public procurement will be transformed to benefit architects.

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