

# Royal Institute of British Architects

## Transforming Public Procurement: RIBA response to the Procurement Green Paper – March 2021

The Royal Institute of British Architects is a global professional membership body driving excellence in architecture. We serve our members and society in order to deliver better buildings and places, stronger communities and a sustainable environment. Being inclusive, ethical, environmentally aware and collaborative underpins all that we do.

### **Q1. Do you agree with the proposed legal principles of public procurement?**

Yes, the RIBA supports the proposed legal principles and the intention to legislate to require contracting authorities to have regard to the Government's strategic priorities. The RIBA believes that effective public procurement that prioritises good design outcomes can maximise the social, environmental and economic benefits of development.

It is vitally important that the Government is prepared to take strong and decisive action against contracting authorities whose commercial decisions have adverse impacts on the quality, safety and sustainability of new construction projects or whose procedures discriminate directly or indirectly against small businesses.

### **Q2. Do you agree there should be a new unit to oversee public procurement with new powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities?**

Yes, the RIBA supports the proposals for the establishment of a new unit to oversee procurement.

The Mystery Shopper Scheme and Public Procurement Review Service were effective tools for highlighting poor practice and led to some encouraging results. If the proposed review mechanism can continue that positive trend of these schemes but add in additional enforcement powers it would be a welcome development.

It is essential that the review unit has the power to intervene when poor practice by a contracting authority is identified.

**Q3. Where should the members of the proposed panel be drawn from and what sanctions do you think they should have access to in order to ensure the panel is effective?**

We believe that there is a strong case for the creation of a number of specialist panels within the new unit which look at both specialist sectors and address different contract value thresholds. There should be clear rules to ensure that all panels contain a representative selection of business types including small and micro businesses where relevant.

The cost and complexity of construction projects requires a greater level of scrutiny than many other procurement types. It is vital that the panel is representative of the industry and society and has powers to intervene if they have concerns about the safety, sustainability, quality and value implications of procurement decisions.

Should the panel consider it necessary they should be able to call upon external experts and technical advisors. The RIBA maintains a number of registers of specialist Architects whose expertise would be beneficial to these review panels including Conservation specialists and Client Advisers.

We feel that all panels examining construction would benefit from the inclusion of Architects and other specialist consultants, however, for cases where the panel examines higher risk buildings, it is essential that an Architect is involved and that the panel has the power to stop a procurement process if they have concerns about decisions being taken.

Contracting authorities which are found to have made procurement decisions that either could or do lead to building safety issues arising should face significant restrictions on their commercial activities until such time as the Cabinet Office or other regulators have deemed their processes to be safe.

**Q4. Do you agree with consolidating the current regulations into a single, uniform framework?**

Yes, provided that the framework contains a suitable degree of flexibility to allow for the wide range of products and services being procured.

One of the biggest issues with the current Public Contract Regulations and their application is that they cover the procurement of a multitude of goods and services by public bodies, which do not necessarily always align that well with construction-related projects. A concern could be that a single uniform framework might not necessarily help in this respect. For examples asking for relevant examples of work over the past 3 years isn't particularly suitable in the world of architecture. 5 or 7 years gives greater scope to better reflect the time it takes to complete a project.

**Q5. Are there any sector-specific features of the UCR, CCR or DSPCR that you believe should be retained?**

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**Q6. Do you agree with the proposed changes to the procurement procedures?**

While the RIBA broadly welcomes the proposed changes, we are disappointed that the Design Contests have been omitted from these proposals. While we recognise that the use of ‘Design Contests’ in this country has been limited, across Europe and around the World, this route is used effectively across a range of different building types.

The ‘Design Contest’ is a specific ‘OJEU’ Procedure that requires at least 1/3rd of the Judging Panel to hold a similar qualification to that being sought, and for anonymity to be maintained throughout the procurement process. In our experience, the latter has been the greatest barrier to Public bodies utilising the Design Contest route more. Since (without introducing an additional procurement step) it effectively precludes the interviewing of an anonymously selected shortlist such that Clients can then explore issues of deliverability etc.

We would urge the Government to consider an explicit reference to the use of design competitions as a permitted procurement route as part of the proposed flexible procedure and would welcome the ability to work with Government to develop best practice guidelines.

**Q7. Do you agree with the proposal to include crisis as a new ground on which limited tendering can be used?**

Yes – provided that there are clear transparency regulations around the award of contracts, the reasons for using limited tendering and clarity around award notices and prices.

We would expect that contracts awarded in a crisis would not be covered by commercial confidentiality on the terms and value of the contract given the need for effective retrospective scrutiny.

**Q8. Are there areas where our proposed reforms could go further to foster more effective innovation in procurement?**

We would urge the Government to examine the potential for a reform of the way in which the cost element of procurement is scored. The price scoring of bids should be reviewed to improve construction delivery, whole life, sustainable, social, and qualitative values. Assessment evaluations and selection where lowest bid prices are automatically rewarded the highest score will reduce the likelihood that the most advantageous tender will be selected

We would urge the Government to recommend the use of the *mean narrow average* approach on construction projects. We note that the submission from Project Compass recommends that bids for construction service contracts are assessed on a mean narrow average basis, whereby the highest score is awarded to the bidder closest to the (narrowed) mean. We believe that this approach would be beneficial and hope the Cabinet Office will consult on its adoption.

**Q9. Are there specific issues you have faced when interacting with contracting authorities that have not been raised here and which inhibit the potential for innovative solutions or ideas?**

In 2020, the RIBA published a report setting out how local government authorities could improve their capacity to deliver social housing. A lack of procurement experience and the disconnect between delivery departments and procurement teams is one of the most significant barriers to delivering innovation in public contracts. One of the most regularly expressed concerns from both local government staff and architects that we spoke to was the inability of staff with experience of housing and construction to influence the commercial decisions made by procurement departments.

This can be particularly true where requirements are very specific in terms of previous experience, with X similar projects of >£Ym having been delivered in the last Z years. The current default 3yrs is too short a time period given that construction is a relatively slow process, with only the largest practices often having had multiple project experience. We would recommend that for construction procurement a longer timeframe is permitted – RIBA members have suggested that up to 7 years may be sensible.

As a result of poor procurement decisions, unsuitable suppliers were chosen or potential suppliers excluded for reasons that do not relate to their suitability to deliver the contract.

The Construction Playbook makes an explicit statement that ‘Paying more for higher quality may be justified if the whole life cost is advantageous’ – we would welcome a restatement of this position in the new procurement policy.

The proposal to establish a single digital platform for supplier registration that ensures businesses only have to submit their data once to qualify for any public is strongly endorsed by the RIBA. Contracting Authorities which fail to adopt systems which are compliant with these regulations within a reasonable timescale should face punitive sanctions including restrictions on the operation of their procurement departments.

**Q10. How can government more effectively utilise and share data (where appropriate) to foster more effective innovation in procurement?**

Proposals to embed transparency by default throughout the commercial lifecycle from planning through to procurement, contract award, performance and completion are very welcome.

At present, one of the biggest barriers to innovation in construction is the lack of usable data on the quality, safety and sustainability of completed projects. The Government should urgently consider introducing a requirement for all projects which receive public funding to carry out and publish detailed post-occupancy evaluation. More detail on the costs, benefits and reasoning behind this proposal can be found in the RIBA’s report [\*Post Occupancy Evaluation: an essential tool for the built environment.\*](#)

**Q11. What further measures relating to pre-procurement processes should the Government consider to enable public procurement to be used as a tool to drive innovation in the UK?**

When considering the use of frameworks, there is a need for contracting authorities to more accurately assess the sorts of projects that are to be delivered. While there are benefits to frameworks in terms of speed and complexity, it is also the case that frameworks which cover a wide variety of project sizes and types can lead to the exclusion of businesses from opportunities that they would otherwise be well placed to deliver.

**Q12. In light of the new competitive flexible procedure, do you agree that the Light Touch Regime for social, health, education and other services should be removed?**

Yes

**Q13. Do you agree that the award of a contract should be based on the “most advantageous tender” rather than “most economically advantageous tender”?**

Yes – we would go further and suggest that where a contracting authority decides to accept the lowest cost bid, they should have to state their reasoning in the award notice and provide details of how they will monitor the quality of the outcomes to ensure that their procurement processes delivers the most advantageous outcome.

**Q14. Do you agree with retaining the basic requirement that award criteria must be linked to the subject matter of the contract but amending it to allow specific exceptions set by the Government?**

Yes

**Q15. Do you agree with the proposal for removing the requirement for evaluation to be made solely from the point of view of the contracting authority, but only within a clear framework?**

Yes

**Q16. Do you agree that, subject to self-cleaning fraud against the UK’s financial interests and non-disclosure of beneficial ownership should fall within the mandatory exclusion grounds?**

Yes

**Q17. Are there any other behaviours that should be added as exclusion grounds, for example tax evasion as a discretionary exclusion?**

The RIBA feels that the new regulations should reflect forthcoming changes to the building safety regime in England to ensure that firms that do not meet standards or whose work has been found to be deficient face exclusion.

**Q18. Do you agree that suppliers should be excluded where the person/entity convicted is a beneficial owner, by amending regulation 57(2)?**

Yes

**Q19. Do you agree that non-payment of taxes in regulation 57(3) should be combined into the mandatory exclusions at regulation 57(1) and the discretionary exclusions at regulation 57(8)?**

Yes

**Q20. Do you agree that further consideration should be given to including DPAs as a ground for discretionary exclusion?**

Yes

**Q21. Do you agree with the proposal for a centrally managed debarment list?**

Yes

**Q22. Do you agree with the proposal to make past performance easier to consider?**

Yes, however the RIBA would like to see this requirement to cover the long-term evaluation of contract outcomes. As previously stated, we believe that Post-Occupancy Evaluation should be mandatory on all schemes which receive direct or indirect public funding, and that the data on outcomes should be made available in an easily accessible format to allow for consideration.

**Q23. Do you agree with the proposal to carry out a simplified selection stage through the supplier registration system?**

Yes

**Q24. Do you agree that the limits on information that can be requested to verify supplier self assessments in regulation 60, should be removed?**

Yes – provided that these changes are introduced in a way which is broadly compatible with the single digital platform for supplier registration.

**Q25. Do you agree with the proposed new DPS+?**

The RIBA broadly supports these proposals as they have the potential to capture some of the benefits of frameworks while removing the closure of the market to new entrants. However, it is important that DPS+ systems do not inadvertently exclude suppliers by imposing unrealistic and unnecessary conditions on firms which seek to join a DPS+. Examples of this would include DPS+ systems which cover a wide range of contract sizes. It is important that turnover, professional indemnity insurance and geographical coverage requirements are proportionate to the size of the contract – not just set for the largest contracts.

**Q26. Do you agree with the proposals for the Open and Closed Frameworks?**

These proposals are an improvement over the current system however greater consideration needs to be made as to the appropriateness of frameworks within the construction sector.

**Q27. Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?**

The RIBA strongly supports this proposal. It will not be possible to improve the safety, quality and sustainability of the built environment without much better information about the outcomes of procurement processes. We would welcome the opportunity to discuss this in more detail as the proposals are developed.

**Q28. Do you agree that contracting authorities should be required to implement the Open Contracting Data Standard?**

Yes

**Q29. Do you agree that a central digital platform should be established for commercial data, including supplier registration information?**

Yes

**Q30. Do you believe that the proposed Court reforms will deliver the required objective of a faster, cheaper and therefore more accessible review system? If you can identify any further changes to Court rules/processes which you believe would have a positive impact in this area, please set them out here.**

Yes

**Q31. Do you believe that a process of independent contracting authority review would be a useful addition to the review system?**

Yes

**Q32. Do you believe that we should investigate the possibility of using an existing tribunal to deal with low value claims and issues relating to ongoing competitions?**

Yes

**Q33. Do you agree with the proposal that pre-contractual remedies should have stated primacy over post-contractual damages?**

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**Q34. Do you agree that the test to list automatic suspensions should be reviewed? Please provide further views on how this could be amended to achieve the desired objectives.**

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**Q35. Do you agree with the proposal to cap the level of damages available to aggrieved bidders?**

No

**Q36. How should bid costs be fairly assessed for the purposes of calculating damages?**

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**Q37. Do you agree that removal of automatic suspension is appropriate in crisis and extremely urgent circumstances to encourage the use of informal competition?**

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**Q38. Do you agree that debrief letters need no longer be mandated in the context of the proposed transparency requirements in the new regime?**

The RIBA would broadly support this, provided that mechanisms to provide informal feedback for unsuccessful bidders is maintained. Debriefing conversations are an essential resource for unsuccessful bidders



**Q39. Do you agree that:**

- **businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?**
- **there should be a specific right for public bodies to look at the payment performance of any supplier in a public sector contract supply chain?**
- **private and public sector payment reporting requirements should be aligned and published in one place?**

Yes

**Q40. Do you agree with the proposed changes to amending contracts?**

Yes

**Q41. Do you agree that contract amendment notices (other than certain exemptions) must be published?**

Yes

**Q42. Do you agree that contract extensions which are entered into because an incumbent supplier has challenged a new contract award, should be subject to a cap on profits?**

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