Opportunities for SME contractors in the schools estate

Insights into how procurement change can:

• Impact smaller firms.

• Open the way for smaller building firms to bid for schools work.

How has the UK been procuring?
What can be done?
Areas to change
Your own OJEU contract bids

Walter Menteth
Director, Walter Menteth Architects
Director, Project Compass CIC
RIBA National Councillor
Senior Lecturer (part time), Portsmouth Architecture school
UK Cabinet Office SME Panel 2011- 2015
Chair RIBA Procurement Reform Group 2011-13
COMPETITIONS can seem COSTLY, ARBITRARY, DIFFICULT TO WIN, NOT A LEVEL PLAYING FIELD. At best they are frustrating + constraining to SME’s: business growth + progression.
context
evidentially unnecessary

**COMPLEXITY**

REDUCES

Accountability
Transparency
Effectiveness
Efficiency
Access
Opportunity
Sustainability
Cohesion
Growth
Quality
Innovation
EU PROCUREMENT

FOR PUBLIC COMMISSIONING

THE LEGAL FRAMEWORK
OF COMPETITIONS

For all contracts above
The European ‘procurement thresholds’

THE NEW EUROPEAN PROCUREMENT
DIRECTIVE

for most construction it is the:-

DIRECTIVE 2014/24/EU

THIS DEFINES COMMON

• Legal language,
• Procedures, +
• Processes

Requiring Member States to
adopt these Laws + Practices
be TRANSPARENT, FAIR + PROPORTIONATE
+ gather Data
THE EUROPEAN PROCUREMENT DIRECTIVE

DIRECTIVE 2014/24/EU

HAS NOW BEEN TRANSPOSED INTO
THE NEW
PUBLIC CONTRACT REGULATIONS 2015
Feb 2015

This is now a copy out of the EU directive making it more comprehensible + better aligned.
There is also less scope for national variations

The new regulations also now cover sub-threshold procedures and fair payment terms

A digest of some of the most notable amendments are provided at the end of this presentation.
How has the UK been procuring?

Insights on UK performance:

• Relative to the EU.

• In the service sector
  (which its suggested probably reflects all the construction industry experience)

• In education
PROCUREMENT COST

typical costs of a competition
(weighted averages across all industries)

ref. EU commissioned evaluations of ALL PUBLIC PROCUREMENTS

Authorithy € ('000) + (Firm € ('000)*Bids) = Total € per competition('000)

EXPENSIVE

EU PROCUREMENT COSTS:-
(averages)

25% are borne by
CONTRACTING AUTHORITIES

75% are borne
BY BIDDERS

UK has been at least 20% more expensive
than comparable EU countries,
costs are almost 2x EU average
**MICRO + SME ACCESS**

SME’s relative to OJEU awards

ref. EU commissioned evaluations of ALL PUBLIC PROCUREMENTS

---

**MICRO + SME ACCESS TO PUBLIC PROCUREMENT**

UK is the 4th lowest within the EU 27

The ‘Directives’ new min. turnover (x2 min. contract value) would still exclude for services (@ €200,000) **90% of EU architectural practices** from public work

for such work typically 85% of UK architectural practices are too small to be able to tender

For works contracts the same pattern of exclusion is apparent

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**Table:**

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<thead>
<tr>
<th>Country</th>
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**Context:**

Project Compass

6–8 OCTOBER 2015, NEC BIRMINGHAM
ref. EU commissioned evaluations of ALL PUBLIC PROCUREMENTS

**MICRO + SME ACCESS**

access relative to the Member State economy

-50 0 50

LU 15
SK 11
DE 3
IE 2
HU -0.3
FI -5
FR -7
SE -11
DK -12
NL -12
GR -12
BE -13
LV -14
SI -17
LT -18
EU27 -19
PL -20
AT -21
RO -23
UK -25
EE -31
IT -33
CZ -34
CY -40
ES -42
PT -46

**MICRO + SME ACCESS TO PUBLIC PROCUREMENT**

falls below the economies as a whole

within the EU it is an average **19% below**

**UK 25% below**

small businesses are not getting equal opportunity in the public sector

It is implicit to fair + competitive access that SME + micro business access to public tenders should be roughly in proportion to their weight in the economy
UK ‘OJEU’ PROCUREMENT has aberrant high mean values + 60% higher median values than the EU average.

The UK trend has been towards more ‘aggregation’ into large, high value contracts + frameworks awarded by aggregated authorities (eg the NEIPs).

Aggregation excludes many smaller firms and can have a negative impact on reducing competition.
AGGREGATION

Number of awards for architectural services won (red) relative to the numbers of firms winning those awards (blue) (Q1 2009 - Q2 2014)

UK ‘OJEU’ PROCUREMENT
the glass ceiling in construction design services

15,524 awards to 4,233 firms

5.5% of firms won 43.4% of all awards
94.5% of firms won 56.8% of all awards

Data on UK efficiencies evidences they are in inverse to the extent of UK aggregation

Discriminatory markets are contrary to the fundamental principles of the European treaties + the Directives

‘Bigger is not always best’

Contracts should be determined
Proportionality + appropriately
The initial ITT shortlist (results from the PQQ)

<table>
<thead>
<tr>
<th>NORTH-EAST (£500M)</th>
<th>EAST OF ENGLAND (£750M)</th>
<th>LONDON &amp; SOUTH-EAST (£1.5BN)</th>
<th>SOUTH-WEST (£500M)</th>
<th>WEST MIDLANDS (£875M)</th>
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<td>T&amp;B (Contractors)</td>
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</table>

Those already on the National Framework (red)
SME contractors (green)

The EFA regional frameworks for smaller jobs.
For individual schools, new build + refurbishment, + elemental works.
(Min. call off of £200k + anticipated average call off of £2m)

Purporting to enable
SME regional contractors to successfully bid.
And aligned with the requirements of:
The 2012 Social Value Act
The NPPF, Section 1 (18,19 & 20)
The HMG Procurement Pledge

In each region they bid contractors needed
a min. turnover of £25m

For consortia members each required
a turnover in excess of £10m

46% (39) of all potential lots were shortlisted to
7 (19%) firms selected for 5 or more lots.

8% (7) of all potential lots were shortlisted to
6 (17%) firms who are SME regional suppliers.
EducatioN Funding AgenCy RegioNal Frameworks

Awards - The successful bidders

<table>
<thead>
<tr>
<th>Region</th>
<th>Awarded to</th>
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<tbody>
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<td>Bam Construction, Kier, Bowmer &amp; Kirkland</td>
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</tr>
</tbody>
</table>

2.5% (1) of all the lots were awarded to 1 (6%) firm who is an SME regional suppliers.

Full report available [HERE](#)
What can be done?

Embedding change + challenging bad practice:
WHAT CAN BE DONE.

Influence the buyer
To change towards adopting best practices through their Procurement standing orders and regulations.

Petition elected representatives, the press and public
To highlight procurement issues.

Complain
About bad procurement practices and processes through the Gov. Crown Commercial Services (CCS) Mystery Shopper Service by sending an email to MysteryShopper@crowncommercial.gov.uk or by tele. 0345 010 3503. Mystery shopper is an anonymous service set up to support SMEs but tend to be reactive and not pro-active, aiming to influence change over the longer term.

Challenges
Maybe mounted for discrimination within invitations to tender, or by subsequent alterations of the conditions, but they will typically only be successful when the bidder had a prospect of winning the contract in the absence of the alleged brief.
Under the Public Procurement Regulations a challenge can allow a claim for a loss.

Under the Remedies Directive a challenge needs to be mounted within 10 working days of the award decision being made to the supplier.
Judicial review proceedings
Although the Remedies directive and the PCR allow only those tendering to challenge the proceedings, other interested parties may also do so using judicial review proceedings if the breach is not a straightforward breach of the regulations.

Can be useful for claimants seeking information held by public authorities. The information requested needs to be clear and specific, and commercially confidential material will not be released, but this can provide valuable insight into for example selection criteria and processes or lack of.

The EU Commission
May intervene but is unlikely to do so unless the breach is serious, and is under no obligation to do so.

SOLVIT
Is a European Commission network that deals with complaints against public contracts that have been concluded in another country. Further info at http://ec.europa.eu/solvit/index_en.htm

Disseminate knowledge.

When making a complaint it is worth remembering that as the law is so complex it is often quite easy for bad procurement practices to appear excessively obscure, so endeavour to be clear.
The Public Services (Social Value) Act 2013

31 Jan 2013

Places a duty on public bodies to consider social + environmental benefit + value AHEAD OF A PROCUREMENT.

... only matters that are relevant to what is proposed to be procured and, in doing so, must consider the extent to which it is proportionate in all the circumstances to take those matters into account.
The Thames Garden Bridge
£167+ construction design sub-OJEU
This procedure has not been transparent.

An exemplar of bad procurement practice

Engaging in the process
- Scrutinise the detail
- Work together
- Raise FOIs
- Support and sustain:
  - elected representatives
  - the public
  - the press

Challenge + complain against bad practice
Areas to change?

- Through the EU + directive
- Through digital procurement (disruptive technology)
1. At the next round of international trade negotiations (WTO), the EU commits through renegotiating to seek

**TO RAISE THRESHOLD VALUES**

- WTO renegotiations need to be supported & evidenced

2. Within approx. 2.5 years there will be

**FULL E-PROCUREMENT.**

- end to end e-procurement, documentation, guidance, submissions, invoicing, data + drawings.
- e-procurement directive to establish programme + protocols
- e-transparency + reporting

3. A standard e-based reusable European Single Procurement Document will

**ALLOW SELF-CERTIFICATION OF DOCUMENTATION SUBMISSION REQUIREMENTS AT PQQ STAGE**

for submissions to participate, or tender.

- verified prior to award stage.
- Self certification documents can be provided with links to national data registers + be aligned to the standard data held within Trade or Professionals Registers (eg NFB, RIBA Chartered Practice)
4. **NEGOTIATED PROCEDURES ARE INCENTIVISED**
   + simplified
   - via a PIN (Prior Information) notice + easier recording

5. **WHOLE LIFE COSTS (LIFE CYCLE) ARE EMBEDDED**
   as a pivotal principle in the new directive
   - however WL cost will be assessed at contract selection (prior to the development of a design) rather than as a contract performance criteria + threatening to increase bid complexity

6. **TURNOVER REQUIREMENTS BECOME NON MANDATORY**
   + **ARE CAPPED TO A MAX. 2x A CONTRACTS VALUE**
   - For all but the largest value band of works RIBA has promoted turnover be non mandatory
7. **THE OPPORTUNITIES FOR CONSORTIA BIDS ARE ENHANCED**, with bidders not required to be legal entities when bidding
   - *only upon award + ensure fair terms are applied*

8. **A PRESUMPTION IN FAVOUR OF SPLITTING LARGE CONTRACTS INTO MORE NUMEROUS LOTS** unless justifiable - is introduced.
   - *through an “apply or explain” principle - this calls for legally justifiable explanation*

9. **PROJECT BANK ACCOUNTS** are allowed along with **BETTER PAYMENT TERMS FOR TIER 2 SUPPLIERS**
   - *but for MEMBER STATES determination*
   - *Gov is adopting this but will all other public bodies follow?*
10. **MEAT**
(Most economically advantageous tender)
will be the default

**SELECTION PROCEDURE FOR CONTRACTS IN CONSTRUCTION**

- RIBA has recommended quality based assessment weightings should be no less than 70% in MEAT selection, with financial criteria no more than 30% for design services
- furthering opportunity for emphasising in assessment the specific skill sets of designers eg on their specific design/ drawing expertise (+ aesthetics).

11. Some procedures will allow that cost in award selection maybe a fixed price, **ALLOWING COMPETITION ON QUALITY CRITERIA ONLY**

12. **ABNORMALLY LOW BIDS MAY BE REJECTED**
Reform for a digital age

e-PROCUREMENT

inception to completion

ACCESS, GUIDANCE, DATA, SELECTION
pre-award, award, post award, e-invoicing

Directive 2014/24/EU
The Public Contract Regulations 2015
• 60,930 data records (UK 2008-2014)
• large UK market
• data base acquisition with backwards capture
• automated with graphical + statistical outputs
• high grain data
Your own OJEU contract bids

• Target your opportunities, scrutinise the documentation + procedures carefully, + be realistic about what is appropriate for you.

• Avoid wasting time + money

• Understand the OJEU, CPV & NUTS codes, + note that contracts aren’t always where they should be or are expected.

• Develop bid ready consortia with other contractors +/or construction professionals for future OJEU bids.

• View + work at the whole picture
INDUSTRY NEEDS TO WORK TOGETHER TO EMBED REFORMS

• Public construction *procurement is expensive + inefficient*, in a market with significant barriers to fair access + competition for SMEs.

• **Our current economic climate makes reform an imperative** with growth badly needed and the time for changing public construction procurement is now.

• The UK construction industry has an annual turnover of more than **£110bn** and represents almost **10% of GDP**, with some **40%** of this being in the public sector. Proportions in other EU nations are thought to be similar.

work together with industry colleagues, your organisations (eg NFB), your representatives, the public + the press to
Lobby for nondiscriminatory, proportionate + better procurement practices

IMPROVE UK COMPETITION PRACTICE

RIBA Procurement Reports evidence further reasoning
ANALYSIS INFORMING POLICY - PROJECT COMPASS

Public Construction Procurement Trends 2009-2014

Project Compass CIC

Walter Menteth, Owen O'Carroll, Russell Curtis and Bridget Sawyers

Public Construction Procurement Trends 2009-2014

Project Compass CIC

Walter Menteth, Owen O'Carroll, Russell Curtis and Bridget Sawyers

EDUCATION FUNDING AGENCY PROCUREMENT ISSUES

March 2015

• transparency
• access
• procedures
• values
• regions
• guidance
• clients
• contractors
• consultants