

# Comparative **Procurement**

Procurement regulation  
and practice in Germany,  
Sweden and the UK

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This is an independent report, commissioned by the RIBA from Burges Salmon, which examines the comparative implementation of the EU Public Procurement Directive, as it relates to the appointment of architects and the procurement of buildings in Germany, Sweden and the UK, and in the context of some of the RIBA's key procurement reform recommendations.

Burges Salmon is a leading UK law firm working across the full breadth of major practice areas and is noted for its procurement practice.

Our national and international client base ranges from global organisations, government and non-profit businesses, to smaller entrepreneurs and private individuals. Burges Salmon regularly advises the RIBA on public procurement issues in relation to RIBA competitions and best practice guidance to architects.



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# 1 Executive summary and recommendations

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**1.1** The EU Commission Evaluation report into EU public procurement legislation substantiates RIBA's concerns that construction procurement in the UK can be expensive and time consuming, and recognises that the legislation often makes it difficult for SMEs to compete, particularly in comparison with other EU member states.

**1.2** However, there is widespread belief that one of the reasons for this is that in implementing the Public Contracts Directive (2004/18/EC) (the '**Directive**') the UK has 'gold plated' the requirements of the Directive, in the sense that it has imposed additional requirements upon contracting authorities. Whilst it is true that the UK has implemented all of the non-mandatory provisions of the Directive to give contracting authorities flexibility as to whether they wish to use the provisions on framework agreements, competitive dialogue or e-auctions, the basic process for conducting a tender process in accordance with the mandatory framework is the same in the UK, Germany and Sweden.

**1.3** What is interesting is how the public procurement legislation is used on the ground.

## Use of procedures

(a) In Germany and Sweden, the application of the public procurement rules is much wider and contracting authorities are required to conduct tendering procedures for contracts below the thresholds, albeit in a simplified form to the regulated procurement routes. Whilst there has been an increase in transparency of contracts awarded under the thresholds in the UK, there are no standardised formal rules or guidance that apply.

(b) The UK is the greatest user of the competitive dialogue procedure. This is perhaps not surprising given that it was the UK government who sought to introduce it as a replacement to the negotiated procedure.

(c) In Germany, there is greater use of the design contest procedure for the selection of architects. This procedure requires submissions to be judged anonymously (the selection of a design rather than of an architect). This leaves contracting authorities unable to have regard to capability and financial standing including professional indemnity insurance. In Germany this issue has been partially overcome because the system of procuring construction transfers the responsibility for obtaining appropriate insurance to the main contractor. It is wrong however to see this as always being necessarily supportive of the SME practice, as there is indirect evidence of smaller practices later being sidelined on capacity issues.

## Selection and award

(a) In the UK, contracting authorities still have the choice as to whether they apply the lowest price test or the most economically advantageous tender offer test for the award of the contract. Even though there is guidance in place which directs central government to apply the most economically advantageous tender test for complex projects there are no strict enforcement measures in place for policing this and the guidance is not binding on local authorities. In contrast, the German government has been more prescriptive in its legislation about use of the tests and making sure that concept of quality is clearly defined. It is more unusual however for a design service to be procured on the basis of lowest price.

## Enforcement

(a) National supervisory bodies for public procurement exist in all three jurisdictions but the roles and powers differ. As far as we are aware, the Swedish Competition Authority is the only national supervisory body with real enforcement powers.

**1.4** The comparative analysis of the public procurement systems in the UK, Germany and Sweden suggest that there are a number of lessons that can be learned.

(a) Whilst helpful, guidance may be of limited impact if there is no mechanism in place for ensuring that the guidance is being properly applied or observed. It may need to be supported by additional training. Or the role of national supervisory procurement bodies may need to be strengthened to give them greater enforcement powers. The option of appointing National Oversight Authorities is one of the options currently being considered by the EU Commission (the '**Commission**') in its proposals for a new EU procurement directive issued in December 2011 (the '**Proposed Directive**').

(b) Sweden and Germany appear to have a greater track record of success for encouraging SMEs. The network of Chamber of Industry and Commerce in Germany also provides training and support to SMEs on how to tender so the perceived barrier to entry is not as great, and the work of the Chamber seems to help to uphold the proportionality principle.

**1.5** EU procurement reforms on their own are unlikely to be the complete answer. One of the advantages of the German system is that the implementation of the public procurement rules appears to be tailored to fit with the current contractual and legal system. Consequently to achieve the same effect in the UK, further consideration may need to be given as reforming the way construction procurement is carried out in the UK.

## 2 An overview of EU public procurement law

**2.1** The root of public procurement law is in the EU's goal to create a 'common market' by removing all national barriers to trade set up by its Member States. The EU recognised that government spend represented a significant portion of the Member States' combined GDP and that the common market would be significantly more effective if governments abandoned their historic approach of purchasing predominantly from domestic suppliers, sometimes at the expense of value for money or quality.

**2.2** The EU public procurement rules establish a framework for advertising and tendering certain contracts for works, services and supplies above defined thresholds across the EU and awarding those contracts on the basis of value for money.

**2.3** There is a strict hierarchy of rules. The Treaty on the Functioning of the European Union (the '**TFEU**') sits at the top of the hierarchy and contains two provisions, which, amongst others, help to promote open procurement:

- (a) an overarching prohibition on discrimination on the basis of nationality;<sup>1</sup> and
- (b) the establishment of 'four freedoms': freedom of a citizen of one Member State to work or establish a business in any other Member State and the freedom to move their goods and capital between and through Member States.<sup>2</sup>

**2.4** Below the TFEU sits the Public Contracts Directive (2004/18/EC, the '**Directive**'). The Directive sets out the body of the rules, which Member States are required to implement into their own legislation. The Directive gives Member States the freedom to implement the provisions in a manner which they think fit and which best reflects their individual legal systems. The current Directive also includes some optional provisions, such as the right to use e-auctions or framework agreements. In the event of any conflict between the Directive and national implementing legislation, the Directive will prevail.

**2.5** Finally, the decisions of the European Court of Justice ('**ECJ**') provide a body of law on the application and interpretation of the TFEU principles and the Directive. These are binding as to the interpretation of the TFEU principles and the Directive. The judgments have also developed the principles of fairness, transparency and non-discrimination, which underpin all public procurement in the EU, whether the Directive applies or not.

**2.6** This should mean that the public procurement principles are applied uniformly across the Member States, allowing for some variations to reflect the different legal systems in force and procedural rules.

**2.7** The EU public procurement rules are enforced by the Commission and at a local level through civil procedures in Member States.

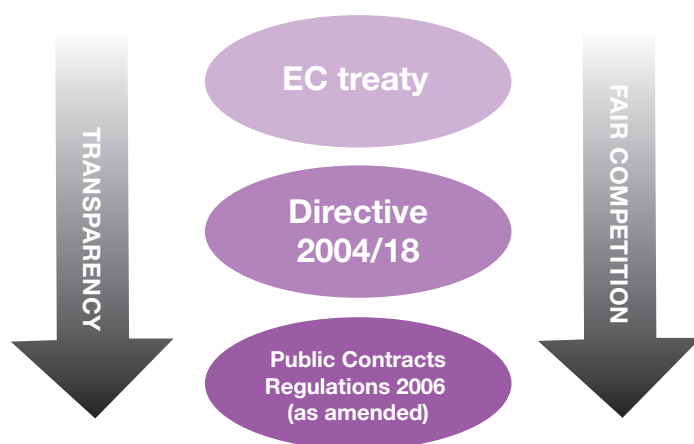


Figure 1 Hierarchy of rules

# 3 How does it apply: UK

## Construction procurement approaches

**3.1** Any comparison between the UK and other EU Member States of how the implementation of procurement law affects the selection of design team members does need to have regards to the different approaches to the selection of professional and contracting members of the construction team. Within this report we will have regard to some of the key differences.

### (a) Typical design team selection process

In the UK the emphasis for the majority of projects is for contracting authorities to select an architect with whom they can work effectively. A competition that centres on the selection of a design first, whether or not as a formal design contest is used relatively infrequently.

### (b) Authorities are looking to allocate risk

Construction is a complex process and carries significant risk during both design and construction phases. Clients regard the procurement process as relatively expensive and offering no saving in professional fees. Clients including contracting authorities tend to select practices with a track record and financial standing that at least seemingly creates the comfort that the practice (and its professional indemnity cover) will be there if ever called upon in the future. The criteria that can be used at the selection stage in a regulated procurement encourage this 'filter' and can be used too inflexibly in a way that discourages SME involvement.

### (c) Use of design and build with novation of design team militates against SMEs

Construction and design risk are interrelated. One of the advantages to a contracting authority of single point responsibility available with a design and build procurement route is avoiding having to separate out construction and design issues in the event of a later problem. Contractors who accept this risk, do so on the basis that they take a novation of the architects appointment and require typically higher professional indemnity levels.

### (d) Liability and insurance context – drives contracting authorities towards larger businesses

There is a perception, not limited to the public sector, that larger practices are more stable (although the recent financial climate has challenged this), and certainly more likely to carry larger levels of professional indemnity cover on an 'each and every claim' basis. Whilst this is to some degree rational unless the basis of insurance changes, there is a danger that over prescriptive use of the selection stage evaluation criteria, compounds the impact of this approach on SME architects.

## Legislation

**3.2** The Public Contracts Regulations 2006 (as amended) (the '**Regulations**') implement the Directive into English and Welsh law.<sup>3</sup>

**3.3** The UK government adopted a comprehensive implementation package, including all of the optional provisions in the Directive (for example, on central purchasing bodies, e-auctions and framework agreements). This approach gives contracting authorities maximum permitted freedom regarding how to conduct a competition and the choice of procedure.

**3.4** The Regulations require contracting authorities to use one of five competitive procedures when procuring contracts for certain works, services and supplies, if the individual elements or aggregate value of the procurement in question exceed designated thresholds.

## Open procedure

**3.5** This is a one stage process. This procedure involves: (i) a call for competition; (ii) bidders respond with a tender; and (iii) evaluation of bids on pre-disclosed selection/award criteria. There is no negotiation. This process is better suited to commoditised services or goods and is not commonly used for the selection of architectural services.<sup>4</sup>

**3.6** Whilst the speed of this procedure means it is attractive to contracting authorities, it has the following drawbacks if used for the selection of architects. There is no limit to the number of bidders who can submit a tender. Whilst contracting authorities can impose minimum standards as a filter, care has to be taken to avoid using the filters as an indirect method of shortlisting bidders. This means that it is not possible to assess both design submissions and conduct a face-to-face interview with bidders. Consequently, minimum standards as to financial thresholds or professional indemnity insurance may be set unreasonably high to provide contracting authorities with reassurance that an architect will be able to perform the contract.

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## Restricted procedure

**3.7** The restricted procedure permits contracting authorities to use selection criteria set out in pre-qualification questionnaires ('PQQ') to thin down the number of bidders who will subsequently be invited to submit a full tender.

**3.8** However, contracting authorities may only thin down bidders on the basis of their economic or financial standing and their technical or professional ability, as defined in Regulation 24 and 25 of the Regulations, whereas a procurer of architectural services does sometimes wish to first exclude bidders on the basis of initial designs and then base the final award on face-to-face interviews (as discussed above). As contracting authorities strictly cannot thin down on the basis of design, the benefit of a two-stage procedure is limited to the situation where the contracting authority wishes to select an architect rather than a design.

## Competitive Dialogue (CD) procedure

**3.9** The CD procedure is used by a contracting authority who knows the outcome it desires but is unable to define the legal or financial structure at the outset of the tender process. Its use is restricted by Regulation 18 of the Regulations to 'particularly complex contracts', which is defined by reference to the technical, legal and financial complexity of the project. The CD process may be used where the design is carried out by a main contractor as part of a wider project for the design, build and delivery of a construction project.

**3.10** Under the CD procedure, bidders who have successfully passed the PQQ stage are invited to participate in structured dialogue with the contracting authority to identify and discuss the best technical and contractual solutions to meet the contracting authority's requirements. Once dialogue has closed, bidders are asked to submit their final solutions, without scope for further negotiation.

**3.11** CD procedures have been criticised for being very time and resource intensive. However it is the only procedure which can provide flexibility as to solutions. If properly managed and resourced it can be delivered in a streamlined way, but problems have arisen in practice, perhaps partly as result of lack of guidance in the rules.

## The negotiated procedure

**3.12** The negotiated procedure had been used extensively in the UK up to the point that the Regulations came into force. The negotiated procedure was the preferred procurement route used for the majority of complex projects. Under the present procurement regime the negotiated procedure should only be used in exceptional circumstances. It appears to be used more commonly in some other EU countries for the procurement of design services, but this may be a matter of lack of enforcement of the rules rather than what is strictly permitted. Very few public authorities in the UK are using the negotiated procedure, save in very clear justified circumstances.

## Design contests

**3.13** Design contests have significant potential for the procurement of architectural services and better quality construction as the Regulations allow contracting authorities to create a unique procedure and set of selection/award criteria for each contest. This has significant benefits as contracting authorities are able to place design at the forefront of their assessment and a winner is chosen by a jury selected by the contracting authority on the basis of their expertise in a given area.

**3.14** However, whilst design is given increasing importance, the Regulations require submissions to be made anonymously so a contracting authority is unable to assess its ability to work with a bidder to fulfil a project. In addition, the Regulations do not address the ownership of intellectual property rights in the design, which can lead to disputes between the contracting authority and the winner. Design contest rules can be the subject of some tension with the commercial protections that contracting authorities are looking for from a bidder.

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## Selection and award

**3.15** The distinction between selection criteria and award criteria is emphasised throughout the Directive, Regulations and case law. However, this distinction can cause difficulties for contracting authorities when evaluating tenders.

**3.16** The selection stage of procurement allows contracting authorities to shortlist bidders on the basis of the ability of a bidder to perform a contract based on their financial and economic standing and technical experience gained from carrying out similar contracts. Any minimum standards must be proportionate and relevant to the specific contract. There is no legal definition of what is proportionate as this will depend upon the individual circumstances of each case. Proportionality is an issue for the national courts to decide upon. Bidders must be excluded if either the company or any directors or senior management have been convicted of certain offences relating to, amongst others, dishonesty and money laundering and may be excluded for other breaches of regulatory rules or insolvency.

**3.17** The award criteria should identify the bidder best able to perform the relevant contract in question. Contracting authorities may decide to award the contract on the basis of:

- (a) The lowest price; or
- (b) The most economically advantageous tender.

**3.18** Where the most economically advantageous tender criteria is used, contracting authorities must disclose the key criteria to be used in identifying the most economically advantageous offer and state the weighting to be given to each criteria.<sup>5</sup> One of RIBA's concerns is that in the UK, qualitative assessments may often be subordinated to other weightings, such as price.

**3.19** The difference between selection and award criteria has been widely considered at both European and Member State level. The legal reasoning is based on the ECJ's decision in the *Lianakis*<sup>6</sup> case, which clearly states that contracting authorities are unable to include further selection style criteria at the award stage. However, this fails to take account of the fact that selection criteria at PQQ stage typically assess a bidder's past experience of similar projects. This prevents contracting authorities from considering the ability of the bidder and the proposed team to deliver on the specific proposal, which is likely to be a key consideration for the provision of architectural services.

## Enforcement

**3.20** The body responsible for implementing procurement policy in the UK is the Cabinet Office, which has recently taken over the role of the now defunct OGC. Its focus is on making procurement processes more efficient, particularly at a central government level. It provides guidance to central and local government on procurement issues however it has limited enforcement powers. It can mandate the application of guidance to central government departments, their executive agencies and non departmental government bodies but can only recommend their application as best practice to local authorities.

**3.21** Private law enforcement is available through the UK national courts for breaches of the Regulations.

# 4 How does it apply: Germany

## Legislation

**4.1** The Directive has been implemented into German law by a suite of legislation:

- (a) the German Act against Restraints of Competition;
- (b) the German Ordinance on the Award of Public Contracts; and
- (c) the Procurement Regulations. There are different versions of the Procurement Regulations for works, supplies and services. In relation to the provision of architectural services, the Procurement Regulations for the award of Independent Contractor Services are the most appropriate. For construction projects, the Procurement Regulations for Public Works apply and set out standard terms and conditions of contract.

**4.2** Germany has chosen not to implement the optional provisions of the Directive relating to central purchasing bodies.

**4.3** At the federal and local government level, a simplified tendering regime applies for contracts which are below the thresholds set out in the Directive.

## Choice of procedures

**4.4** The same range of procedures is available in Germany as apply in the UK. However in practice the CD procedure has not widely replaced the negotiated procedure. In contrast to the UK, much greater use is made of design contests. Whereas in the UK, design contests are not popular because of the requirement to assess design proposals anonymously this does not seem to raise such concerns in Germany. One reason for this may be as a result of the different approaches to construction procurement. In Germany the responsibility for obtaining insurance cover for a project lies with the main contractor or occasionally the client, rather than with individual members of the design team. This allows contracting authorities to focus on the designs proposed rather than the identity of the architectural practice.

**4.5** For contracts under the thresholds, simplified versions of the open, restricted and negotiated routes are available. The contracting authority must comply with the general EU principles of fairness, transparency and non-discrimination.

**4.6** Germany procurement legislation is more prescriptive in relation to changes that can be made during and after the tender process. It is notable that Germany is one of the Member States with the shortest tendering times. In part,

this may be explained by the reluctance to use the CD process which statistically tends to distort the average in the UK even though it is not used extensively for selection of a design team. However the greatest reasons for delay and increased costs in a construction project are changes to the specification during the tender process and/or extensive negotiations after the appointment of the preferred bidder. The fact that German legislation sets out detailed requirements for contract specifications and prohibits a bidder from changing its offer after it has been submitted to the contracting authority is likely to focus the minds of both bidders and contracting authorities much earlier on and avoid changes and subsequent delays during the tender process.

## Selection and award

**4.7** The ground for exclusion of bidders and selection are the same as apply in the UK, in accordance with the Directive.

**4.8** At the award stage, contracting authorities have the option of awarding the contract on the basis of the most economically advantageous tender (MEAT) or the lowest price. Interestingly, where quality criteria are used to determine the most economically advantageous offer, Germany judicial rulings call for greater disclosure of the criteria and sub-criteria on which quality will be assessed. It is not clear whether this results in greater weightings being attributed to design.

## Enforcement

**4.9** The Federal Ministry of Economy and Technology is responsible for implementing procurement legislation and providing guidance on its application.

**4.10** Specialist procurement review bodies or 'award chambers' are responsible for enforcing procurement law between contracting authorities and aggrieved complainants. The process for seeking a review of an award decision is much quicker than in the UK national courts. By way of illustration, the award chambers must carry out a review of the decision within 5 months of receiving the formal complaint. This compares with between 6 months to 2 years in the UK courts. Moreover the concept of automatic suspension of the award decision which was introduced by the Remedies Directive<sup>7</sup> has been in force for much longer in Germany. Whilst it could be said that there is a greater culture of litigating procurement disputes in Germany, the remedies regime appears to be cheaper, faster and more effective in practice.



# 5 How does it apply: Sweden

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## Legislation

**5.1** The Law on Public Procurement (2007:1091) applies to procurements both above and below the thresholds set out in the Directive.

**5.2** Sweden has decided not to implement most of the optional provisions of the Directive. It is one of only four Member States not to implement the competitive dialogue procedure. Interestingly the one exception is in relation to framework agreements, where its usage is quite high, with contracting authorities routinely conducting mini-competitions from widely based frameworks

## Choice of procedures

**5.3** The same range of procedures is available in Sweden as apply in the UK contracts above the thresholds, with the exception of the competitive dialogue process.

**5.4** For contracts below the thresholds, there are three procedures. The simplified and selective tendering procedures are similar to the open and restricted procedures but permit negotiation with one or more bidders at the award stage. The direct tendering procedure is only permitted if the value of works or services is less than 15% of the current EU thresholds.

## Selection and award

**5.5** The ground for exclusion of bidders and selection are the same as apply in the UK, in accordance with the Directive.

**5.6** Contracting authorities may award a contract based upon the lowest price or alternatively the most economic advantageous offer, provided that the basis of evaluation is set out clearly in advance.

## Contract forms

**5.7** There are no specific standard forms of contract for construction projects or the appointment of architects.

## Enforcement

**5.8** The Competition Authority in Sweden also has responsibility for enforcement of procurement legislation in Sweden. Unlike the national supervisory bodies in the UK and Germany, the Swedish Competition Authority has the power to fine contracting authorities for non-implementation.

**5.9** Private law enforcement is available through the Swedish national courts.

# 6 A comparative assessment

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**6.1** Whilst the application of the EU public procurement rules in the UK, Germany and Sweden follow similar routes of procurement, selection and award criteria as dictated by the Directive, in practice there are some interesting divergences in the way that contracting authorities choose to carry out tender processes.

**6.2** Taking some of the key RIBA procurement reform recommendations in turn, we have set out in Appendix 1 examples of good and bad procurement practice in the UK and other Member States to identify how the UK could implement some of the recommendations being put forward.

# Appendix Comparison table

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## RIBA Recommendation 1

### RIBA Recommendations

#### Clarify and simplify process and language

An example of the over-complicated language used in the Directive is the definition of bodies governed by public law in Article 1 (5) of the Directive.

RIBA is also concerned that an unfair burden is placed upon charities and other voluntary organisations who are required to carry out a regulated procurement process in respect of subsidised works and service contracts and these should be amended.

### UK

### Germany, Sweden and other member states

There is evidence that organisations which are caught in the UK as bodies governed by public law are not subject to the rules in other Member States. For example, 'Registered Social Landlords' fall outside the procurement rules in the Netherlands. In Germany, certain hospitals and providers of medical services which are funded by subscriptions rather than the government also fall outside the definition. This could place organisations in the UK at a competitive disadvantage. However, we are unable to comment on whether the different outcomes are as a result of divergent interpretation by different Member State of the rules, or as a result of different structures of the organisations, without further investigation.

### EU

The purpose of the proposed Directive is to simplify the procurement process and to consolidate the caselaw of the ECJ into the revised Directive.

However critics will argue that the introduction of two new procedures and additional reforms are likely to add more complication and issues for interpretation.

**RIBA  
Recommendations**

**Reduce the time and costs  
of the tendering process**

**UK**

The EU evaluation report and Lean report identify the UK as having some of the longest tender times and highest costs of tendering, both for the contracting authority and bidders. In part this may be explained by the higher use in the UK of the CD procedure. In part also it may be a result of failure of contracting authorities to properly define their requirements early on in tender process, which can lead to changes in specification at a later stage. In our experience this is one of the main reasons for delay.

The Lean report has identified a number of causes of delay resulting from:

- Lack of capability and resources
- Failure to properly engage with suppliers at the pre-tendering stage
- Lack of proper governance and procurement processes
- Issuing contract notices too early
- Adverse attitude to risk

The focus of the report is on improving the pre-tendering phase for contracting authorities so that they have a clear idea of their requirements and are better prepared for the tender phase. Guidance and training on intelligent commissioning and scoping are practical ways to address some of these issues.

Attempts have been made in the UK to standardise PQQs to save time. For example, central government bodies are required to use the standard form of PQQ issued by the OGC the previous government body responsible for implementing the public procurement laws in the UK. The risk with a generic PQQ which is based on 'one size fits all' is that it may be difficult to select candidates to be invited to tender, without setting too high minimum standards which may discriminate against SMEs and micro businesses. Often contracting authorities will fail to adapt a standard document to the specific contract or type of bidder that they wish to attract. To address some of these issues, the Cabinet Office has just issued a Procurement Policy Note on the use of the standard PQQs

[www.cabinetoffice.gov.uk/sites/default/files/resources/PPN-01-12-Use-of-PQQ.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/PPN-01-12-Use-of-PQQ.pdf)

The UK has a greater track record for e-tendering.

**Germany, Sweden and  
other member states**

In Germany, there are more detailed rules on requirements for specifications and prohibitions on changes which may explain in part why Germany has one of the quickest tender times on average, 102 days compared with 161 days in the UK.

**EU**

The focus of the EU proposals to reduce timescales is on greater use of e-tendering.

EU proposals for self-accreditation and passports will remove some of the costs of the selection phase, although the benefit may be greater for Germany and Sweden who do not use e-tendering so much.

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**RIBA  
Recommendations**

**Remove any 'gold plating'**

**UK**

There is a perception in the UK that in implementing the Directive, the UK has introduced additional tendering requirements in the Regulations beyond those contemplated by the Directive. Whilst it is true that the UK government has given contracting authorities the option of using all of the non-mandatory features provided for in the Directive, for example, framework agreements and the competitive dialogue procedure, the Regulations do not impose greater requirements on bidders. This would be contrary to EU law.

Experience however suggests that at the day to day level, procurement officers may adopt a very rigid interpretation of the Regulations.

**Germany, Sweden and  
other member states**

In contrast to the UK, Germany and Sweden have decided not to implement some of the non-mandatory features of the Directive, notably the CD procedure is not available in Sweden.

**EU**

## RIBA Recommendation 2

### RIBA Recommendations

**Focus on processes and incentives that drive quality and outcomes**

### UK

Contracting authorities must retain the freedom to evaluate based upon their individual requirements. However, guidance on the importance of quality of design and its benefits in terms of 'whole life' costings may address this concern.

### Germany, Sweden and other member states

Where quality is used as a criterion for assessing the most economically advantageous tender, German legislation requires greater transparency on how quality is assessed.

### EU

**Embed assumptions in favour of sustainability at all stages of procurement**

There is a misconception with some contracting authorities that sustainable criteria cannot be used at contract award stage. It is possible for sustainability criteria to be used in evaluating tender bids provided that they are linked to the subject matter of the contract, are proportionate and can be demonstrated to have an economic benefit. This issue can be addressed through training and guidance.

**Award of a construction contract should always be to the most economically advantageous tender**

OGC Guidance to central government requires contracting authorities to take into account 'whole life costing' to ensure Value for Money ('VfM'), especially in relation to complex contracts.<sup>8</sup> However at the local authority level, this may be more difficult to enforce. There is also a concern that in the UK, weightings given to qualitative assessments are frequently subordinated to all other considerations such as price.

The Commission has recognised the need for further guidance in this area. In its Green paper on the modernisation of EU public Procurement policy, it mooted the idea of eliminating tenders based upon lowest price although this idea has not been included as part of the revised package of proposals.

**Prioritise defining the principles of 'whole life costing'**

OGC Guidance to central government requires contracting authorities to take into account 'whole life costing' to ensure Value for Money ('VfM'), especially in relation to complex contracts.<sup>9</sup> However at the local authority level, this may be more difficult to enforce. Training and encouragement may be beneficial.

## RIBA Recommendation 3

### RIBA Recommendations

#### Enable access for micro businesses and SMEs

### UK

Whilst the EU Evaluation report shows that SME's participation in contracts above the thresholds in the UK has been decreasing, the evidence of the reasons for this appears to be inconsistent. The UK has a high use of framework contracts which may be one reason for the decrease.

But the same report notes that access for SMEs below the thresholds has improved. It also shows that the UK has good record of division into lots which tends to be a factor which facilitates SME access, with approximately 18% of contracts being advertised in lots. It would be helpful to provide evidence from the construction and architectural services sector specifically to determine rates of access in the sector which would support RIBA's proposals in relation to this issue.

The fact that Germany and Sweden both have tendering regimes in place for under the thresholds contracts, and have increased SME participation in contracts in recent years, may suggest that greater guidance on use of tendering to promote competition would be beneficial in the UK.

One of the issues for architects in the UK is the high cost and basis of professional indemnity cover, which may restrict access to contracts for architectural services for SMEs and micro-businesses. In the UK professional indemnity cover is taken out on an annually renewable 'claims made' basis. Clients typically require architects to maintain a prescribed level of cover for 12 years. The cost of committing to this can be a disincentive for an SME.

### Germany, Sweden and other member states

Germany and Sweden both have simplified tendering regimes for works and services below the thresholds.

Evidentially access for SME's in Germany and Sweden has been greater in the last two years than the UK.

In Germany 19% of contracts are advertised in lots and there is a relatively low take up of framework contracts.

Germany also provides consulting centres for public procurement through its network of Chamber of Industry and Commerce to provide support and assistance to contractors on tendering.

In Germany, the allocation of risk between the design team is shared across the project, for example through Single Project Insurance. This means that the cost of taking out professional indemnity cover is not solely the responsibility of the architect. This promotes wider access for architects. As a result, more design competitions are also held.

Sweden has a high proportion of frameworks. This may explain why SMEs share of contracts above the threshold has been decreasing over time.

### EU

From a legal perspective, the proposal to discriminate in favour of SMEs and micro businesses raises difficult issues since the rationale for the public procurement rules is to open up the public sector markets to competition. Moreover, any subordinate legislation issued under the Treaty on the Functioning of the European Union must comply with the general principles of fairness, transparency and non-discrimination.

Other indirect ways, such as harmonising the requirements for professional indemnity cover or promoting the adoption of independent/ single project insurance across Member States, may be easier to implement.

RIBA Recommendations	UK	Germany, Sweden and other member states	EU
Commit to reviewing OJEU threshold values	The UK Government response to the European Commission Green paper indicated that it was in favour of this idea in principal.		
Ensure financial standing criteria are proportionate to the project and the contract	The OGC has issued a practice note to contracting authorities on how to set minimum turnover requirements in order to ensure the financial stability of bidders. <sup>10</sup> One of the difficulties in this area is that financial stability is not necessarily linked to the ability of architects to design quality buildings. This is another example where procurement officials may ‘gold plate’ the legislation by interpreting the guidance too literally and not applying the rules to the particular sector.		
Set objectives for the proportion of contracts awarded to micro businesses and SMEs			From a legal perspective, the proposal to discriminate in favour of SMEs and micro businesses raises difficult issues since the rationale for the public procurement rules is to open up the public sector markets to competition. Moreover, any subordinate legislation issued under the TFEU must comply with the general principles of fairness, transparency and non-discrimination.



# References

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## References

**1** Article 18 TFEU

**2** Articles 21, 26 and 28 TFEU

**3** Different sets of Regulations apply in Scotland and Northern Ireland although the procedures discussed in this document and the surrounding considerations are broadly similar to the English and Welsh legislation.

**4** The Open procedure should be distinguished from the 'open competition' – a phrase unconnected with regulated procurement to describe a restricted procedure process to select an architect where the ability to express interest is 'open' to all and is in contrast to a 'limited' or 'invited' competition. An 'open competition' would most usually be undertaken in accordance with the restricted procedure.

**5** Regulation 30

**6** Case C-532/06 – Emm.G. Lianakis AE and others v Dimos Alexandroupolis and others

**7** 2007/66/EC

**8** [www.forthconstruction.co.uk/downloads/achieving-excellence-guide-7.pdf](http://www.forthconstruction.co.uk/downloads/achieving-excellence-guide-7.pdf)

**9** [www.forthconstruction.co.uk/downloads/achieving-excellence-guide-7.pdf](http://www.forthconstruction.co.uk/downloads/achieving-excellence-guide-7.pdf)

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