

PUBLIC PROCUREMENT AFTER BREXIT

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BREXIT AND THE ABOLITION OF RED TAPE

“If we vote leave we can scrap the EU’s foolish rules on how Whitehall runs procurement processes, which add billions to the cost of government every year”

-Rt Hon Michael Gove MP, 28.5.16

News › UK

De La Rue boss joins Brexiteers in fury after blue post-Brexit UK passport contract is handed to French firm



WHAT BREXIT, AND WHEN?

- The EU (Withdrawal) Act 2018 defines EU “exit day”, currently defined as 31 October 2019 (section 20), but subject to amendment under section 20(4)
- Three scenarios as at 31 October:
 - The UK has left the EU with “**no deal**”
 - The UK has left the EU pursuant to some or other **Withdrawal Agreement**. If so, likely that procurement rules unchanged in transitional period, but thereafter may be some change.
 - The UK **remains** in the EU for now. If so, it may of course leave at a later date, and that may or may not be with a deal.
- Which of these will occur is not within my professional expertise!

WHAT BREXIT, AND WHEN? (2)

- For so long as we remain in the EU, our procurement regime will continue to be that which is contained in the various EU Directives, as implemented by the regulations made pursuant to section 2 ECA 1972 (PCR 2015, CCR 2016 and UCR 2016, for England, Wales and Northern Ireland)
- So one of four possible legal regimes may govern our procurement law after 31 October or any date thereafter:
 - (1) EU law as applied to UK as continuing EU member
 - (2) EU law as applied to UK in transitional period (in which case law is the same)
 - (3) A withdrawal or final trade agreement with the EU
 - (4) UK domestic law applying or purporting to apply UK's international obligations especially under the GATT / GPA.

EU LAW AFTER BREXIT: THE 2018 ACT

- Section 1 of the 2018 Act repeals the ECA 1972 on exit day (“deal” or “no deal”)
- Secondary legislation made pursuant thereto will automatically fall, subject to savings in 2018 Act.
- But section 2 of the 2018 Act makes wholesale savings for all EU derived secondary legislation made under the ECA 1972 – it is all “retained EU law”.
- That is subject to amendment under section 8, which permits amendment of “retained EU law” to address “any failure of retain EU law to operate effectively” or “any other deficiency in retained EU law” (section 8(1)).
- Most notably for present purposes, under section 8(2)(d), this includes addressing the “coordination problem”, where retained EU makes provision in connection with “arrangements which involve ... an EU entity ...”.

APPLICABLE DOMESTIC LEGISLATION IN THE EVENT OF NO DEAL (1)

- Government has made the Public Procurement (Amendment etc) (EU Exit) Regulations 2019 pursuant to section 8 2018 Act.
- The 2019 Regs will come into force on “exit day” (31 October or a later date)
- They amend all three sets of Procurement Regs with effect from exit day
- Consolidated version of amended regs does not seem to be available.
- Procurement Policy Note – Preparing for the UK leaving the EU
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790425/PPN-0219.pdf) and on GOV.UK

APPLICABLE DOMESTIC LEGISLATION IN THE EVENT OF NO DEAL (2)

- DON'T PANIC! Guidance available on GOV.UK, "Public procurement after a no-deal Brexit", <https://www.gov.uk/guidance/public-sector-procurement-after-a-no-deal-Brexit>:

After No Deal Brexit

If the UK leaves the EU without a deal, the public procurement regulations will remain broadly unchanged after Brexit.

APPLICABLE DOMESTIC LEGISLATION IN THE EVENT OF NO DEAL (3)

What will change for contracting authorities and entities

For the most part the legal framework for public procurement and, in particular, the different procedures available to contracting authorities and entities will remain exactly the same. One key difference for contracting authorities will be the need to send notices to a new UK e-notification service instead of the EU Publications Office.

Contracting authorities have a legal obligation to publish public procurement notices. In a no deal scenario, contracting authorities may no longer have access to the EU Publications Office and the online supplement to the Official Journal of the EU (OJEU) dedicated to European public procurement (i.e. Tenders Electronic Daily (TED)). Therefore, the government has amended current legislation to instead require UK contracting authorities to publish public procurement notices to a new UK e-notification service. The new service is called [Find a Tender \(FTS\)](#).

Find a Tender will be deployed at 11pm GMT on 31st October in the event that the UK leaves the EU without a deal.

The requirement to advertise in Contracts Finder, MOD Defence Contracts Online, Public Contracts Scotland, Sell2Wales and eTendersNI will remain unchanged.

APPLICABLE DOMESTIC LEGISLATION IN THE EVENT OF NO DEAL (4)

- Contracting authorities who use an “e-sender” or other third party provider to submit procurement notices can continue to do so provided that provider has notified that they are ready to switch to the new system by 31 October (or presumably some other exit day). Gov.UK provides a list of compliant e-senders
- Businesses who wish to submit themselves to procurement exercises by contracting authorities must likewise operate in accordance with the new regime. GOV.UK says that further updates / guidance will be provided

APPLICABLE DOMESTIC LEGISLATION IN THE EVENT OF NO DEAL (5)

- **Transitional cases**

Procurements in progress on exit day

Some organisations will have a regulated procurement in progress as the UK leaves the EU. Further guidance has been published in procurement [policy notice \(PPN\)](#).

For procurements that have commenced before the UK leaves the EU (for example, they have been advertised in the OJEU already), contracting authorities will need to comply with the new regulations from that point, for example by posting subsequent contract award notices on the new UK eNotification service instead of OJEU TED. However, the effect of the former rules will be preserved in some circumstances to maintain fairness throughout the procurement.

LEAVING THE EU WITH A DEAL

- If the UK leaves the EU pursuant to the current Withdrawal Agreement, there will be no immediate change to the procurement regime (even to the extent which would apply on “no deal” as just discussed”). According to the Procurement Policy Notice:

If the UK leaves the EU with a deal, the current public procurement regulations will continue to apply, unamended, during the implementation period (except in circumstances where there are reforms to the EU regime). Subject to the Withdrawal Agreement⁴ between the UK and the EU being approved by Parliament, Article 127 sets out the agreement for the implementation period.
- By definition it is not possible to say that this is the case for any amended Withdrawal Agreement but in practice this is likely given that it is expected to involve a transitional / implementation period.

PROCUREMENT IN THE LONGER TERM

- Secretary of State for International Trade (Hansard, HC Deb, 9 January 2018, Col 213), speaking on the Trade Bill 2017-2019:

“we want to maintain UK businesses’ guaranteed rights to access global public procurement markets worth approximately £1.3 trillion per year. The GPA, or government procurement agreement, is a plurilateral agreement within the framework of the WTO that aims to create an open market for Government procurement among participating nations. They include many of the world’s major economies, such as the United States, Japan and Canada, as well as the EU states. Currently, we participate in the GPA through our membership of the EU. It is worth pointing out that the UK creates around £68 billion of procurement opportunities within the GPA annually—over 25% of the total EU offering. After we leave the EU, **the UK will need to join the GPA as an independent member, not only to safeguard continuity of access for UK companies overseas, but to ensure that we can tap into international expertise and obtain the best deal for the taxpayer here in the UK. The powers in clause 1 will allow us to make regulations implementing our obligations under the GPA as an independent member, reflecting our new status within the GPA.** Parliament will be able to scrutinise the terms of our membership of the GPA through the Constitutional Reform and Governance Act 2010 before we join
- Trade Bill fell on prorogation but would appear to have been revived by the *Miller (No 2)* case.

PROCUREMENT IN THE LONGER TERM (2)

- Government policy on GOV.UK as at 16 August 2019 (<https://www.gov.uk/guidance/bidding-for-overseas-contracts-what-to-expect-if-theres-a-no-deal-brexit>):

The Government Procurement Agreement (GPA) allows UK businesses to bid for government contracts in other countries, and foreign businesses to bid for contracts in the UK.

At present, the UK is signed up to the GPA through EU membership. If there's a no-deal Brexit, the UK expects to join the GPA on substantially the same terms.

It may take up to 30 days to come into force, after exit day. The impact of this on businesses should be minimal. UK businesses will still have access to government procurements in many overseas markets. They may temporarily lose some rights provided by the GPA

PROCUREMENT UNDER THE GPA (1)

- No requirement for damages
- Greater flexibility in terms of procedures
- Similar general procurement principles

PROCUREMENT UNDER THE GPA (2)

Article IV

Non-discrimination:

1. *With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, **treatment no less favourable than the treatment the Party, including its procuring entities, accords to:***

- a. **domestic goods, services and suppliers; and***
- b. **goods, services and suppliers of any other Party.***

2. *With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:*

- a. **treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or***
- b. **discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.***

PROCUREMENT UNDER THE GPA (3)

Transparency:

A procuring entity shall conduct covered procurement in a transparent and impartial manner that :

- is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering;*
- avoids conflicts of interest; and*
- prevents corrupt practices*

PROCUREMENT UNDER THE GPA (4)

Article XVIII (**Domestic Review Procedures**):

Each Party shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge:

- a breach of the Agreement; or
- where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement, arising in the context of a covered procurement, in which the supplier has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.

Thank you for listening

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