

**Welcome to Landmark Chambers’
‘Procurement post-Brexit: an update’ webinar**

The recording may be accessed [here](#).

Your speakers today are...



James Neill (Chair)

Topic:
Transforming
public
procurement:
the Green Paper



Tim Buley QC

Topic:
Retained EU Law
in Procurement
Law



Nick Grant

Topic:
The Trade and
Co-operation
Agreement

Retained EU Law in Procurement Law



Tim Buley QC

THE CONTEXT

- The UK has left the EU (31/01/2020), and the Implementation Period is over (31/12/2020)
- UK no longer subject to the EU Treaties, but has signed up to a number of separate international treaties with EU including:
 - Withdrawal Agreement, 2019
 - Trade and Co-operation Agreement, 2020
- UK Procurement law was derived almost exclusively from EU law, but the European Communities Act 1972 (which gave effect to EU law in the UK) has been repealed
- So what is current position for procurement law after Brexit? Will address two points:
 - Legal basis for procurement law as “retained EU law”
 - Practical changes following Brexit
- Do not cover implications of TCA which will be covered in next talk

RETAINED EU LAW: THE EU (WITHDRAWAL) ACT 2018

- Prior to Brexit, EU law is largely given effect in domestic law under section 2 ECA 1972.
- 2018 Act *repeals* ECA, but provides for *retention* of most pre-existing EU law through one of three routes:
 - Section 2, EU derived legislation
 - Section 3, directly effective EU law
 - Section 4, miscellaneous including certain Treaty rights and directly effective Directives
- EU law is preserved in the form it took on “IP completion day” i.e. the end of the transitional period, 11pm 31 December 2021

RETAINED EU LAW: INTERPRETATION

- Section 6 2018 Act deals with interpretation of retained EU law. Section 6(3) provides that a question as to the “*validity, meaning or effect of any retained EU law*” is to be decided:
 - ... *in accordance with any retained EU case law and any retained general principles of EU law.*
- Further (section 6(7)):
 - “Retained EU case law” means CJEU or domestic case law which “relate[s] to anything to which section 2,3 or 4 applies”.
 - Retained general principles of EU law are principles which must “relate to” sections 2, 3 or 4
 - Retained EU law:
 - ... *means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above*
- Section 6 also draws important distinction between pre- and post-exit case law:
 - Domestic courts may “have regard” to CJEU case law in interpreting retained EU law,
 - Domestic courts are “bound” by CJEU case decided pre-IP completion day, subject to the right of the Supreme Court and certain other courts (now the Court of Appeal) to depart

RETAINED EU LAW: PRIMARY AND SECONDARY CATEGORIES

- Three “primary” categories of retained EU law:
 - EU derived domestic legislation (section 2)
 - Directly effective EU law (section 3)
 - Treaty rights etc (section 4)
- Two “secondary categories”:
 - Retained EU case law
 - Retained principles of EU law
- Difference between primary and secondary categories is that *primary* categories are retained in their own right as sources of law. *Secondary* categories are retained only as relevant to *interpretation* of primary categories
- For procurement law, most important categories will be EU derived domestic legislation, as interpreted etc via case law and retained principles

AMENDMENT OF RETAINED EU LAW UNDER SECTION 8 OF THE 2018 ACT

- Retained EU law can always be amended by primary legislation.
- Section 8 of the 2018 Act provides for secondary legislation to amend retained EU law so as to deal with “deficiencies arising from withdrawal”, namely:
 - ... to prevent, remedy or mitigate-*
 - (a) any failure of retained EU law to operate effectively, or*
 - (b) any other deficiency in retained EU law ...*
- Deficiencies defined in subsection (2)
- Broad “Henry VIII” power which gives government wide-ranging powers to amend primary and secondary legislation. But note limits in statutory wording, as confirmed in Hansard debates, white paper, explanatory notes etc. EG David Lidington, Secretary of State for Justice, 11 September 2017, HC Deb:

A Minister cannot make regulations because he dislikes the underlying policy

RETAINED EU LAW IN PROCUREMENT LAW: RETENTION OF THE PUBLIC CONTRACTS REGS

- Prior to Brexit, UK procurement law derived from EU law, in particular Public Contracts Directive. Given effect in UK law via Public Contracts Regulations 2015
- PCA are therefore “EU derived domestic legislation”, originally made under section 2 ECA 1972 but retained, following Brexit, by section 2 of the 2018 Act.
- PCA provide very pure example of retained EU law which will not be able to operate effectively post-Brexit without amendments. EG:
 - Basic requirement to commence a tender process was to publish a notice in the Official Journal of the European Union (OJEU), but OJEU no longer accessible to UK public bodies post-Brexit
 - Extensive reference made in 2015 Regs to EU Commission
- Absent amendment under section 8, PCA would be incoherent, imposing obligations to do things which cannot be done or are meaningless

WHAT ARE THE MAIN CHANGES TO THE PCA?

- 2020 Regs make detailed changes to PCA text, but largely to effect to a small number of key changes.
- Main difference is that contracting authorities are no longer required to publish notices in OJEU, but must instead publish on the new UK e-notification service “Find a Tender” (FTS).
- Other changes:
 - Transferral of supervisory powers from EU Commission to Cabinet Office
 - Replacing the European Single Procurement Document with SPD
 - Omitting provisions addressing joint cross border procurement with EU member states
 - In reg 57, deleting the mandatory ground for exclusion from participation in procurement of “fraud affecting the European Communities’ financial interests”
- 2020 Regs make similar changes to other procurement legislation: The Concession Contracts Regulations 2016, Utilities Contracts Regulations 2016
- Thus changes are largely procedural, relating to identity of institutions and the like. In practice there is not much changes for UK businesses and contracting authorities

TRANSITIONAL ARRANGEMENTS: ONGOING TENDER PROCESSES

- Reg 1(6) of the 2002 Regs gives effect to the Schedule which “makes provision in relation to procurements tht are ongoing on IP completion day”, including by “disapplying” amendments to the procurement regime.
- Basic effect is that procurement exercises which commenced prior to 31 December will continue to be governed by EU procurement rules, in accordance with the Withdrawal Agreement.
- Most significant for Framework Agreements, because call-offs under any Framework Agreement will need to be conducted under EU procurement rules for lifetime of Framework Agreement. This may become important if UK simplifies its procurement rules before that time.

The Trade and Co-operation Agreement



Nick Grant

Key Documents

- [The UK-EU Trade and Cooperation Agreement](#) (“**TCA**”)
 - Title VI (Public Procurement)
 - Annex 25 (Public Procurement)
- [WTO Government Procurement Agreement](#) (“**GPA**”)
 - Annexes of the EU and UK

Scope

- Art 276 TCA:

Objective

The objective of this Title is to guarantee each Party's suppliers access to increased opportunities to participate in public procurement procedures and to enhance the transparency of public procurement procedures.

Scope

- Art 277(1) Incorporation of specific provisions GPA outlined in Section A Annex 25. Those are
 - Articles I (definitions), II (scope and coverage) and III (Security and General exceptions)
 - IV.1.a, (no less favourable treatment to parties for procurement of domestic goods, services and supplies)
 - IV.2 to IV.7 (treatment of local suppliers with foreign affiliation, electronic means of procurement, conduct of procurement, rules of origin, offsets, and other measures)
 - VI to XV (information on the system, notices, conditions of participation, qualification of suppliers, tech specs, time periods, negotiations, limited tender, electronic auctions and treatment of tenders and award of contracts)

Scope

- XVI.1 to XVI.3 (transparency of information provided to suppliers, of awards, and maintaining documents for 3 years)
 - XVII (disclosure of information)
 - XVIII (domestic review procedures).
-
- Covered Procurement (Ch. 2)
 - Procurement “beyond covered procurement” (Ch.3).

Covered procurement

- What is covered procurement?
 - Art II GPA
 - Section B Annex 25, adds: Utilities, Hotel and Restaurant Services, Food service services, Beverage serving services, Telecommunication related services, Real estate services, Other business services, Education services.
 - Explicitly does not cover: human health services, administrative healthcare services and supply of nursing or medical personnel.

Covered Procurement

- Art. 278: Use of electronic means to widest extent practicable
- Art. 279: electronic publication of all procurement notices
- Art 280: no need to supply supporting evidence showing not excluded unless necessary to ensure proper conduct
- Art 281: where prior experience necessary cannot require it to be in Party's territory
- Art 282: If supplier registration system maintained, suppliers can request registration at any time
- Art 283: sufficient suppliers in selective tendering
- Art 284: if abnormally low tender, procuring entity may ask if subsidies taken into account.
- Art 285: Environmental, social and labour considerations

Covered Procurement

- Art. 286: Domestic Review procedures
 - GPA Art XVIII requires creation of impartial administrative authority.
 - Rapid interim measures
 - Delay in contract if award challenged
 - Party *may* provide for standstill periods and challenge periods.
 - “Corrective action” may include
 - Removal of offending specifications
 - Repetition of procedure
 - Setting aside or termination of contract
 - Other measures
 - Compensation may be awarded.

Other matters

- Beyond covered procurement (Ch 3)
 - “No less favourable treatment”
 - This is subject to the security and general exceptions of Art III GPA.
- Modification and rectifications of market access commitments (Ch 4)

Transforming public procurement: the Green Paper



James Neill

Current time line

- Consultation ran from 15 December 2020 – 11 March 2021
- Queen’s Speech on 15 May 2021 indicated that a Procurement Bill will be introduced containing “laws to simplify procurement”
- Indications from Cabinet Office are that the Bill may be introduced as early as September 2021

The proposed new procurement principles: broadly based on the WTO GPA

- Public good
- Value for money
- Transparency
- Integrity
- Fair treatment of suppliers
- Non discrimination

A new National Procurement Policy Statement – increasing intervention by central Government in local procurement decisions?

“The Government will separately set out plans to legislate to require contracting authorities to have regard to national priorities of strategic importance in public procurement”

Enforcement by a new central oversight unit with powers of intervention including improvement notices and “spending controls”

A simpler regulatory framework

- Consolidation of the PCRs/UCRs/CCRs/DSPCRs into one set of regulations with sector specific sections
- Replacement of the 7 procurement procedures with 3 new procedures:
 - A new competitive, flexible procedure
 - Open procedure
 - The “limited tendering procedure”

Changes to the award, selection and exclusion rules

- Most Economically Advantageous Tender becomes “Most Advantageous Tender”
- Opportunities to “break the link” with subject matter of the contract – greater scope to take into account poor prior performance
- Additions to mandatory exclusion grounds: fraud/non-disclosure of beneficial ownership, and tax evasion
- Greater flexibility in terms of information required to verify financial standing etc
- A new central debarment list

A new Dynamic Purchasing System + and “open” frameworks

- DPS will be available to all types of procurements not just goods and services generally available on the market
- Longer maximum terms for frameworks (4 years and 8 years), and new suppliers can join at defined points

Embedding transparency: greater emphasis on standardised contemporaneous record keeping throughout commercial lifecycle

“The Government proposes legislating to embed transparency by default throughout the commercial lifecycle from planning through procurement, contract award and performance. Contracting authorities would be required to disclose procurement and contract data as soon as practically possible and significantly increase transparency in the public procurement regime. Contracting authorities would be required to declare in their tender documents when information would be disclosed and justify what, if any, information is to be treated as commercially sensitive. Suppliers would be able to bid with a better understanding of the expected transparency requirements and the timetable for when data should be released.”

Compliance with **Open Contracting Data Standard** will now be mandatory

Debrief letters post award may no longer be mandatory in light of more information being provided at contract award

Publication of contract amendment notices – will be required for majority of contract amendments (replaces the VEAT/VTN system)

A new remedies regime: some fundamental changes

- Greater emphasis on pre-contractual remedies and quicker trials
- **Tweaks to procedure in the TCC**, including mandatory initial disclosure requirements
- **Capping the level of damages** available to aggrieved bidders to legal fees and 1.5x bid costs
- Possibility of transferring a set of procurement challenges to **a tribunal-based system** – “in flight” challenges could use this route. Thresholds not clear.
- “Independent contracting authority review”. Not clear if this is by contracting authority itself or external body.
- **Test to lift automatic suspensions** may be changed.

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

© Copyright Landmark Chambers 2021

Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

Follow us

🐦 [@Landmark_LC](https://twitter.com/Landmark_LC)
🌐 [Landmark Chambers](https://www.linkedin.com/company/landmark-chambers/)