

The Brexit Papers



Public Procurement

Paper 19



Bar Council Brexit
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Brexit paper 9: Public procurement post-Brexit

Summary and recommendations

1. Effective public procurement law is essential for ensuring that suppliers of goods and services in the United Kingdom (UK) may access public and utilities sector markets in other countries, both within the EU¹ and elsewhere in the world. Over the past 40 years, the EU has developed a comprehensive system of procurement rules which ensures the fullest access for economic operators based in the EU, both to markets in their own and other Member States of the EU and, via the Government Procurement Agreement (GPA) under the auspices of the World Trade Organisation (WTO), to markets in countries throughout the world.
2. Whilst the possibility of access to the single public procurement market in terms of the EEA now looks remote, and the authority of the Court of Justice of the EU (CJEU) as a court whose decisions are binding on the domestic courts appears to be politically unacceptable, it will also be essential for any arrangement negotiated with the EU in this as in other fields of law, to take account of the decisions of the EU courts and evolving general principles of EU law, and as appropriate, incorporate them into our domestic procurement regime.
3. Following Brexit, it will be important for the UK substantially to maintain its body of procurement law. This will be crucial not only to facilitate negotiation of the fullest possible access to the EU Single Market, but also to becoming a party to the GPA under the WTO, in order to ensure access to GPA parties' procurement markets and to gain access to the procurement markets of the growing list of countries which have applied to join (e.g. China).
4. Whilst the principal aim of EU public procurement law may be to open up procurement markets across national borders, the EU regime, and the UK's implementing legislation, also provide a system of fair and transparent procurement procedures which serve to ensure value for money and anti-corruption objectives through procurement. This should not be lightly discarded.

¹ For example, had the UK been excluded from the EU public procurement market for 2015, UK tenderers would have been limited to a total potential UK market of €349.7bn; as opposed to an EU wide potential market of €2015.3bn. (Figures taken from European Commission December 2016 report "Public Procurement Indicators 2015", <http://ec.europa.eu/DocsRoom/documents/20679/attachments/1/translations/en/renditions/native>)

The Current position

5. Since February 2014 when the EU legislature adopted the three most recent significant measures in this field, the EU public procurement regime has principally consisted of the following directives: Directive 2014/24/EU² on procurement in the public sector; Directive 2014/25/EU³ on procurement by entities operating in the utilities sectors; Directive 2014/23/EU⁴ on the award of concession contracts; Directive 2009/81/EC⁵ on defence and security procurement; and Remedies Directives 89/665/EEC⁶ (public sector) and 92/13/EEC⁷ (utilities sectors) as both amended by Directive 2007/66/EC⁸. These directives supplement the general principles of EU law applied under the Treaty on the Functioning of the EU (“TFEU”), particularly the fundamental freedoms: the free movement of goods, the freedom to provide services and the right of establishment in any Member State.

6. The EU public procurement directives are variously implemented into UK⁹ law by the Public Contracts Regulations 2015¹⁰, the Utilities Contracts Regulations 2016¹¹, the Concession Contracts Regulations 2016¹² and the Defence and Security Public Contracts Regulations 2011¹³. This large body of procurement law, i.e. “the EU public procurement regime”, forms a very substantial legislative achievement, a detailed analysis of which is beyond the scope of this paper. Suffice it to say that, whilst there are aspects of the regime which arguably represent an unwelcome extension of EU law, it undoubtedly contains much to commend it. Indeed, the UK was enthusiastic about its adoption and has implemented all recent directives either ahead of, or by, the given deadlines.

² Directive 2014/24/EU of 26.2.14 on public procurement and repealing Directive 2004/18/EC (OJEU No. L 94/65 of 28.3.14).

³ Directive 2014/25/EU of 26.2.14 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJEU No. 94/243 of 28.3.14).

⁴ Directive 2014/23/EU of 26.2.14 on the award of concession contracts (OJEU No. L 94/1 of 28.3.14).

⁵ Directive 2009/81/EC of 13.7.09 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJEU No. L 216/76 of 20.8.09).

⁶ Directive 89/665/EEC of 21.12.89 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJEU No. L 395/33 of 30.12.89).

⁷ Directive 92/13/EEC of 25.2.92 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJEU No.L 76/14 of 23.3.92).

⁸ Directive 2006/77/EC of 11.12.07 amending Council Directives 89/665/EEC and 92/13//EEC with regard to improving effectiveness of review procedures concerning the award of public contracts (OJEU No. L335/31 of 20.12.07).

⁹ At least in England, Wales and Northern Ireland, since separate implementing legislation exists in Scotland.

¹⁰ SI 2015 No. 102; in force since 26.2.15.

¹¹ SI 2016 No. 274; in force since 18.4.16.

¹² SI 2016 No. 273; in force since 18.4.16.

¹³ SI 2011 No. 1848; in force since 21.8.11.

7. Although there still exists the possibility for aggrieved tenderers to lodge a formal complaint with the European Commission, since the amendment to the remedies regime under Directive 2007/66/EC (notably imposing a mandatory standstill period in respect of procurement awards and an automatic stay on the award of a contract once a claim is commenced), this is now generally unnecessary, as most actions can be satisfactorily brought before the national courts. Since UK economic operators are significant providers of services (and goods) throughout the EU, the UK would benefit from continued rules guaranteeing fair and transparent access to these markets. This is best achieved by maintaining in force the core of the current EU public procurement regime, regardless of the future UK – EU relationship, at least in the short term.

The implications of Brexit

8. If the UK's domestic regime remains as is following Brexit, aggrieved UK-based tenderers will still be able to challenge UK procurement award decisions before the domestic courts. However, the removal of the Court of Justice of the European Union (CJEU) as the final arbiter on EU law in the UK will mean that those national courts will lose the ability to refer to it questions on the EU procurement regime and the general principles of EU law applicable therein, unless other provision is made. In addition, any general principles that are not expressly incorporated into the existing legislation (such as non-discrimination and transparency) may need to be adopted in legislation.

9. Whether UK-based tenderers will have access to tenders awarded in other EU Member States will, of course, depend on the terms of the future UK-EU relationship. Ideally, any deal should provide the possibility for an aggrieved UK-based tenderer to bring a claim before the national court of the Member States in which the contracting authority/entity is based.

Extra territorial application

10. EU competence in the area of public procurement brings benefits beyond the EU internal market. The Government Procurement Agreement (GPA) is an agreement negotiated under the framework of the WTO, whose aim is to offer non-discriminatory access to government procurement contracts among its parties (which currently comprise 47 WTO members). The UK is a party to this agreement, but only through its membership of the EU. After Brexit, the UK will need to apply to accede to the GPA as an individual member, in order to enjoy access to any significant procurement markets under the WTO rules.

11. A UK exit from the EU could therefore have economically mixed consequences in procurement terms. The UK would continue to benefit from WTO rights and may well in due course negotiate trade agreements with third countries, that approximate to the position achieved, or aspired to, by the EU in its trade deals. In addition, it would be open to the UK to adopt specific rules that either go further than, or derogate from, the EU rules in certain respects. So long as UK legislation remains compliant with the WTO GPA rules, it could for example broaden the range of social goals that contracting authorities could seek to implement by means of their procurement powers; or further encourage authorities to contract with SMEs or other specific categories of supplier. However, by leaving the EU, the

UK would, at least in the short term, lose the benefit of liberalised access to public procurement and other service markets under existing EU multilateral (and bilateral) arrangements, which the EU 27 would continue to enjoy. The UK will presumably seek to accede to the GPA in due course, and it will also of course, seek to negotiate bilateral arrangements with third countries. It is far from clear, however, that the terms it could secure in any bilateral negotiations would be as favourable as the EU equivalent.

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