

Public procurement - deal or no deal

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With the planned date of Brexit less than a month away but no clear picture of how the UK will exit the EU, we look at the likely consequences for public procurement in the UK under both a 'deal' and 'no deal' scenario. We set out below the latest position which (of course!) may be subject to further change.

Before we look at the two different scenarios, it is important to understand the current position. The Public Contracts Regulations 2015, the Concession Contracts Regulations 2016 and the Utilities Contract Regulations 2016 (the "Procurement Regulations") are all UK enacted legislation. They are derived from EU Directives but are not EU law.

Deal

As things currently stand, if we leave the EU with a deal, the Procurement Regulations will remain in place during the "implementation period" (also known as the transition period). This is set to last from Exit Day (11pm on 29 March 2019) until 31 December 2020.

What is this likely to mean in practice?

- It will be business as usual for public procurement for the implementation period at least.
- Notices for UK procurements will continue to be published on OJEU.
- The requirement to advertise on Contracts Finder will also remain in place.
- What will happen beyond the implementation period will depend upon the deal agreed. However:
- for procurement procedures already commenced before the end of the implementation period, the Cabinet Office has clarified that the existing Procurement Regulations will continue to apply for the entire procurement process. This will mean that Contract Award Notices (or any Corrigendum or VEAT notices) will need to be published on OJEU even after the implementation period has ended.
- for framework agreements where the procurement was commenced prior to the end of the implementation period (whether the framework was concluded before the end of the implementation period or not) the existing Procurement Regulations will continue to apply for the duration of the agreement and will therefore apply to the award of all contracts under those frameworks.
- UK suppliers who want to access contract opportunities from the EU can continue to do so via OJEU.

No Deal

As the Procurement Regulations are UK law, if we leave the EU without a deal we won't automatically be released from them and they will, subject to the below, continue in force in the same way as other UK legislation.

However, in the event of a no deal, the Procurement Regulations are due to be amended by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 - as further amended by supplementary regulations (the "Exit Regulations"). The Exit Regulations currently exist in draft form only, but if they are finalised for use in time, they should be expected to come into force on Exit Day. The Exit Regulations will amend very little of the existing Procurement Regulations. The main changes relate to the removal of EU related terms and references.

What is this likely to mean in practice?

- Under the amended version of the Procurement Regulations, the majority of the rules and procedures will remain the same. For example there will be no changes to the financial thresholds, procedures available, the timescales or the remedies for challenge. There will be some minor changes to the grounds for exclusion, meaning that a new standard selection questionnaire (SQ) will no doubt become available in due course.
- There will no longer be a requirement to advertise opportunities or publish the results of a procurement on OJEU. Procurement notices will need to be published on a UK e-notification service instead. The Cabinet Office will be setting up the new e-notification service prior to Exit Day.
- For procurements commenced before Exit Day, UK authorities will need to comply with the amended version of the Procurement Regulations from Exit Day. This will generally mean that Contract Award Notices (or any Corrigendum or VEAT notices) will need to be published on the UK e-notification service instead of OJEU. However, the Cabinet Office has stated that the effect of the existing Procurement Regulations will be "preserved in some circumstances to maintain fairness throughout the procurement". Although not clear, this could mean that UK authorities running live

procurements commenced prior to Exit Day where bidders from the EU are participating, will need to publish any further notices on both OJEU and the UK e-notification service so as to not disadvantage any bidder already engaged in the process.

- The requirement to advertise on Contracts Finder will remain in place.
- There will be no requirement for UK authorities to accept the European Single Procurement Document (ESPD) or have recourse to e-Certis.
- The duty owed by UK authorities under the Procurement Regulations (and the challenge remedies available) will principally apply to suppliers from the UK and Gibraltar. However, the duty of UK authorities under the Procurement Regulations will also apply to suppliers from countries that are signatory to the Government Procurement Agreement “GPA” (including EU member states), so long as the procurement concerned is covered by the terms of the GPA (e.g certain services such as health and legal services are excluded).
- UK suppliers who want to access contract opportunities from the EU can continue to do so via OJEU. However, they will only benefit from the rights and remedies afforded to the UK under the GPA.

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