

# Brexit: should procurement professionals tear up the rule book?

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Clearly the one thing on most peoples' minds at the moment is Brexit and what it means for their lives both personally and professionally. As procurement lawyers, we had already given a great deal of thought to what an "out" vote could mean for public procurement law.

## 1. What happens now?

Well at the moment, nothing changes; this includes the thresholds despite the current value of the pound against the Euro.

Article 50 needs to be invoked by the UK giving formal notice, following which there will be at least two years of negotiations. In the meantime the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations ("the Public Procurement Regulations") apply and are in full force. This means that contracting authorities need to continue to adhere to the rules in order to ensure compliance and bidders can continue to enforce their rights if they believe there has been a breach.

## 2. What happens once the UK has left the EU?

The Public Procurement Regulations are all national laws, based on an EU Directive. Each Regulation would need to be actively repealed in order to lose its effect.

## 3. How likely is it that the UK will actively repeal all or some of the Public Procurement Regulations?

We consider this is unlikely. We will still need some form of procurement law - the public sector will still need to purchase supplies, services and works. Underpinning English public life are the Nolan principles which the public sector will still have to act in accordance with. The Nolan principles include objectivity, accountability, openness and honesty, all key considerations when spending public money.

It is important to note that some of the UK's procurement rules do not derive from European law and are examples of the importance of public procurement law domestically. These include the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013, which legislate how commissioners purchase health services for the NHS, and the below threshold regime within the Public Contracts Regulations 2015.

The principles within the Public Procurement Regulations are internationally accepted and therefore the procurement regime is unlikely to change substantially. The World Trade Organisation's Agreement on Government Procurement which already features in the Public Procurement Regulations, sets out many of the basic procurement principles such as the rules on technical specifications and advertisement. Many other jurisdictions which are not part of the World Trade Organisation have similar rules.

## 4. What are the possible changes?

This depends on the outcome of the negotiations and what the Government wishes to achieve.

Should the UK elect to join the European Free Trade Association and then become part of the European Economic Area ("EEA"), nothing is likely to change. EEA countries have very similar procurement rules; this includes the availability of the remedy of a declaration of ineffectiveness for above threshold contracts. Although, we don't see many opportunities from EEA countries in the Official Journal of the European Union, there is still a requirement to advertise opportunities for public contracts.

If the UK government does not join the EEA, then the Agreement on Government Procurement is likely to apply in any event. This could mean changes in relation to the enforcement, as although under the Agreement on Government Procurement bidders must have the right to challenge procurement processes, the remedies they can seek are not defined.

Therefore, in our view, there is no need for public procurement professionals (and lawyers!) to retrain - public procurement law in some form will be here to stay.

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