



## PUBLIC PROCUREMENT POST-BREXIT?

Public Procurement in the UK is currently governed by EU Directives<sup>1</sup> transposed into UK Regulations<sup>2</sup> (the Rules). These aim to promote a single EU market, where contractors can bid for public work across the EU and receive equal treatment, prevent bribery and corruption and achieve the best value for money for public spending.

Currently the European Commission has oversight of the Rules and the Court of Justice of the EU (CJEU) has ultimate jurisdiction to resolve disputes which are not

<sup>1</sup> Directives 2014/24/EU on public contracts, 2014/25/EU on utilities contracts and 2014/23/EU on concessions contracts.

<sup>2</sup> Public Contracts Regulations 2015, Utilities Contracts Regulations 2016 and Concession Contracts Regulations 2016.

resolved fully in the UK courts. The Rules require public authorities to apply the principles of transparency, equal treatment, non-discrimination and proportionality. For contracts valued at above certain financial thresholds, the Rules require procurement processes to follow certain procedures and notification requirements. Disappointed bidders can seek damages and declarations rendering awarded contracts ineffective.

The UK's European Union (Withdrawal) Bill (EUWB) provides that domestic legislation derived from EU law, including public procurement laws, will continue to have effect after Brexit. Decisions of the European Courts post Brexit would be persuasive not binding, and existing EU case law would adopt the status of UK Supreme Court (UKSC) decisions, which may only be overturned by the UKSC or by subsequent legislation. Practical legal issues include the replacement of EU oversight and notification mechanisms with UK equivalents. Parties may also need to seek to renegotiate (or future-proof) cross-border contracts as GBP-Euro exchange rates fluctuate.

The future of public procurement law will depend on the negotiations with the EU. Possible models include: joining the European Economic Area (EEA); a bespoke trade agreement; or trading on WTO terms.

**EEA membership** would maintain most of the status quo and EU public procurement law would essentially continue to apply, except the European Commission would be replaced by the EFTA Surveillance Authority and the CJEU by the EFTA Court.

**A bespoke trade agreement** would be on terms negotiated between the UK and EU. The EU usually insists on procurement rules equivalent to its own in such agreements in return for access to EU markets.

**Absent an agreement**, the UK will continue to trade with the EU as a member of the World Trade Organisation (WTO)<sup>3</sup>. Currently the UK is party to the WTO's Agreement on Government Procurement (GPA) as a member of the EU. On Brexit it is likely to re join the GPA in its own right. There are 47 parties to the GPA including the EU, the US and Canada. GPA rules are narrower in scope than the EU Rules, they do not impact low value procurement or private utilities, and have very limited impact on defence and concessions. They are also subject to negotiation, as each party to the GPA negotiates its own schedules. If the UK were to trade with the EU on WTO terms, it could develop a more flexible procurement regime and 'Buy British' for contracts below GPA thresholds, but UK access to EU markets would likely be reduced. The GPA would also afford bidders fewer remedies, so there could be less risk of successful challenges to award decisions.

Whether the UK will, or should, be bound by the prescriptive EU procurement procedures is up for debate. There are many who advocate that the UK should adopt a simpler regime for public procurement, which focuses on the key general principles of the EU regime, but is more flexible, less prescriptive, and less burdensome.

<sup>3</sup> Subject to the negotiation of revised schedules under the General Agreement on Tariffs and Trade (GATT).

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