



PUBLIC PROCUREMENT AFTER BREXIT

By Simon Taylor

The EU Rule Framework

Prior to Brexit, public procurement law in the UK was based on EU directives and general principles of the Treaty on the Functioning of the European Union (TFEU), in particular the principles of:

- Equal treatment.
- Transparency.
- Non-discrimination.
- Proportionality.

These principles were in essence designed to ensure that public bodies and utilities with monopoly rights were required to ensure that public tendering was transparent and accessible to economic operators from EU countries and conducted in a fair way which did not discriminate in favour of national providers. UK case law in this area was subject to the rulings of the Court of Justice of the European Union (CJEU) and the principle of sovereignty of EU law enshrined in the European Communities Act 1972.

The procurement directives were implemented into UK law by regulations. The current procurement regulations in force in England, Wales and Northern Ireland are:

- The Public Contracts Regulations 2015 (PCR 2015)
- The Concession Contracts Regulations 2016 (CCR 2016)
- The Utilities Contracts Regulations 2016 (UCR 2016)
- The Defence and Security Public Contracts Regulations 2011 (DSPCR 2011)

The effect of this rule framework and its interpretation in the UK is that there is a body of jurisprudence in the UK courts (mainly the TCC and appeal courts) which supplements and explains the statutory rules. In fact, the statutory rules have been amended (by the EU) over the past two decades to codify much of the jurisprudence and the regulations run to hundreds of pages.

The PCR 2015 also include a package of rules that are domestic in origin, being a product of UK government public procurement policy. These new rules are applicable, for example, to below threshold contracts.

The questions which arise following Brexit are (a) whether this complex and detailed rule framework has been swept away and (b) whether the UK courts are now free from the constraints of EU law?

As I explain below, the answer to both questions is not yet.

Agreement on Government Procurement (GPA)

A further complication is that the EU rule framework is also designed to benefit economic operators from World Trade Organization's (WTO) countries who have signed up to the GPA. This reflects reciprocal rights that EU operators have to access certain public tenders in GPA countries outside the EU (such as the US and Canada).

While it was a member of the EU, and during the transition period (up to the end of 2020), the UK was part of the GPA through its EU membership.

The GPA is comprised of two parts:

- The main rules, which establish requirements for non-discrimination, transparent award procedures and remedies for affected suppliers.
- The market coverage schedules (or annexes) for each GPA party, which specify what procurement opportunities (including type, threshold value and exceptions) each party has agreed to

open up to other GPA parties and will therefore be subject to the main GPA provisions.

Where a GPA party agrees in the annexes that certain goods, services or works are covered, it must generally (subject to general and specified exceptions) give suppliers situated in other GPA party countries the opportunity to bid for public tenders of those goods, services or works, with guaranteed rights to fair treatment and non-discrimination. By way of an example of a specified exception, Annex 5 (Services) of the EU (and UK) GPA schedules state that services are covered in respect of a particular GPA party's providers only to the extent that such party has covered the services in its own Annex 5. Similarly, Annex 2 (sub-central entities, such as local authorities) does not grant rights to US providers.

GPA parties must have "domestic review procedures" that allow suppliers to challenge breaches of the GPA or the national legislation giving effect to the GPA. The EU procurement directives (and procurement regulations) implemented the commitments that the EU made under the GPA. Accordingly, if the GPA applies to a public contract being awarded in the UK (because of the threshold and nature of the contract), a supplier in a GPA country has the same rights as an EU-based supplier and these rights are reflected in the procurement regulations.

Regardless of Brexit, therefore, the UK's intention of remaining part of the WTO 'family' and its commitment to international trade meant that it was always likely to maintain a GPA compliant public procurement regime.

In fact, the UK became an independent member of the GPA on 1 January 2021. The UK coverage schedules substantially replicate the EU coverage schedules under the GPA.

Withdrawal from the EU: Legislation and Agreements

The *European Union (Withdrawal) Act 2018 (EUWA)* and *European Union (Withdrawal Agreement) Act 2020 (WAA)* prepare the UK's legislative framework for its withdrawal from the EU and give effect to the UK-EU Withdrawal Agreement of January 2020 (Withdrawal Agreement).

The effects of the EUWA and WAA include:

- Repeal of the European Communities Act 1972 and exit from the European Union on 31 January 2020 (exit day).



- A transition period up to 31 December 2020 (IP completion day) during which EU law including the procurement regulations would remain in full effect.
- Conversion of EU law into UK law. At the end of the transition period, the majority of EU law was converted into UK law, and EU-derived domestic legislation (such as the procurement regulations) which would otherwise have lapsed was preserved. This created a new body of retained EU law.
- Conferring powers to make secondary legislation, including regulations that deal with deficiencies (such as provisions which are no longer appropriate as they refer to the European Commission) in retained EU law.

The Withdrawal Agreement came into force when the UK left the EU on exit day, but many of the Withdrawal Agreement provisions deal with the period after IP completion day. These include a further transition period for procurements launched prior to the end of 2020, as explained below.

The following are the main Brexit SIs adopted under section 8 of the EUWA relevant to public procurement:

- Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1319) (PPAR 2020). The PPAR 2020 amend the PCR 2015, CCR 2016, UCR 2016 and other retained EU law and existing UK primary legislation.
- Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 (SI 2019/697) and 2020 (SI 2020/1450) which amend the DSPCR 2011 and reduce the rights of non UK (and Gibraltar) bidders in relation to UK defence procurement. These changes are not covered by this article.

The Substantive Changes

The sort of changes brought about by the PPAR 2020 are illustrated by the examples below. They are not major changes. The duties of equal treatment, transparency and proportionality will remain as will the detailed rules relating to the procedures to be followed, the selection and award criteria that can be applied and the available remedies.

- A UK e-notification service (Find a Tender) replaces the Official Journal of the European Union (“OJEU”) as the site to be used for the publication of notices (eg advertising a tender). The Welsh and Northern Ireland equivalent national sites (eg Sell2Wales) can still be used to publicise tenders, but notices must first be placed on Find a Tender and national notices must not provide more detail than the official UK notice.
- The thresholds applicable to public tenders (the full set of rules and remedies only apply to above threshold contracts) are to be set biannually by the Cabinet Office Minister rather than the European Commission. The first set of thresholds are set out in the PPAR 2020 and resemble those applicable previously. In fact, the procurement thresholds are and will continue to be based on GPA thresholds.
- The Cabinet Office Minister (rather than the European Commission) can also adopt rules regarding the use of electronic communications in tenders.





- Under regulation 56 of the PCR 2015, the authority can refrain from awarding a contract to the most economically advantageous tender where they have established that the operator is non-compliant with international treaties relating to environmental, social and labour law entered into by the EU. PPAR 2020 gives the Cabinet Office Minister the power to ratify new treaties or de-ratify treaties for this purpose, subject to the consent of the devolved bodies (Welsh Ministers and Northern Ireland Department).
- Certain reports that are required under the Regulations could previously have been requested by the European Commission but may now be requested by UK bodies. In particular, reports prepared under Regulation 84 documenting decisions taken in the course of the procurement (such as grounds under Regulation 32 for concluding that the authority was able to conduct a negotiated procedure without a call for competition) may be requested by the Cabinet Office Minister (or the Welsh Ministers or Northern Ireland Department in relation to devolved authorities).

- Grounds under Regulation 69 for rejecting an abnormally low tender previously included the fact that the tenderer had received state aid and could not show that it was lawful under the TFEU. The reference to state aid is removed by the PPAR 2020.
- Regulation 25 of the PPAR 2020 disapplies any rights, powers, liabilities, obligations, restrictions, remedies and procedures in the field of procurement that are derived from Article 18 of the TFEU (non-discrimination on grounds of nationality) to the extent not already disapplied. However, for procurements caught by the PCR 2015 as amended, Regulation 18 continues to apply the principles of equal treatment, transparency and proportionality, which are the essence of the general principles of EU law

Further Transition Period for Pending Procurements

The Withdrawal Agreement requires that procedures that were ongoing at the end of the transition period must be completed in accordance with EU law. Part 2 to the Schedule of the PPAR 2020 implements

these “separation provisions”. Paragraph 3 provides that “steady state amendments” (such as those above) do not affect any procedure launched under the PCR 2015 before, and not finalised by, IP completion day.

“Procedure” for these purposes includes a framework tender, a tender for a dynamic purchasing system and a procedure where the call for competition is a periodic indicative notice (PIN).

A procedure is “launched” when a call for competition or any other invitation to submit applications has been made in accordance with the PCR 2015 or, where the PCR 2015 do not require such a call or invitation, when the contracting authority contacted economic operators in relation to the procedure.

A procedure is “finalised” on (a) publication of a contract award notice in accordance with the PCR 2015, (b) conclusion of the contract where the PCR 2015 do not require the publication of such a notice, or (c) where the contract is not awarded, when the tenderers or persons otherwise entitled to submit applications are informed of the reasons why the contract was not awarded.



Where a framework agreement was concluded and had not expired before IP completion day or was concluded after IP completion day but the tender procedure was launched before IP completion day, steady state amendments do not affect any procedure relating to the performance of the agreement. This includes the award of call off contracts under the agreement.

UK-EU Trade and Co-Operation Agreement

The UK and EU finally agreed a deal on their future trading relationship post Brexit on 24 December 2020. The text of the UK-EU trade and co-operation agreement (TCA) was published in the Official Journal of the European Union on 31 December 2020, subject to final legal linguistic revision. The European Union (Future Relationship) Act 2020 implements the future relationship agreements into UK law.

The TCA contains specific provisions relating to public procurement (Title VI: Public Procurement and Annex PPROC-1). The provisions incorporate the GPA rules (as between UK/EU procurement) and provide certain further rights, protections and clarifications for UK and EU operators. These include:

- **Wider coverage than GPA.** Covered procurement (that is, EU/UK procurement activity that is caught by the agreement) is broader than that provided for under the GPA. In particular,

as under the PCR 2015, most of the 'light touch regime' services (e.g. educational, social, cultural services, hotel and restaurant services, legal services) are covered by the EU/UK commitments whereas these are not covered by the GPA schedules. The notable change from the position under the PCR 2015 is that healthcare services (including administrative services and the supply of medical personnel) are not covered. In addition, certain utilities are subject to the EU/UK coverage which are not covered by the GPA schedules, notably utilities providing gas and heat networks and privately owned utilities with special and exclusive rights.

- **National treatment beyond covered procurement.** When procuring a contract which is outside the scope of the GPA schedules as supplemented by the EU/UK Agreement (e.g. below threshold) and not within a specific exception (e.g. the healthcare exception), the procuring party must treat EU or UK suppliers (as the case may be) established in its territory through the constitution, acquisition or maintenance of a legal person, no less favourably than established suppliers from its own country (Chapter 3, Article PPROC.13). This is not a general equal treatment principle as it does not relate to cross border services. It is a provision which requires equal treatment in relation to EU suppliers established in the UK (and vice versa).

Rights of Non-UK Bidders

Subject to the minor coverage changes set out above (and special rules for defence), non-UK bidders will effectively have the same rights to bid for UK procurement opportunities as they had before BREXIT.

GPA bidders will continue to have rights under the PCR 2015 provided the tender is within the relevant EU GPA schedule. EU bidders will continue to have similar but slightly broader rights on the basis of the coverage of the UK-EU Trade Agreement:

- Regulation 89 of the PCR 2015 (duty owed to EEA operators) has been amended by the PPAR 2020 to apply only to UK and Gibraltar economic operators.
- However, regulation 90 (duty owed to economic operators from certain other states), as amended by the PPAR 2020, now provides that, for a period of 12 months after 31 December 2020, the duty in regulation 89 (to comply with Parts 2 and 3 of the PCR 2015 and any enforceable retained EU procurement obligation in respect of a contract falling within Part 2) is a duty owed also to an economic operator from a GPA or EU country (where the contract is covered by a relevant EU GPA schedule)
- The regulation 90 rights will lapse on 31 December 2021, except in relation to procurements that commenced before that date. The explanatory memorandum to the PPAR 2020 indicates that, once the powers under the UK Trade Bill become available, the government will revoke and replace the above provisions. The UK's accession to the GPA on 1 January 2021 means that EU and other non-UK bidders from GPA countries will continue (after 2021) to have rights to bid for UK procurement opportunities to the extent that the UK's coverage schedules allow.

- As explained above, the TCA goes further in certain respects than the EU GPA schedules. Pending further changes, the PCR 2015 as amended should be read (by virtue of section 29 of the EU Future Relationship Act) as providing EU economic operators with rights in relation to procurements covered by the TCA.

Relevance of CJEU Procurement Case Law

EU case law as at the end of 2020 is retained until such time as the higher courts make changes to precedent.

The treatment of CJEU case law post-transition for the purposes of the interpretation of retained EU law (which includes the procurement regulations) is dealt with in sections 6 and 7C of the EUWA as amended and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525). These set out the rules governing when the UK courts can or must follow previous EU case law and are summarised below:

- Retained EU case law means CJEU decisions and general principles of EU law developed by the CJEU, as they had effect in EU law immediately before the end of the transition period, and which relate to retained EU law.
- Retained EU case law is binding on the lower courts, until the Supreme Court or the Court of Appeal (or their closest equivalent courts in Scotland and Northern Ireland) depart from the retained EU case law, or until UK legislation modifies the relevant retained EU law that is being interpreted.
- When interpreting retained EU law which the UK has further modified post-transition, UK courts can decide whether or not to follow retained EU case law provided their interpretation is "consistent with the intention of the modifications".
- In deciding whether to depart from any retained EU case law, the Supreme Court must apply the test it would apply in deciding whether to depart from their own case law (whether it appears right to do so) and the Court of Appeal must apply the same test.
- Other than in the circumstances specified by the Withdrawal Agreement, UK courts are not bound by any CJEU decisions made or general principles developed after the end of the transition period, but may have regard to them, where relevant.

- Subject to limited exceptions in the Withdrawal Agreement, the UK will no longer be able to make referrals to the CJEU.

However, the effect of section 7C of the EUWA and the Withdrawal Agreement is that disputes relating to pending procurements (those launched before the end of 2020 as explained above) are to continue to be subject to principles set out in EU case law, even where the UK higher courts have diverged from those principles.

Conclusion

While the mix of statute, regulation and international treaties introduced to enact Brexit is complex, UK public procurement law in 2021 very much retains the pre-Brexit status quo.

Change to the rules and case law will no doubt come but change will not be immediate.

The UK Government published a Green paper on Transforming Public Procurement in December 2020. This promises to simplify the rule framework. The reforms will be constrained by the GPA, but new guiding principles may be enshrined, procedures changed, rules consolidated into a single instrument and court procedures may also be revised. Consultation on outline proposals is under way and we will report on developments later in the year.

