

PPP AND PFI

Brexit: What do I need to know about procurement on the island of Ireland?

Updated 22 December 2020

EU public procurement law aims to create a level playing field across the EU for economic operators competing to win public contracts. As we near the end of the Brexit transition period, what should economic operators on the island of Ireland know?

IS UK PUBLIC PROCUREMENT LAW SET TO CHANGE?

Yes. The [Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020](#) are due to come into force at 11.00 pm on 31 December 2020.

Although the UK public procurement regime will largely remain the same in January 2021, there will be some notable changes. The changes convert the UK public procurement system to a standalone system outside of the EU. They also begin the process of swapping the basis of EU economic operators' rights (when accessing UK procurements) from EU law to the WTO [General Procurement Agreement](#) ("GPA").

The new Regulations will amend the UK's Public Contracts Regulations 2015, the Concession Contracts Regulations 2016 and the Utilities Contracts Regulations 2016. They will also amend 'retained direct EU legislation' (i.e. the EU regulations and decisions as at 29 March 2019 that were brought into UK law under the European Union (Withdrawal) Act

2018). They also address certain EU/EEA Treaty rights, described further below.

DO THE NEW UK REGULATIONS EXTEND TO NORTHERN IRELAND?

Yes. (Separate legislation has been laid in Scotland.)

FROM JANUARY 2021 ONWARDS, HOW WILL I FIND OUT ABOUT NEW OPPORTUNITIES IN THE UK?

Whether or not you are an economic operator based in the UK, you will now need to monitor a new portal to be aware of opportunities in the UK.

UK awarding authorities will no longer be obliged to use the Official Journal of the European Union / Tenders Electronic Daily (OJEU/TED) to advertise procurement opportunities and contract awards.

Instead, the UK is introducing a new e-notification system, [Find a Tender](#), on which UK awarding authorities will be required to publish procurement notices.

It goes live at 11.00 pm on 31 December 2020. The Cabinet Office has published [guidance](#) on how the new process for publishing notices will operate. Local platforms will continue to operate but notices must first go to **Find a Tender**. The guidance states that "legal and policy requirements to advertise on other platforms such as ... eSourcing NI and eTenders NI will not be affected by these changes".

A range of other technical amendments de-link the UK from the EU system. For example, European Single Procurement Documents become Single Procurement Documents and contracting authorities no longer have recourse to e-Certis.

I WORK FOR A COMPANY INCORPORATED IN IRELAND. CAN I STILL TAKE PART IN UK COMPETITIONS?

Yes, but your rights will be based on UK domestic legislation and will now derive from a different legal framework: the WTO GPA, rather than the EU. The intention stated in the Explanatory Memorandum to the new UK Regulations is to treat non-UK economic operators on a level playing, whether they are from the EU or not. These are some of the main changes (using the UK Public Contracts Regulations 2015 as the example):

- The prohibition against discrimination on grounds of nationality under the Treaty on the Functioning of the EU and EEA Agreement will cease to be recognised in UK law.
- Part 2 of the Public Contracts Regulations 2015 governs the conduct of procurements. The obligation on a contracting authority (under Regulation 89) to comply with Part 2 and retained EU obligations in respect of contracts falling within Part 2 is no longer owed to economic operators in EEA States but rather to economic operators in the UK and Gibraltar.
- Regulations 25 and 90 of the Public Contract Regulations 2015 are amended to preserve the UK's obligations to GPA States (to include EU Member States), as if the UK is party to the GPA on the basis of the EU schedules. However, after 12 months, these two regulations will be removed. The stated intention is for the UK to accede to the GPA and then, through separate legislation, give UK Ministers and devolved authorities powers to implement the obligations of the GPA (and other international agreements).
- Where a tender is abnormally low because the tenderer has obtained State aid, UK contracting authorities currently may reject the tender on that ground alone, only if the tenderer is unable to prove that the aid was compatible with the EU internal market. This provision is removed.

The UK Government has also published Procurement Policy Note 11/20 on [Reserving below threshold procurements](#), which may impact access to some competitions for below threshold contracts being awarded in the UK. The policy is that UK awarding authorities may restrict competitions for below threshold contracts to suppliers in a specified geographical area within the UK and/or to small and medium sized enterprises (SMEs) or Voluntary, Community and Social Enterprises (VCSEs) only. However, the policy is not to be applied to certain procurements involving the provision of goods into Northern Ireland. The policy states: "EU Treaty rights relating to the free

The WTO [GPA](#) is designed to open procurement markets among its signatories by keeping competitions open, fair and transparent. It consists of a main agreement and schedules for each signatory. The extent to which the GPA applies depends on what is specified in the relevant State's schedule. Each schedule contains several annexes which set out procuring entities; goods; services; construction services; threshold values; and exceptions to coverage. You can access the EU's schedules [from this page](#). The process by which the UK is acceding to the GPA is nearly complete.

Enforcement of GPA obligations is carried out through two mechanisms. First, the GPA requires signatories to establish domestic review systems to enable bidders to challenge breaches of the GPA and/or the national legislation giving effect to it. Secondly, there is a WTO dispute settlement mechanism at international level. Any GPA State can initiate proceedings against another in circumstances where it believes the other has breached its GPA obligations.

movement of goods will continue to apply in Northern Ireland beyond the end of the transition period under the terms of the Northern Ireland Protocol. This means that below threshold procurements involving the provision of goods into Northern Ireland will continue to be subject to a cross-border interest test (i.e. which may be of interest to suppliers from EU Member States including the Republic of Ireland). Consequently, for supplies, services or works procurements where goods are to be provided into Northern Ireland and where there is cross-border interest, this policy should not be applied." The guidance document published with the policy note indicates that the EU Treaty rights being referred to are Articles 34 and 36 of the Treaty on the Functioning of the EU (which are articles concerned with preventing restrictions on the movement of goods).

I WORK FOR A COMPANY IN NORTHERN IRELAND WISHING TO TENDER FOR A CONTRACT BEING AWARDED IN THE REPUBLIC OF IRELAND. CAN I STILL TAKE PART?

Again, yes, but your rights and protections will not be derived from your status as an economic operator in an EU Member State, but rather a GPA State (once the UK's accession process has completed, and subject to any trade agreement reached by the EU and UK).

Contracting authorities in the Republic of Ireland are bound to treat GPA States no less favourably than EU States, in so far as is covered by the EU schedules to the GPA and any other international agreements by which the EU is bound (see, for example, Regulation 25 of the [European Union \(Award of Public Authority Contracts\) Regulations 2016](#)).

For companies incorporated in either jurisdiction on the island of Ireland, it is likely that queries will arise when participating in competitions in the other jurisdiction, for example in relation to procurements that fall below GPA thresholds.

WILL UK AWARDING AUTHORITIES CONTINUE TO USE THE EXISTING PROCUREMENT PROCEDURES?

For the moment, much of the UK public procurement framework will not substantially change. Procedures (such as the open, restricted, and competitive dialogue procedures) are still being used unless and until they are changed by further UK legislation.

However, the UK Government has published a [green paper](#) that proposes the transformation of the public procurement regime and it invites responses by 10 March 2021. The proposals, as outlined in the green paper, include:

- requiring contracting authorities to have regard to the UK Government's strategic priorities for public procurement in a new National Procurement Policy Statement,
- consolidating current regulations into a single framework,
- replacing procurement procedures with three procedures: 1. a 'competitive flexible procedure', stated to be similar to the existing light touch regime; 2. the existing 'open procedure', and 3. a 'limited procedure' for use in certain circumstances, stated to be similar to the existing negotiated procedure without prior publication,
- making changes to award criteria rules to include exceptions to the requirement that award criteria must be linked to the subject matter of the contract and to allow past performance to be taken into account in evaluation,
- providing a Dynamic Purchasing System for all types of procurement and new options in framework agreements,
- requiring contracting authorities to implement an Open Contracting Data Standard,
- reforming processes by which procurement decisions are challenged with the stated aim of speeding up the review system and making it

more accessible. Proposals include removing the requirement to provide debrief letters and removing automatic suspension of contract awards in crisis or extreme urgency situations, and

- legislating further around contract management to, for example, increase ability to amend contracts in times of crisis.

DO THE CONTRACT VALUE THRESHOLDS ABOVE WHICH THE UK PROCUREMENT REGULATIONS APPLY REMAIN THE SAME?

The monetary thresholds above which the statutory procurement regime applies is the same for now, but converted into sterling and set out in the main regulations. However, the UK Cabinet Office will now be responsible for reviewing thresholds to verify that they correspond with GPA thresholds. The first review will relate to the 24 month period ending 31 August 2021, with a view to any changes coming into force in January 2022.

I AM ALREADY INVOLVED IN A PROCUREMENT PROCESS BEING CONDUCTED BY A UK AWARDING AUTHORITY. WILL IT BE IMPACTED BY THE NEW LEGISLATION?

No. The regime existing in 2020 continues to apply to procurements commenced before 11.00 pm on 31 December 2020. If you have been appointed under a framework agreement, call-off competitions are to be conducted in line with existing 2020 law. Transitional arrangements are set out in the [schedule](#) to the new Regulations.

I WORK FOR A NORTHERN IRELAND CONTRACTING AUTHORITY AND HAVE STARTED A PROCUREMENT PROCEDURE BEFORE 31 DECEMBER 2020. DO I HAVE THE OPTION OF SWITCHING TO THE NEW UK REGIME?

No, procurements that were commenced before 11.00 pm on 31 December 2020 must be conducted in accordance with

the rules applying before that time. A procurement commenced on the OJEU/ TED must be concluded on OJEU/ TED. The UK guidance recommends that, for ease of use, notices which are required to be sent to OJEU/TED for publication should also be sent to the new **Find a Tender** System.

WHAT ARE THE NEXT STEPS?

Inevitably, questions will arise as contracting authorities and economic operators get used to new systems in Northern Ireland, and as questions about engagement of GPA rights arise. For the moment, it seems that the most prudent course of action for contracting authorities on both sides of the border is to stick closely to the fundamental principles that govern procurement law (objectivity, transparency, fairness & proportionality, equality of treatment) as these likely underpin any standard of good procurement practice enshrined in international or domestic law.

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