

PPP AND PFI

Brexit: update on public procurement under the EU-UK Trade and Cooperation Agreement

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We recently looked at [what economic operators need to know about procurement on the island of Ireland](#) in light of legal and policy developments in the UK as it prepared for Brexit. In this update we look at what the EU and UK have now agreed on public procurement.

On 24 December 2020 the EU and the UK reached a Trade and Cooperation Agreement. What does it say about public procurement?

The [EU-UK Trade and Cooperation Agreement](#) is provisionally applicable as of 1 January 2021. It explicitly addresses public procurement at Part Two, Heading One, **Title VI (Public Procurement)** and at **Annex PPROC-1: Public Procurement**.

The objective of Title VI is to “*guarantee each Party’s suppliers access to increased opportunities to participate in public procurement procedures and to enhance the transparency of public procurement procedures*”. Title VI incorporates certain GPA provisions into the Agreement, and the parties (the EU and UK) are required to apply the specified GPA provisions to “covered procurements”. “Covered procurements” are broadly those caught by the GPA, *as well* as those listed in Annex PPROC-1 of the Agreement.

What are the additional procurements set out in Annex PPROC-1? They are certain procurements by contracting entities whose procurements would be covered by the EU utilities directive; and

procurements for certain services (hotel, restaurant, food and beverage serving services, telecommunication related services, real estate services, education services and certain other business services).

Title VI sets out further provisions. The parties must ensure that procuring entities conduct covered procurements by electronic means to the widest extent practicable. They must ensure that, where their procuring entities require a supplier to demonstrate prior experience, they do not require that the experience is in the party’s territory. They must ensure that, where a procuring entity uses a selective tendering procedure, the number of suppliers invited to submit a tender is sufficient to ensure genuine competition. Where a procuring entity receives a tender with an abnormally low price, it may verify with the supplier whether the price takes into account the grant of subsidies. The parties must ensure that their procuring entities can take into account environmental, labour and social considerations, provided they are indicated in the notice of intended procurement or tender documentation.

Some of the provisions of Title VI explicitly supplement GPA provisions. An example of this relates to the GPA domestic review procedures (for review of procurement decisions). Title VI seeks to ensure, for example, the independence and impartiality of the domestic review authority – and to require that it has a legally qualified member. Title VI also includes provisions aimed at protecting the position of an unsuccessful tenderer seeking to challenge a decision. For example, each Party must ensure that a procuring entity does not conclude the contract until the review authority has made a decision or recommendation with regard to interim measures, corrective action or compensation for the loss or damages suffered. These are GPA terms which are elaborated on in Title VI: for example, interim measures can include suspension of the procurement process or contract performance.

Title VI addresses “national treatment beyond covered procurement”. It provides a “national treatment obligation”: a measure of a party shall not result for suppliers of the other party in treatment less favourable than that party accords to

its own like suppliers. (This is subject to some exceptions in Annex PPROC-1.) This protection may prove of interest when it comes, for example, to procurements the value of which fall below GPA thresholds.

Interested observers will wish to keep an eye on how application of the international obligations outlined in the Agreement will interact with the proposals for reform of the UK's procurement

system outlined in its recent [Green Paper](#) along with the other recent legal and policy developments explained in our [previous briefing](#).

KEY CONTACTS



Aaron Boyle
Partner, Dublin
+353 1 920 1213
aaron.boyle@arthurcox.com



William Curry
Partner, Belfast
+44 28 9026 5881
william.curry@arthurcox.com



Joanelle O'Cleirigh
Partner, Dublin
+353 1 920 1650
joanelle.ocleirigh@arthurcox.com



Chris Ritchie
Partner, Belfast
+44 28 9026 5542
chris.ritchie@arthurcox.com



Alan Taylor
Partner, Belfast
+44 28 9026 2671
alan.taylor@arthurcox.com



Ciara Dooley
Associate, Dublin
+353 1 920 1855
ciara.dooley@arthurcox.com



Sinéad Flanagan
Associate, Dublin
+353 1 920 1372
sinead.flanagan@arthurcox.com



Peter Woods
Associate, Dublin
+353 1 920 1659
peter.woods@arthurcox.com