

# Brexit and Procurement Law

[© 2017 Carson McDowell LLP](#)

## Niamh McGuckin - Solicitor

15 March 2017



- UK voted to leave the European Union in June 2016
  - Article 50 likely to be triggered before the end of March 2017
  - 2 year period for negotiating exit (or longer with agreement of EU27)
  - EU law continues to apply in the UK
    - Public Contracts Regulations 2015, as amended
    - Utilities Contracts Regulations 2016
    - Concession Contracts Regulations 2016
  - General EU Principles also continue to apply to below threshold contracts with potential for cross border interest
  - Judgments of CJEU remain binding
- 

# What does the Government say?



- Chancellor Philip Hammond HoC Treasury Select Committee, 19 October 2016:
  - “...will want to introduce our own bespoke competition policy and procurement policy which will seek to encourage the UK supply chain but which **will certainly not want to create a situation where UK Government procurement is buying uncompetitively expensive products.** It would not be in our interests.”
  - “I personally regard some of the **EU public procurement processes as being burdensome** and not conducive to the conduct of good and efficient public procurement but I would certainly not agree with the direction...[which would prop up] uncompetitive and failing industries through public procurement to the detriment of the taxpayer. We’ve been down that route before”.

# What does the Government say?



- Theresa May's Lancaster House speech, 17 January 2017
  - *“As we repeal the European Communities Act, we will convert the “acquis” – the body of existing EU law – into British law... The same rules will apply on the day after Brexit as they did before. And it will be for the British Parliament to decide on any changes to that law after full scrutiny and proper Parliamentary debate.”*
  - *“What I am proposing cannot mean membership of the Single Market... Being out of the EU but a member of the Single Market would mean complying with the EU's rules and regulations that implement those freedoms, without having a vote on what those rules and regulations are.”*
  - *“We seek the greatest possible access to [the Single Market] through a new, comprehensive, bold and ambitious Free Trade Agreement.”*

# What does the Government say?

---



- The United Kingdom's exit from and new partnership with the European Union – White Paper, February 2017
  - *“We do not seek to adopt a model already enjoyed by other countries.”*
  - *“As we leave the EU, the Government is committed to making the UK the best place in the world to do business. This will mean fostering a high quality, stable and predictable regulatory environment, whilst also actively taking opportunities to reduce the cost of unnecessary regulation and to support innovative business models.”*
  - *“Our WTO membership will form the bedrock on which we build our future trade relationships.”*

# What are the options for the UK?

---



- **A UK/EU Free Trade Agreement**
  - Bespoke free trade agreement
  - Difficult to comment on what it would look like
  - EU policy generally requires adoption of procurement regime similar to its own e.g. recent agreement with Ukraine
  - Likely to mean continuity of procurement regulation in its current form
  - Some deviations possible e.g. from copy-out approach taken to 2014 Directives
  - Government's preferred approach but may be difficult to achieve in two years

# What are the options for the UK?

---



- **Government Procurement Agreement**
  - Reliance on membership of World Trade Organisation (WTO) and its participation in the Government Procurement Agreement (GPA)
  
- **Going it alone**
  - Rewrite the rule book on procurement law
  - Unlikely to adopt this approach unless it has no other option e.g. failure to agree FTA with EU and negotiate membership of GPA

# Government Procurement Agreement

---



- UK is member of WTO in its own right
  - GPA is an agreement on government procurement within the framework of the WTO which regulates the basis on which GPA countries give access to their government procurement markets
  - UK is member of GPA through EU – may have to negotiate membership
  - Accession may be straightforward if current GPA compliant regime is maintained
  - Other parties include US, Japan and Canada
  - China, Russia and Australia joining
- 
- A decorative graphic in the bottom right corner consisting of several overlapping, curved blue shapes in various shades of blue.

# GPA Rules

---

- Thresholds apply to goods, services and works contracts
  - Technical specifications – reference to international standards where possible
  - Principles of non-discrimination, impartiality and transparency
  - Exclusion on the grounds of criminal convictions, misconduct, non-payment of taxes and poor performance
  - Informing bidders of characteristics and relative advantages of the winning bid
  - Definition of many terms will be the same e.g. contracting authorities, public contracts
  - Remedies regime – however more flexible than the current regime
- 

# What does the GPA not cover?

---

- Utilities procurement for private utilities with special and exclusive rights
  - Defence procurement for the protection of essential security interest
  - No requirement to supply all tender documentation at the start of the procurement process
  - No remedy of ineffectiveness, standstill or automatic suspension
  - Shorter limitation periods
  - No rules for below threshold contracts
- 

- **Great Repeal Bill**
  - Confirms UK implementing regulations as UK law
  - Essential as European Communities Act is being repealed
  - Amendments required to procurement regulations e.g. OJEU, EEA states and thresholds
- **Advertising**
  - Access to advertising via OJEU?
  - Use of national portals e.g. eTendersNI and Contracts Finder (England and Wales)

- **Case Law**
  - Technically continues to apply
  - Will courts be less inclined?
  - Following Brexit, may have persuasive value
- **Recitals to the Directives**
  - Used as an aid to interpretation
  - Contain some additional obligations e.g. competitive procedure with negotiation
  - What will their status be?
- **EU Principles**
  - Currently interpreted in light of EU law
  - Principle of non-discrimination and single market
  - How will these be interpreted going forward?

# What does the future hold?

---



- Likely that changes will come in time
  - More freedom under GPA regime e.g. remedies
  - Rules may become simpler e.g. open, restricted and negotiated procedures only
  - Regime based on 2004 Utilities Directive
  - More access to negotiated procedures
  - Possibility for divergence amongst devolved governments
- 
- A decorative graphic in the bottom right corner consisting of several overlapping, curved blue shapes in various shades of blue, creating a modern, abstract design.

# Abnormally Low Tenders

© 2017 Carson McDowell

## Declan Magee - Partner

15 March 2017

# Abnormally Low Tenders

---



- The concept of abnormally low tenders has been around for over a decade
- Abnormally low tender has never been defined in European or domestic legislation or case law. However, Professor Sue Arrowsmith states that:

*“it seems to refer to a tender that, because of its particularly favourable terms, raises a suspicion either that the economic operator will not be able to perform lawfully according to the terms offered (which may create a risk of non-performance/unlawful performance) and/or a danger that the economic operator will seek extra payments or that the tender is affected by unlawful state aid.”*



# What does the legislation say?

---



- Article 58 of Directive 2004/18/EU
- Regulation 30 of the Public Contracts Regulations 2006, as amended
- Article 69 of Directive 2014/24/EU
- Regulation 69 of the Public Contracts Regulations 2015, as amended

# Some recent cases from 2017

- **TV1 v Commission 2017**
  - 3 technical quality criteria and price
  - Needed over 60% from each technical criterion and 70% overall to move to award
  - Then on to relative evaluation on price to decide winner
  - Challenged by incumbent on 2 points (i) 40% below maximum annual budget in the tender document; and (ii) 11% below incumbent who had sunk costs
- **European Dynamics v Commission 2017**
  - Framework call-off contract by mini-competition
  - Concern accepted bid was abnormally low
  - Duty to give reasons
  - “Bid was not abnormally low”

# Some recent cases from 2017

- FP McCann v DRD
  - 2 stage contract
  - Pricing difficult – picked the most variable items
  - Clarification questions
  - DRD internal processes
  - Court's concerns



# Abnormally Low – Where are we now?

---



As I hurtled through space, one  
thought kept crossing my mind -  
every part of this rocket was  
supplied by the lowest bidder.

— John Glenn —

AZ QUOTES



Thank you

[© 2017 Carson McDowell](#)