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Public Procurement Regulation after Brexit:

Red Tape Bonfire or Procurement Pragmatism?

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WHERE WE ARE AND WHERE WE MAY WANT TO GO

FROM FEW RULES TO FAR TOO MANY

From the Local Government Acts and Government circulars to:

(1) Directive 2014/24/EU on public contracts – Public Contracts Regulations 2015
(2) Directive 2014/23/EU on concessions – Concession Contracts Regulations 2016
(3) Directive 2014/25/EU on utilities – Utilities Contracts Regulations 2016
(4) Directive 2009/81/EC on defence – Defence and Security Public Contracts Regulations 2011
(5) Directive 89/665/EEC (public sector) and 92/13/EEC (utilities) on remedies

BREXIT

- European Union (Withdrawal Act) 2018: EU rules apply until end of transition period
- UK accession to World Trade Organisation Government Procurement Agreement confirmed

POST-BREXIT REFORM

Green Paper on public procurement - imminent? Until then, “a wish list” ….

(1) Future Free Trade Agreements with EU and rest of world (negotiate individual procurement Chapters)
(2) Macro level: Aims & Objectives and Principles – what sort of system do we want?
(3) Micro level: specifics of implementation – the “technicalities” of how we implement it

(1) FREE TRADE AGREEMENT IMPLICATIONS

World Trade Organisation Government Procurement Agreement ("GPA") terms:

(1) Plurilateral i.e. if signatory to multilateral WTO, the GPA is optional

(2) Mutual access to procurement markets for state parties

(3) UK access to EU and *vice versa* based on GPA NOT EU Directives:
- GPA provisions "skeletal" i.e. **much more flexibility than EU Directives (reform potential!)**
- BUT UK-EU FTA **may bring UK more into line with EU Directives** ("GPA plus")

(4) UK access to non-EU states = as before

(5) Non-negotiables:
- GPA requires rules on transparent award and remedies = in effect, legislation = NO Bonfire
- **Mutual market access limits scope to use procurement as a policy tool to support national industry sectors/promote regional development** = NO "Buy British" *unless* UK can negotiate exclusions of coverage from GPA e.g. agricultural products etc

(2) MACRO LEVEL: KEY OBJECTIVES

Procurement pragmatism within a rules-based system: S. Arrowsmith QC (Hons), *Reimagining public procurement law after Brexit: seven core principles for reform and their practical implementation 2020* (adopted as official Conservative Party policy) argues instead:

(1) Focus on 8 key objectives :

(i) Value for money
(ii) Integrity
(iii) Accountability
(iv) Equal treatment
(v) Fair treatment of suppliers
(vi) Effective implementation of industrial, social and environmental objectives
(vii) Opening markets
(viii) Efficient procurement process

(2) Translated into 7 key principles designed to: (A) maximise flexibility afforded by WTO GPA; (B) improve quality of legislation; and (C) preserve certainty and familiarity where appropriate.

PRINCIPLE 1: OPEN CONTRACTING APPROACH

Move away from publication of what is legally required (e.g. contract notice, award notices, Freedom of Information Act requests, disclosure in litigation etc)

Make all procurement information publicly available and usable *via* electronic system

- UK policy before Brexit e.g. (Open Contract Data Standard): https://www.gov.uk/government/publications/open-standards-for-government/open-contracting-data-standard-profile

- Subject to exceptions to freedom of information e.g. commercial confidentiality (tricky!)

PRINCIPLE 2: SINGLE UNIFORM REGIME

Recall 5 Directives on different areas…

All rules in one Act/Regulations

(1) Eases understanding

(2) Reduces “boundary” disputes e.g. does the public sector or defence regs apply?

(3) Uniformity:

- certain procedures found in one but not the other e.g. no open procedure in defence;
- no multi-supplier framework agreements in concessions;
- remedies – violation of directives; EU Treaties for other breaches; domestic judicial review

(4) Distinctions removed between:

- entities e.g. contracting authority, public undertaking etc;
- sectors e.g. utilities, defence;
- type e.g. public contract and concessions etc

PRINCIPLE 3: A COMMON FRAMEWORK ACROSS UK

No major differences between devolved countries: is Welsh, Scottish and NI procurement policy different for difference sake?

Westminster should aim for a common framework across UK

Devolution presents risk of “significant divergence” between England, Wales, Scotland and NI (pandemic has clearly demonstrated it)

PRINCIPLE 4: LEGISLATIVE SIMPLIFICATION AND MORE SOFT LAW

Significant legislative simplification involving a shift from hard law to soft law:

(1) EU Directives claimed to simplify but longer on every revision (20 pages of Recitals etc)
(2) Omit provisions that restate existing powers: If not stated in Directives, it is permitted -
- So no need to spell it out e.g. power divide into lots and joint procurement with other states

(3) Remove superfluous references
- Provisions on life-cycle costing and award criteria (replace with soft-law guidance on legal requirement that criteria must relate to subject matter of the contract)

(4) Remove codifications of case law
(5) Streamline “flexible” methods into one or two
- Remove competitive dialogue and innovation partnership

(6) Remove preferences for EU products (e.g. in utilities sector)
(7) Rewrite unclear/incoherent provisions e.g. abnormally low tenders
(8) Substitute/accompany with high qualify soft law i.e. explanatory/interpretative guidance
- Rules on mandatory exclusion become administrative directions rather than hard law

PRINCIPLE 5: FAMILIARITY WHERE APPROPRIATE

Use of familiar concepts, rules and terminology where appropriate

Retain EU concept “restricted procedure” and negotiated procedure with a prior call for competition (cf GPA concepts such as “selective tendering”)

PRINCIPLE 6: AWAY FROM OPEN MARKET TO OTHER OBJECTIVES

EU sometimes gives higher priority to open market objectives than others. EU law imposes constraints on discretionary judgments on basis it conceals nationality discrimination

A rebalancing of interests is necessary towards value for money, sustainability and reduced procedural costs:

More flexibility for commercial decision making is required – how? Go back to 1990s utilities Directive:

(1) Free access to procedures without requiring justification of use and to design negotiation process

(2) Should be able to choose evidence to prove technical capability

(3) Tenders which do not meet a specification: contracting authority should be able to decide how far to require evidence at award stage based on commercial risks involved

- EU ruling that contracting authority must require proof of equivalence *before* awarding contract (e.g. examining thousands of vehicle parts)

PRINCIPLE 7: MORE EFFECTIVE ENFORCEMENT

Issues with current enforcement system (does not meet EU law's own requirement of "effectiveness")

(1) Cases brought at High Court are complex; expensive (not SME friendly); reluctance to maintain suspension until trial; Judicial review but same problems and difficult to get standing if not a supplier

(2) EU law requires damages for full lost profits (even for no-fault errors): GPA does not require it

- Damages for lost profits should be limited to cases of contracting authority fault + only secondary remedy i.e. if correction is not possible

(3) A more effective and balanced approach to enforcement

- Focus on remedying violations *before* contract has been concluded and rapidly
    - GPA does not require standstill, notification, automatic suspension, ineffectiveness
        - These should be retained even though not required by WTO GPA
- Target time for deciding cases (to reduce delay in enforcement) as suggested in UNCITRAL
- Shift focus from courts to procuring entity review and specialist rapid tribunal

(3) MICRO LEVEL: COVERAGE

Thresholds based on “cross-border” interest = less relevant. Domestic objectives do not require same approach. So…

- Uniform threshold set at the same level as current PCR15 thresholds (which are WTO GPA compliant anyway)
  - For all contracts (e.g. light touch, defence, services concessions)
  - For all types of entities (e.g. central, sub-central and most utilities)
  - Except retain a higher threshold for:
    - works contracts – WHY? Disproportionate to reduce to same level as supplies and services
    - Entities operating in utilities that are <u>not</u> contracting authorities – WHY? Justified by international trade obligations
- For below threshold contracts: No EU Treaty obligations (e.g. transparency); instead: uniform regime for all regulated by soft law guidance (perhaps backed by Ombudsman)
- Retain WTO GPA rules on aggregation and valuation

(3) MICRO LEVEL: AWARD PROCEDURES

No requirement to justify use of procedures on specific grounds. Permit:

- Open procedure
- Negotiated procedure with a call for competition
- Restricted procedure

Remove:

- Competitive dialogue (negotiated procedure can do iterative tendering)
- Innovation partnership: issue soft law guidance on procuring innovation and development within the negotiated procedure

Direct awards should be permitted on same grounds as now

- But post-COVID – requirement of non-foreseeability and attributability removed for urgent procurement – there is still an emergency even if you foresaw it
- Clarity on procedural rules for direct awards e.g. mandatory exclusion
- Pricing regulation (e.g. Single Source Contract Regulations model)

(3) MICRO LEVEL: OTHER MEANS OF CALLING FOR COMPETITION

Retain contract notices under new e-portal system

Use more qualification systems (e.g. inviting all registered suppliers to tender and calling off): if so, no need for rules on dynamic purchasing systems

Multi-supplier framework agreements: rules not necessary for single supplier – it is just a normal public contract

No need for specific rules on electronic auctions (guidance will suffice)

(3) MICRO LEVEL: QUALITATIVE SELECTION AND AWARD

Qualitative selection:

Exclusions (more than rules reform is required):

(1) Mandatory: Centralised agency to deal with mandatory exclusions (criminal convictions/breaches etc): contracting authorities are not the police!

(2) Discretionary: retained for serious regulatory breaches and professional standards

Selection:

Detailed rules and evidence requirements on qualification/section criteria should be removed: just require selection to be done using criteria (which are proportionate and relevant to subject-matter of contract)

Award:

Criteria should be lowest price or most economically advantageous tender + linked to the subject matter of the contract – remove reference to “innovation” etc

(3) MICRO LEVEL: QUALITATIVE SELECTION AND AWARD

Other key rules:

- Retain rules on contract modifications
- Abnormally low tenders: right to reject in appropriate circumstances (clarify no wider obligation to reject/investigate to ensure unsustainable tenders are not accepted) and require investigation *before* rejection