This section explains that the current UK regulations on public procurement (being closely based on EU directives) will continue to apply until the end of the transition period, but that the Government then intends to replace those regulations with a new, simpler system. Precise details of the new regime have not yet been announced.

Transition period
The Public Contracts Regulations 2015 ("PCR"), the Concession Contracts Regulations 2016 ("CCR") and the Utilities Contracts Regulations 2016 ("UCR") require UK public authorities and certain utilities to award contracts for the provision of goods, works and services in a transparent, competitive and non-discriminatory manner and to afford equal treatment to bidders from any EU Member State. Although based closely on EU Directives, these UK Regulations will remain in force, unchanged, until (at least) the end of the transition period on 31 December 2020.

After the transition period
According to Title VIII of the Withdrawal Agreement, any procurement procedures launched under the EU procurement directives during the transition period and which are not completed until after 31 December 2020 will continue to be governed by those EU directives until their completion. The same is true in respect of framework agreements concluded before the end of the transition period, but which continue to be operational after that date. Article 76(2) of the Withdrawal Agreement confirms that, in relation to such procedures and framework agreements, contracting authorities in either the UK or other Member States shall continue to respect the non-discrimination period even after the end of the transition period.

The implicit corollary of the above rule is that discrimination on grounds of nationality will be permitted in relation to public procurement procedures commenced (or framework agreements awarded) after the end of the transition period, insofar as this is not ruled out by the GPA or by any new bilateral agreement between the UK and the EU.

Shortly before the recent election, the UK Government announced that it intended to replace the current UK procurement regulations with a new, simpler system, which it said would be in place by 1 January 2021. The announcement gave few details of what the new system would look like, but did say that it would be geared towards promoting British business and supporting the local economy.
The Government also promised to introduce simpler and speedier dispute resolution mechanisms.

The Government announcement stated that the new UK rules would be based on the WTO’s Government Procurement Agreement (“GPA”). The GPA requires its members to ensure that public authorities in their territory award public contracts using transparent, non-discriminatory tender procedures. The GPA is based on similar principles to the current EU and UK procurement rules, but is much less detailed and prescriptive as regards tender procedures. The UK is currently bound by the GPA through its EU membership and, post-transition, the UK intends to be a party to the GPA as an independent nation. The UK Government has introduced legislation to enable it to implement the GPA in the UK: clause 1 of the Trade Bill 2019-21, introduced in the UK Parliament on 19 March 2020.

The UK Government had already taken steps to ensure that, following the end of the transition period, public contracts awarded in the UK will no longer have to be advertised in the Official Journal of the European Union (“OJEU”). In March 2019, the Government enacted a statutory instrument, entitled The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019, number 560). These Regulations will end the current obligation on contracting authorities to publish their contract requirements in the OJEU and replace it with a requirement to submit notices to a new UK e-notification service. The Regulations also provide that various monitoring functions will transfer from the European Commission to the Minister for the Cabinet Office.

The content of the promised new UK procurement rules will depend in part upon what is agreed on procurement in any future EU-UK trade deal. For example, if that deal provides for mutual, non-discriminatory access to each side’s public procurement markets, this would limit the extent to which the UK could introduce new domestic rules which favour British suppliers.

“The current UK public procurement regulations are closely based on EU Directives. The Government has announced that, post-transition, it intends to replace the UK regulations with a new, simpler regime based on the WTO’s Government Procurement Agreement.”

ADRIAN BROWN

At the end of transition – will there be elements of no deal?

- At the end of the transition period, if the new trading relationship is not in place, there could be a situation similar to no deal. It is more likely that this will be modified by the introduction of agreed elements of the future relationship or some other temporary set of rules, even though the UK Government has ruled out extending the transition period. Both sides have set out their respective negotiating positions. The EU has published its version of the draft EU-UK FTA and the UK has sent its draft to the EU, but has not yet released it publicly - for further updates, please subscribe to our Brexit blog. However, there will be no clarity as to what will happen until towards the end of 2020 and the adage “plan for the worst, hope for the best” continues to apply and no-deal guidance therefore remains relevant. See the accompanying section: Leaving the EU – The process and preparations.

- The body of EU law in force at the end of 2020 will be imported into UK law (with necessary amendments) under the European Union (Withdrawal) Act 2018 and the UK legislation made to implement EU law will be retained, with suitable amendments – this will be called “retained EU law”.

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