

MOFO BREXIT BRIEFING

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BREXIT: GOVERNMENT AND PUBLIC PROCUREMENT IN THE UK

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The process of Brexit will take many years, and the implications for our clients' businesses will unfold over time. Our MoFo Brexit Task Force is coordinating Brexit-related legal analysis across all of our offices, and working with clients on key concerns and issues, now and in the coming weeks and months. We will also continue to provide MoFo Brexit Briefings on a range of key issues. We are here to support you in any and every way that we can.

Government and Public Procurement in the UK

Government entities and public bodies in the UK spend around £200bn a year on acquisitions of goods, services and works via publicly-tendered contracts. In the wake of the "Leave" vote in the UK's referendum on 23 June 2016, we examine what Brexit may mean for the structural landscape of public procurement in the UK.

The UK has always had a strong commitment to regulating public procurement, and it is unlikely that Brexit will have an immediate impact on this. However, legislators in the UK may treat the Brexit decision as an opportunity to forge a new path in global procurement. It's unclear at this stage whether this will result in more stringent – or more relaxed – procurement legislation in the UK. The greater likelihood is that the UK will find its hands tied by obligations under other international agreements and opt to make relatively little change to its procurement procedures and government contracting regime.

What are the alternatives?

There are a number of options available to the UK government at this point, all of which depend on the type of post-Brexit relationship that the UK seeks to cultivate with the EU. This will largely revolve around the UK's appetite to maintain access to the EU's internal market, within which there is freedom of movement for goods, services, capital and persons. Purely in terms of the government procurement market, the two most viable options at this early stage are:

1. **Subscribing to the Norwegian model**, which permits full access to the single market to non-EU Member States by means of membership of the European Economic Area. This model requires full compliance with all EU legislation involved with the single market, including government procurement legislation. If the UK subscribes to this structure, there will be no

need for any substantive changes to the UK procurement legislation but the UK would be unable to negotiate or shape any future EU legislation, which is unlikely to make this a particularly attractive choice.

2. **Remaining as a party to the WTO's Agreement on Government Procurement (the GPA)**, which is a multi-lateral agreement between members of the WTO, whereby signatory parties give access to foreign suppliers to their government procurement markets. It seems likely that the UK will want to maintain its membership to the GPA, because this will provide UK suppliers with access to the EU procurement markets, but also the USA, Japan and Canada (as well as China in the near future, once it finalizes its accession to the GPA). However, the UK could not rely on the GPA for full access to the EU procurement markets because the GPA is narrower in scope than the EU procurement legislation.

Preparing for post-Brexit Public Procurement

We should not get ahead of ourselves. For the time being, the UK is still a member of the EU and will have to continue complying with all of its EU law obligations, including implementing EU legislation into domestic legislation, up until Article 50 is triggered by the UK government (we set out the full implications of this in our Brexit Briefing [here](#)). So, in the immediate future, the UK's implementation of the various EU procurement directives will continue to apply.

Once Brexit is confirmed and the UK leaves the EU, depending on what model for Brexit is applied the UK will no longer have to comply with new EU legislation. However, it will still have to comply with its own existing domestic procurement regime, namely the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016. Interestingly, these laws go beyond the minimum EU requirements in some areas (*e.g.*, provisions assisting SMEs to access the government procurement market), underlining the UK government's sustained desire for regulation in this area.

The UK could repeal these laws in favour of less stringent regulation; however, this is unlikely particularly because the UK has always had its own home-grown procurement regime, which was set up before the EU regime.

A more likely outcome could be that the UK government may seek to simplify a procurement regime that has grown over the years through changes at the EU level. But even in streamlining the regime, the UK government would still need to stay within the parameters of the GPA – so we don't expect significant changes in direction in the procurement rules.

Even if the UK government decides to relax its public procurement legislation, it might be a while before UK businesses start seeing tangible results. The UK government will most likely have other legislative priorities, and the overarching principles of procurement (*i.e.*, value-for-money and accountability) should ensure that any new laws are not too far removed from existing procurement legislation.

Further, regardless of how the UK government acts, UK businesses may have their hands forced, if they wish to remain competitive against other non-UK bidders, particularly in the EU. Both market demand and customer expectation may mean that UK businesses are pushed to keep up with EU standards in procurement, regardless of any new legislative framework that is created by the UK government.

And the most interesting aspect of all this? Over recent years, direct cross-border procurement amounted to 3.1% of the value of all contracts across the whole of the EU, with the UK itself only awarding [1.3% of public contracts](#) to suppliers based in other Member States. Evidently, Member States are not keen to award to businesses from other Member States, and Brexit isn't likely to change this attitude.

It would therefore appear that, in the near future at least, Brexit will have minimal impact on public procurement in the UK, which should provide some degree of comfort for UK businesses operating in the procurement arena and for multinationals seeking to maintain a consistent pan-European approach to the government contracting market.

Please do not hesitate to call with any question or concern that you may have. We're here to help.

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