



# No-deal Brexit: Impact on public sector procurement contracts

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While a range of outcomes, including [a departure under the terms of the current Withdrawal Agreement](#), remains possible, it is important for businesses to plan for a no-deal Brexit, in which the UK leaves the EU without a withdrawal agreement or other deal. Here we look at the potential impact of a no-deal Brexit on public sector procurement law.

## Key impacts

In general terms there will be no public procurement equivalent of a 'Dover lorry park' should the UK leave the EU on a no deal basis.

In the event of a no-deal Brexit:

- **EU rules on public procurement[1] crystallise in UK domestic law:** UK public procurement regime remains largely unchanged at the domestic level[2].
- **Changes to the way operators access and respond to notices in the UK:** new UK e-notification service rather than OJEU Notices or Tenders Electronic Daily (TED).
- **UK becomes a third country without any transition period:** movement of supplies, services and works between the UK and the EU-27 may be subject to tariff/non-tariff barriers, visa and other restrictions arising from the loss of Single Market freedoms, thus impeding UK contractors' ability to bid for or deliver services in the EU27.
- **UK will accede to World Trade Organisation's plurilateral Government Procurement Agreement (GPA):** once accession process is complete (this is expected to take a month but could take up to eight months), UK operators will have access to EU procurement markets and those of other signatories on a non-discriminatory basis (but subject to higher thresholds than currently apply under EU law).

Until the UK accedes to the GPA, eligibility requirements under EU law may preclude UK suppliers from participating in EU Member State tenders. The European Commission is clear that following a no-deal Brexit, *"economic operators from the United Kingdom will have the same status as all other economic operators based in a third country with which the EU does not have any agreement providing for the opening of the EU procurement market."* There is no indication that existing procurement contracts by EU27 contracting authorities will be invalidated as a consequence of a no-deal Brexit.

In contrast, under post-EU Exit public procurement law, EU or GPA contractors will have immediate and continuing access to UK public procurement marketplaces - thus demonstrating the general imbalance between the UK approach to no-deal (which seeks to preserve the status quo and access by EU market operators to UK markets) and that of the EU27 which, with fewer exceptions, apply the doctrine that the UK will have become a third country.

## Legislative changes

Using the powers conferred by the European Union (Withdrawal) Act 2018<sup>[3]</sup>, Amendment Regulations make the following principal changes<sup>[4]</sup>:

- Introduce the new UK e-notification service.
- Transfer certain functions of the Commission to the Cabinet Office (e.g. to set financial thresholds).
- Address other otiose references to EU law or institutions.
- Afford GPA (including EEA) operators continuing access to the UK public sector market place for a period of eight months from EU exit.

## Actions for business

- From the point of exit, UK, EU27 and other GPA businesses should access/respond to UK public sector notices using the new e-notification service rather than TED.
- UK, EU27 and other GPA businesses may continue to participate in 'inflight' UK public sector procurements.
- It is not clear how EU27 contracting authorities will treat UK participants in 'inflight' EU27 public sector procurements, given the post-EU exit interlude before the UK accedes to the GPA.

## Actions for UK contracting authorities

- For procurements in progress on exit day, contracting authorities will need to comply with the Amending Regulations from that point (but there is no obligation to re-issue notices already logged on TED).

## Crystal ball

Although nothing will change on Day 1 of EU exit, the UK has in time the opportunity to reform its domestic procurement regime, moving away from some of the perceived constraints of the EU regime, whilst still being GPA-compliant. An example might be the prescriptive regime for modification of procured contracts<sup>[5]</sup> which has no parallel under the GPA<sup>[6]</sup>.

Like almost everything else relating to Brexit, there is however no clear view as to future UK priorities. And of course, the public procurement policy field will be a pale reflection of the many debates about regulatory convergence and divergence with the EU in a post-Brexit world.

DLA Piper's Brexit and public procurement specialists remain on hand to guide you and your business through the coming months. For a more detailed analysis, please contact **Richard Bonnar**, **Paul Hardy** or your usual DLA Piper contact.

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[1] The key legislative instruments at EU level relating to public procurement are the Public Procurement Directive 2014, the Concessions Contracts Directive 2014 and the Utilities Directive 2014. These are transposed into UK law by the Public Contracts Regulations 2015, the Concession Contract Regulations 2016 and the Utilities Contract Regulations 2016 (and their Scottish equivalents).

[2] For more information please see the Public Procurement Policy Note (PPN) 02/19 and Frequently Asked Questions.

[3] Section 8

[4] The relevant Amendment Regulations are the Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 and the Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 (and their Scottish equivalents).

[5] Regulations 32 and 72 of the Public Contracts Regulations 2015

[6] For further information, refer to the policy paper Consequences of Brexit in the Area of Public Procurement (2017), authored by Sue Arrowsmith and commissioned by the European Parliament.