

Report to: STAR Joint Committee
Date: 2nd May 2017
Report for: For Information
Report of: Business Improvement Manager

Report Title

Brexit – Impact on Public Procurement

Summary

The purpose of this report is to provide a briefing to STAR Board on current intelligence concerning the impact on Local Government procurement of the UKs withdrawal from membership of the EU

Recommendations

The recommendation of this report is that the Joint Committee notes the content of the briefing

Contact person for access to background papers and further information:

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Background

Financial Impact:	None
Legal Impact:	None
Human Resources Impact:	None
Asset Management Impact:	None
E-Government Impact:	None
Risk Management Impact:	None
Health and Safety Impact:	None

Consultation

No public consultation required

Reasons for Recommendation(s)

The Joint Committee requested a briefing on the potential impact on public procurement of the UK decision to withdraw from membership of the EU. The attached paper sets out the position based on commentary reviewed by the Business Information Manager. In essence, there is no certainty at this time but it is the view of STAR Procurement that current UK legislation is unlikely to change in a manner which would require the STAR Councils to consider risk mitigation

1. Summary of Key Matters

- 1.1 UK will most likely retain Public Contracts Regulations in a form compliant with the EU Directive as various trade agreement models with non-EU trading partners require this
- 1.2 UK will lose 'membership' of the World Trade Organisation Government Procurement Agreement on leaving the EU; re-negotiation likely to be a priority
- 1.3 Thresholds will remain aligned to the EU Directive; trade agreements will stipulate OJEU advertisement/non-advertisement
- 1.4 Removal of the option for supplier selection (the Restricted Procedure) unlikely
- 1.5 Any new legislation likely to encompass the basis of EU law – proportionality, equal treatment and transparency
- 1.6 Local Government procurement post-EU membership likely to be 'business as usual'

2. Recommendations

- 2.1 It is recommended that the Joint Committee notes the contents of the attached briefing

Report Appendices

1. Post-EU Membership UK Procurement Regulation - Briefing for Joint Committee

Introduction

STAR Procurement has reviewed current commentary on the possible direction that UK procurement legislation might take, post-EU membership. Commentary is limited to speculation - the UK Government cannot say now, what a 'post-EU' UK will look like

Sources reviewed include commentary from UK lawyers, UK educational research establishments and procurement support businesses in the UK. This briefing is limited to considering the impact on Local Government procurement; no consideration has been given to the impact on national, defence or utilities procurement

Current UK and EU procurement legislation is founded in the EU Treaty fundamentals of equal treatment, proportionality and transparency; these principles are unlikely to be abandoned by the UK as it withdraws from membership of the EU

Summary & Likely Position in 2020

Recent UK Government statements have confirmed that procurement regulation will continue beyond EU membership. The UK was instrumental in defining the 2014 EU Procurement Regulations, so enacted them (the Public Procurement Regulations 2015) with little alteration. The resulting procurement legislation can be seen to be UK domestic procurement policy, not simply enforcing the relevant EU Regulations

It is unlikely that the UK will wholly revise procurement legislation following withdrawal from EU membership. The current trade agreement options being discussed will all require the UK to maintain EU-equivalent procurement regulation. Thresholds imposed by the EU are based on World Trade Organisation-level trade agreements. It is unlikely that these will change before 2020

The earliest date for UK withdrawal from EU membership is mid-2019. It is widely considered that the UK will not by then have concluded new trade agreements either with Europe or wider, global, trading partners. The UK is a member of the World Trade Organisation Government Procurement Agreement (WTO GPA) by default of its EU membership. On leaving the EU, the UK will have to negotiate new membership of the GPA. It is considered that this will be a priority action by the UK ahead of any individual trade agreements and that the UK will maintain existing procurement legislation in the interim

Reversion to Pre-EEC Membership Procurement Guidance

This is considered to be unlikely, given that the UK did not have specific procurement rules prior to joining the EEC in the 1970s. During the last 40+ years, a considerable wealth of UK procurement legal precedent has been established in the domestic courts, which will not be undone by virtue of the UK withdrawing from EU membership

Trade Agreements

Procurement legislation post EU membership is likely to be influenced by whatever trade agreement the UK negotiates with the EU and with wider global markets. Procurement regulation is a common strand of any international trade agreement. Any direct trade agreement with the EU is likely to require commonality of procurement regulation. If the UK simply re-joins the WTO GPA there is a potential for the introduction of more flexible of award processes. However, participation in the GPA requires countries to maintain their existing procurement regulation standards if better than the GPA minimum – so regulation is unlikely to change dramatically from the existing rules. A GPA solution will not mandate procurement regulation for any contracts not covered by the GPA (i.e. below threshold). It is unlikely that this area of procurement will be deregulated, but it presents an opportunity for the UK to create a more SME-friendly approach to lower value procurement

In any period of transition upon leaving the EU but without finalisation of alternative trade agreements, the consensus opinion in continuation of current procurement regulation without recourse to enforcement by non-domestic suppliers

If the UK adopts the 'Norway' solution of membership of the European Economic Area (EEA), then existing procurement legislation will remain and be subject to future change corresponding to EU Procurement Regulations. This is not seen by commentators as the most likely outcome of negotiations due to 'freedom of movement' requirements that EEA membership entails and which are perceived to be opposed by those voting to leave the EU. Similarly, if the UK pursues the 'Switzerland' solution of a bespoke trade agreement, it is equally likely that procurement regulation within such an agreement will be based on EU Procurement Regulations

Thresholds

There is a general consensus that the threshold for goods/services is too low, so any negotiation on trade agreements by the UK is likely to include a review of such thresholds. However, the current EU thresholds, due to be updated in 2017 for the period January 2018 – December 2019 are based on WTO agreements. It is unlikely that the UK thresholds (both domestic, sub-threshold procurement and what will need to be advertised to all new trade agreement partners (above-threshold) will substantially alter. It would need a revision to the WTO approach to thresholds, especially those agreed between the EU and wider global partners to impact on any trade agreements negotiated by the UK

Restricted Process & Supplier Selection

It is unlikely that the Restricted tender process will be removed from UK domestic procurement legislation. Selection process is transitioning to the European Single Procurement Document (ESPD) for Restricted tenders. This is unlikely to change unless the UK moves solely to WTO GPA based trade agreements. 'Norway' or 'Switzerland' style trade agreements will require compliance with EU procedures, including the ESPD. The UK favours the Open process, which is now the default tender mechanism in the Public Contracts Regulations. Removal of the option for supplier selection for procurement in supplier-rich sectors is unlikely