


The future of procurement law: impact of Brexit on the health sector

One key legislative area for the health sector which is always topical and provokes debate even without the added complication of the Brexit question is procurement law. Add in the issue of Brexit and the debate intensifies and possible outcomes multiply.

 09 October 2019

One key legislative area for the health sector which is always topical and provokes debate even without the added complication of the Brexit question is procurement law. Add in the issue of Brexit and the debate intensifies and possible outcomes multiply.

It is a well-established and accepted legal principle that the procurement of supplies, works and services is subject to a public procurement regime. However, in a country with a large scale public health service the extent to which the procurement of health and care services should be subject to a competitive regime continues to be a hotly debated topic as the different sides argue against “privatisation” and for “competition and innovation”.

However, the simple truth is that so as long as the United Kingdom remains in the European Union the procurement of health and care services will be subject to a public procurement regime under the Public Contracts Regulations 2015 (PCR) albeit the less restrictive Light Touch Regime. Depending on the terms of any exit the PCR may also continue to apply. The National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013 can, of course, be amended or even repealed (as NHS England and NHS Improvement recommend in their recent ‘The NHS’s recommendations to Government and Parliament for an NHS Bill’ paper) but this will have little impact so long as the PCR remain in force.

How the procurement of health and care services may be regulated in the future will depend on whether the UK does indeed ‘Brexit’ and the approach to procurement in the UK in the immediate aftermath of Brexit will depend on whether the UK has exited with a deal or not.

The impact of Brexit

If the UK exits the EU under a Withdrawal Agreement it is understood that (as was the case with Prime Minister May’s deal) the UK procurement regime will continue to apply as it does today until the end of any transition period which, based on current reports coming from the government, will still be 31st December 2020. It is anticipated that following the end of the transition period the terms of any trade deal which is agreed may have a bearing on the future procurement regime.

However, as the political turmoil over Brexit continues a deal is far from certain and preparations, from a procurement law perspective, have been undertaken to accommodate a no deal scenario. The previous Government laid two sets of draft regulations before Parliament which contain proposed amendments to the Public Contracts Regulations 2015 to address how public procurement law will apply following the UK’s exit. In principal those proposed amendments reflect the UK’s withdrawal from the UK but they also address practical issues such as changing references to the OJEU TED publication system, EU institutions etc.

Whilst there remains uncertainty as to the manner of the UK’s exit there are some sensible steps you should be taking now to prepare for the potential implications.

Key issues

OJEU Notices

In the event of a no deal scenario or following the end of any agreed transition period UK contracting authorities will no longer be required or entitled to publish notices in the OJEU, instead contracting opportunities will be advertised via the new UK e-Notification Service (and contracting authorities will need to be live to the requirements as to when publication under the new UK e-Notification system is required even if procurements have been started under the PCR).

Regulations

UK bidders may not be entitled to enforce the provisions of the EU procurement Directives when seeking to do business within the EU once the UK leaves the European Union. As the UK have now acceded to the WTO Government Procurement Agreement UK Bidders should still have access to the EU markets but will have the same status as all other economic operators based in a third country which does not have a deal with the EU. However, the terms of any trade deal should impact on this when agreed.

Access to EU member states contracts

Whilst membership of the GPA will ensure access, UK companies are likely to find it more difficult, post Brexit, to have access to contracting opportunities in EU countries post exit. There is no clear position over whether tariffs will be levied by the EU in a no deal scenario. This could be an issue where UK companies are heavily reliant on contracts that derive from EU member states.

Restriction on workers

If there is to be a restriction on workers after the transition period (or on no deal) this may affect the viability of contracts.

Action points

There is a clear message from the Government that everyone should be stepping up Brexit preparations now and with a specific focus on procurement and contracting issues we have set out below four key actions to undertake now to ensure you are in the best position to be able to address the impact of any Brexit.

Plan for the long-term

Ensure that the focus is on the lifetime of the procurement rather than the initial costs and promote competition through having various streams of procurement rather than large contracts.

Internal audit

Review your contracts database and ensure you know when existing contracts are due to end and/or new opportunities are due to come to market – make sure you know any 'new' route to market and understand any subsequent legislative changes.

Existing EU contracts

It is important to prepare for the potential impact Brexit may have on existing contracts. It is worth checking the termination provisions in your existing contracts to understand whether you or the party with whom you contract can trigger any termination provisions in the event that Brexit impacts the continued viability contracts as well as understanding any specific Brexit provisions.

Consider the costs

Contracting parties should consider negotiating the allocation of risk where there could be restrictive measures or potential costs on the access of labour deriving from the EU. It is important to factoring in these costs when determining whether or not a contract is worth competing for or considering costs proposals.

How we can help

We are supporting a number of clients both public and private sector to navigate a number of Brexit related issues. For those who need support with understanding the procurement landscape and getting to grips with contracting issues we offer a number of services which can be tailored to your specific circumstances.

1. **Initial planning** – We will provide an overview of the key risk issues affecting the method in which the public procurement affects your

day to day business and operations in various Brexit scenarios and the preliminary action points you can take to prepare.

2. **Contract audit** - we can provide a bespoke review of all of your ongoing contracts which were procured under the existing EU procurement regime to assess the potential issues that may arise as a result of Brexit.
3. **Risk analysis** – We will work with you to assess your business and operational needs and produce a risk register setting out the priority issues, actions points and a Brexit project plan to help you start contingency planning and risk mitigation.
4. **Ongoing support** – We will provide continuing legal and project management support as the need arises, along with analysis and advice on the legislative and policy changes brought about by Brexit.

Contact



Rachel Whitaker

Partner

rachel.whitaker@brownejacobson.com

+44 (0)115 976 6538

Related expertise

Services

Public procurement