Brexit and the great uncertainties for public procurement.

As the metaphorical storms rage around the British Isles regarding the uncertain certainties of Brexit, which currently continue to entertain and amuse (or panic?) the masses, then let us spare a thought for the good ship “Public Procurement” and all of the procurement, purchasing and supply chain professionals who sail in her!

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For those of you whom are specifically in the public procurement arena, the UK Government has published the following draft set of proposed regulations entitled the “Public Procurement (Amendment etc.) (EU Exit Regulations 2019)”

For ease throughout this article, the regulations will be referred to as the DR’s (Draft Regulations).

To give a bit more background regarding the DR’s, which in effect try and deal with any post-Brexit organisational issues in not only the current Public Procurement Regulations 2015 (PCRs), but other primary legislation too, such as the Equality Act 2010, Public Services (Social Value) Act 2012 etc,

The dual purpose of the DR’s is as follows:-

a) To procedurally action by removing or replacing any references to the European Union, the Commission and EU Directives within the PCR 2015 (and any related legislation,) with UK (domestic) equivalents per se,

b) Allow the administering of any further amendments to domestic procurement legislation.

For those familiar with the PCR’s, it is expected that post Exit Day, it is proposed that they will still continue to apply to those suppliers from signatory states of the agreement on government procurement between certain parties to the World Trade Organisation (WTO), dating back to 1994; (commonly referred to as the GPA,) and also suppliers from EU Member States whom were already members prior to exit day; however, the PCR obligations themselves would immediately cease to apply – with respect to any rights and remedies - to suppliers from states who are signatories to “other international treaties”.

In any event, it’s sort of “business as usual” re the majority of the PCRs for the UK initially, however, eight months following exit day, it is a further proposed provision that the PCR obligations would also cease to apply to suppliers from signatory states of the GPA but would continue to apply to suppliers from EU Member States.

Whilst the UK is already party to the GPA pursuant to its existing EU membership, it is interesting to note that the above provision anticipates the UK’s accession to the GPA (in effect membership in its own right) by the end of this eight-month period and thus, should this be completed, it is likely that obligations will continue to apply to suppliers from signatory states of the GPA after this date anyway!

So in simple terms, it could be construed that (unless the UK fails to retain its GPA membership viz a viz the WTO), that it will still be “business as usual” for the UK anyway.

However, the DR’s appear to primarily convey, that regarding procurement legislation, it is predominantly going to be a status quo from a procedural/protocol perspective, there are some definitive proposed changes that should be brought to the attention of those operating in the public procurement professional arena:
Over threshold notification obligations via the Official Journal of the European Union (OJEU)
One of the most significant proposed changes, is that for over threshold value procurement exercises, advertising, awarding, modifications of notices etc, that instead of having to do this via the TED/OJEU portal, that the intention is for the UK to implement its own “UK e-notification service” to replace OJEU.

One would suspect that this would be similar to the “Public Contracts Scotland” web portal, as the intention is that this would be a single, web-based portal which would be provided by or on behalf of the Cabinet Office, thus notices would still be published so that they are freely accessible to the public. One wonders whether this would either become a modified version of contracts finder, or a totally new portal that would replace it.

In relation to the thresholds, the DR’s also propose the transfer of Commission’s function to revalue the main financial thresholds, and review reports to the Minister for the Cabinet Office (MCO). At this juncture though, the proposal as such, is that the thresholds would not change from the current applicable levels until the very earliest 1st January next year.

Common Procurement Vocabulary codes (CPV’s)
There is also a proposed draft regulation to revoke the various EU regulations governing the common procurement vocabulary codes. In that event, the MCO will be responsible for variations to the CPV codes going forward. One could juxtapose that at that juncture, a good house-keeping exercise would not be amiss in removing or standardising, and certainly a long overdue updating, of those CPV’s.

Abnormally Low Tender acceptance and State Aid
The DR’s would also seek to remove the specific provision for contracting authorities (CA) to reject an abnormally low tender on the basis that the tenderer has obtained state aid and is unable to prove (within a time frame designated by the CA) that the aid in question was compatible with the internal market, i.e. an accepted practice within the EU.

Although, the proposed removal of the above provision is speculatively based in anticipation of a new UK state aid regime, implemented post Brexit, in which it falls under the jurisdiction of the competition and markets authority, it could however be considered inappropriate for the supply chain already established within the UK to thus be required to demonstrate that any aid provided by the UK Government was compatible with other supply chain entities situated across the channel in other European states.

Joint procurements between EU Member States
There are also proposed provisions currently dealing with joint procurements with CA’s in other EU member states will also be removed.

Equivalent quality certification, standards thereof, official lists and disqualification note.
From a quality perspective, it is further proposed that in relation to the recognition of equivalent quality assurance certificates from bodies established in other EU Member States and specific environmental management schemes and systems - that the DR’s would still require reference to European standards but would not require CA’s to recognise equivalent certificates.

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It is also proposed that the DR’s would also remove the presumption of suitability on the basis of official lists. For example, suppliers registered on an official list or having a certificate issued by a certification body.

Last but not least, it is also further proposed within the DR’s, that the obligations not to disqualify a supplier on the grounds of failing to be a natural or legal person, as according to English law, would be also be removed.

In conclusion, whilst, it’s unlikely there will be any major changes in the public procurement legislation arena, (in theory not for at least another eight to twelve months anyway,) CA’s will still be under obligations to advertise contract opportunities above a certain threshold, observe duties of equality, equitability and transparency with regards to the end to end protocols of conducting a tender, and may still have to observe procedural aspects such as pre contract commencement standstill periods too.

The aforementioned DR’s are yet to be passed, and until they are, further amendments, tweaks and re-writes could arguably still be made, thus, the great uncertain certainty is that they will either become the catalyst of the next evolutionary change in public procurement law…..or they may never come to fruition at all, subsequently consigned to another moot point of procurement law scenarios for generations to come.

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