



PUBLIC PROCUREMENT AFTER BREXIT
BiP Business Analysis



About the author

Eddie Regan is BiP Solutions' Principal Procurement Consultant. Working alongside the Client Services team, he frequently assists public sector organisations with clarification and interpretation of EU Directives and a wide variety of legislative issues. For the last 19 years Eddie has lectured regularly on procurement policy and processes at conferences and events, both on behalf of BiP and for a variety of other organisations. He also provides in-house training on the tendering process to personnel in both the public and private sectors.



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Introduction

How will Brexit impact public sector procurement?

That's the question many of our public and private sector clients are asking following the EU Referendum vote.

BiP Solutions' Principal Procurement Consultant Eddie Regan spends most of his waking hours either immersed in procurement regulations or running training workshops on how they impact buyers and suppliers. Eddie has helped BiP clients understand countless regulatory changes over the years, and in this *Business Analysis* he gives us his expert opinion on the potential impact of Brexit.



Scale of change

The UK was instrumental in setting much of the EU procurement regulations currently in place and our procurement procedures are enshrined in UK laws such as the Public Contracts Regulations 2015. It is therefore highly unlikely that a UK government would favour fundamental change after Brexit.

Reinforcing this opinion is DWF Law Partner Michael Mousdale, who explained that any small changes would not be implemented until the Article 50 – UK Brexit terms – negotiation is complete.

Mr Mousdale said: *“In the run-up to Brexit legislatively nothing changes. The current rules remain in place and remain enforceable.*

“During the Article 50 notice period it may become a little clearer what the UK is proposing with regard to the Single Market and it may be that by some point there is a degree of certainty as to whether we will remain bound (because we are in

the EEA or EFTA) or are heading for more liberal waters.”

If the UK joins the European Economic Area (EEA) after leaving the EU, there is likely to be little change if any – the one key difference is we won’t have a voice at the negotiating table for future directives, but we will probably comply voluntarily, just like Norway, Iceland and Switzerland.

We should also dismiss the widely quoted view that £1.7bn will be saved by dropping EU procurement regulations. Most of the regulations and processes will be the same and most costs will still apply.





How might key rules and procedures change?

While we expect overall change to be minimal, we have provided opinions on how each of the key steps in the process might be affected.

ADVERTISING CONTRACTS – OJEU

CURRENT POSITION

Contracts above the defined EU thresholds need to be advertised in the Official Journal of the European Union (OJEU) to fulfil transparency requirements and promote competition.

FUTURE PREDICTION

This requirement will remain at least until the UK extracts itself from the EU. After that, it will depend on the trade agreements negotiated as to whether this is still a requirement. If the UK joins the EEA then the status quo will be maintained.

POSSIBLE OPTION

All contracts, above certain values, mandated for advertisement on the relevant national procurement portal.

ADVERTISING CONTRACTS – LOW VALUE

CURRENT POSITION

Contracts below the defined EU thresholds are advertised on the relevant national procurement portal above certain levels.

FUTURE PREDICTION

This position is unlikely to be revised although the levels for advertising could be increased at some point.

POSSIBLE OPTION

If all contracts previously advertised through the OJEU were to be advertised in full on the national portals, there could be a revision of the threshold levels that this applies from.



THRESHOLDS

CURRENT POSITION

The current EU thresholds were set from 1 January 2016 for a period of two years. These are due for revision in 2017; however, there are moves afoot to look at increasing these levels in the future.

FUTURE PREDICTION

There is currently unlikely to be any short-term change to the UK contract thresholds.

POSSIBLE OPTION

There may be a significant change in the thresholds to determine what level of advertising is required to ensure sufficient competition.

COMMUNICATIONS

CURRENT POSITION

There is a move towards all contracts being undertaken electronically and this encompasses all aspects of the procurement process with the exception of evaluation.

FUTURE PREDICTION

There is unlikely to be any change whatsoever, as successive UK and Scottish Governments and Welsh and Northern Irish Assemblies have pushed the process of electronic procurement for many years.

POSSIBLE OPTION

There genuinely isn't one – no one would suggest returning to the days of paper-based tenders to the detriment of the environment.

OJEU PROFORMAS

CURRENT POSITION

Currently the OJEU proformas are used to advertise in the OJEU. There are 22 forms currently in use across the various regulations, processes and procedures.

FUTURE PREDICTION

The forms deliver a useful formatted advertisement structure and their use helps ensure that buyers provide valuable information to contractors looking for opportunities.

POSSIBLE OPTION

If there is no future requirement to advertise via the OJEU, it may be that similar forms are created for use across the public sector to ensure some conformity of advertisement.



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PRIOR INFORMATION NOTICE

CURRENT POSITION

The Prior Information Notice (PIN) has been developed to allow contracting authorities to use it in a variety of ways – all of which effectively precondition the market to future contract opportunities.

FUTURE PREDICTION

It is hard to see a justifiable reason to remove the PIN option from the procurement structure, although on exiting the EU the name could be changed; however, the use is almost certain to be maintained.

POSSIBLE OPTION

Extend the scope of the PIN as a call for competition to include central government bodies as users.

PROCEDURES

CURRENT POSITION

The current regulations have seen the creation of a structured set of six procedures which effectively cover any procurement process undertaken.

FUTURE PREDICTION

It is very hard to see any scope for changing the current set of procedures, not least because the UK had a significant input into the last EU Procurement Directive. One possible change could be to extend the scope of specific elements of the Restricted Procedure and Competitive Procedure with Negotiation to encompass central government bodies.

POSSIBLE OPTION

Considering Westminster favours the Open Procedure for lower-value contracts, and that the Competitive Procedure with Negotiation is effectively the Restricted Procedure with a negotiation option added, the Restricted Procedure could be removed from the procedures.



“ The current timescales are unlikely to see any change in the future. ”

TIMESCALES

CURRENT POSITION

UK contract timescales were revised in the 2015 Regulations, with the intent of speeding up the procurement process to arrive at the award decision earlier. This was implemented with the intent of aiding SMEs to get quicker outcomes.

FUTURE PREDICTION

The current timescales are unlikely to see any change in the future.

POSSIBLE OPTION

Maximum defined evaluation timescales put on different types of contracts, to speed up the overall timescales of a procurement exercise.

SELECTION PROCESS

CURRENT POSITION

The current selection criteria were adopted in the 2015 Regulations and are matched to the European Single Procurement Document (ESPD), which the EU hopes will become a key element of the selection process. Scotland has adopted the ESPD; however, the rest of the UK has not and continues to use Pre-Qualification Questionnaires (PQQs).

FUTURE PREDICTION

It is questionable whether there is any advantage to the UK adopting the ESPD if the intent is to exit from the EU. However, if the UK joins the EEA then its implementation is likely. The Government may defer the implementation for a period until the route forward becomes clear.

POSSIBLE OPTION

The Government could amend the standard PQQ to encompass all of the aspects of the ESPD and mandate its use in future procurements.



TENDER PROCESS

CURRENT POSITION

The revised award criteria and the push towards life-cycle costing, encompassing social and environmental aspects, is now embedded in the 2015 Regulations.

FUTURE PREDICTION

There is likely to be little change to the current tender process as the structure has been developed over many years and many versions of the regulations. The structure of the tender process is familiar to everyone involved in procurement and is common both above and below the EU thresholds; therefore changing it would serve no beneficial purpose.

POSSIBLE OPTION

Other than minor adaptations, UK contract law could not be changed without requiring significant retraining of both buyer and supplier representatives. This could also be detrimental to UK businesses still intent on competing for contracts within the EU.

FRAMEWORK AGREEMENTS AND DYNAMIC PURCHASING SYSTEMS

CURRENT POSITION

Contracting authorities have the option to set up Framework Agreements and Dynamic Purchasing Systems (DPS) to serve their need, or the need of a defined group of buyers. Framework Agreements are widely used across the UK public sector whilst DPS are less common, but nevertheless are used by some buyers in certain markets.

FUTURE PREDICTION

Given that the UK is the most prolific user of Framework Agreements in the EU, there is unlikely to be any change to their use by contracting authorities. However, there may be a few adjustments as to how they are used and who can use them in the future. Since DPS have been around since the 2006 Regulations, similarly, these are unlikely to be affected, other than a few tweaks.

POSSIBLE OPTION

There is the possibility that Framework Agreements could be made mandatory, within certain defined sectors. However, there is no logical reason to extend that option to Dynamic Purchasing Systems.



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STANDSTILL PROCESS

CURRENT POSITION

The current standstill process has been in use since the 2007 Remedies Directive and was adopted into UK Regulations in 2009. It is embedded in the 2015 Regulations and is accepted widely as a logical step to undertake prior to the contract award to reduce the risk of a future challenge and a failed procurement.

FUTURE PREDICTION

There is little likelihood that the standstill process will change in any way as it is a fundamental part of the debriefing process and indeed can, when undertaken correctly, reduce the number of debriefs that a contracting authority has to undertake.

POSSIBLE OPTION

Short of dropping the standstill process, or restricting the information provided, there isn't any alternative other than going back to the more clumsy debriefing process.

AWARD PROCESS

CURRENT POSITION

There are no specific rules governing the award process in the Regulations; however, it is incumbent on the contracting authority to publish a Contract Award Notice within 30 days of the conclusion of the award of the contract.

FUTURE PREDICTION

Given that this information is already published on the various national procurement portals, it's unlikely that there will be any change to the process.

POSSIBLE OPTION

It is difficult to see any way in which to change the process, other than to remove it completely.



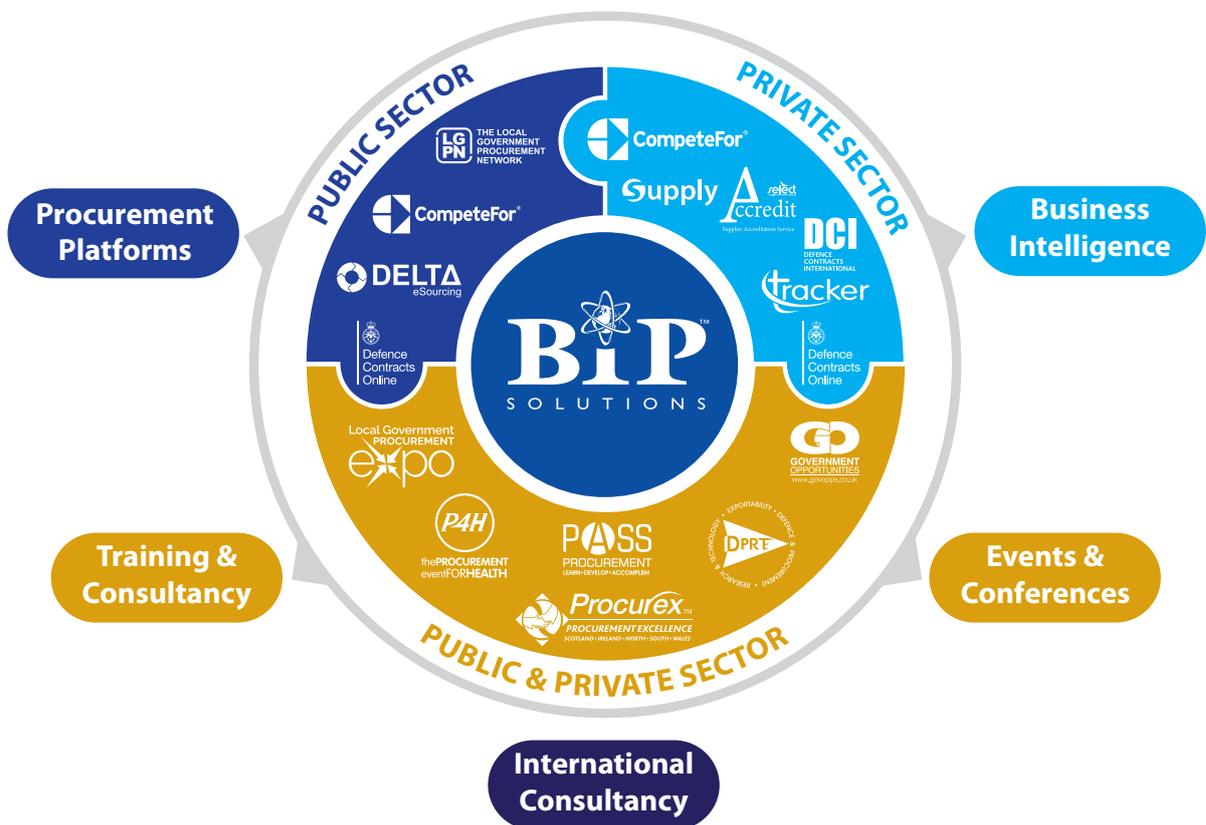
About BiP Solutions

BiP Solutions is the UK's leading specialist in public sector procurement. We have been helping the private and public sectors to work together for over 30 years and we provide expert procurement consultancy to UK and international governments, agencies and purchasing authorities across the world.

More than 250,000 suppliers in the UK use BiP Solutions' business development tools and services to win contracts with the public sector and over 5000 public sector clients use BiP's products and services to help improve their procurement processes.

BiP Solutions is based at Pacific Quay, Glasgow.

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