

What does Brexit mean for public procurement in the UK's Education Sector?

November 2020 Update

Following the end of the transition period in December 2020, there is an air of uncertainty regarding how Brexit may impact the UK's economy, policy and legal system from January 2021 onwards. We have received multiple requests for advice on the potential ramifications that leaving the EU could have on public procurement in the UK, and what this could mean for our clients in the education sector.

It is challenging to predict the long-term impact Brexit may have on public procurement as there is still a lot to be agreed between the UK and EU. However, since the UK gave notice of its intention to leave the EU in March 2017 the Government has provided some assurance to public sector buyers regarding the immediate impact of Brexit on procurement. This paper hopes to shed some light on the practical implications that Brexit will have on public procurement in 2021, whilst also addressing some of the speculation around the long-term impact.

The Immediate Impact

Our most commonly asked question is whether the public procurement regulations will still apply now that we have left the European Union. The answer is yes, both EU and UK public procurement regulation and legislation will apply as normal in the UK until **31st December 2020**. This was confirmed by the Cabinet Office in a guidance note first published on the 14th January 2020, which [can be read here](#). Below we have outlined the key areas of public procurement law that will apply for the next year and have addressed some of the speculation regarding how these may change in the long term.

- 1. The EU Public Procurement thresholds will continue to apply to UK contracts for works, goods and services until 31st December 2020.** Public authorities, both central and sub-central, must calculate the contract value for their key categories of spend in order to check whether the contract value exceeds the EU thresholds. For contract values that exceed the thresholds, authorities must ensure that they run a compliant tender process in line with EU and UK public procurement law. The task of setting the thresholds for tenders currently is with the European Commission, however it has been speculated that this responsibility may be transferred to the Cabinet Office in the long term. For Schools to calculate whether their contract exceeds the EU thresholds, we recommend calculating the current annual contract value and then multiplying this by the new contract period e.g. 5 years. We find that the biggest areas of spend for Schools which exceed the thresholds are catering and cleaning services.
- 2. The UK Public Contract Regulations 2015 will apply to tenders as normal.** This means that for all tenders that exceed the EU threshold, Schools must ensure that they select the appropriate route to market that complies with UK and EU Public Procurement Law until 31st December 2020. The most frequently used routes include the open procedure, which is a one stage process comprising of a Request For Tender (RFT), the restricted procedure, which is a two-stage process comprising of a selection questionnaire (SQ) and Invitation To Tender (ITT), or by using a framework agreement which has already gone through the full Official Journal for the European Union (OJEU) process. It is highly unlikely that the public procurement routes to market will change significantly following the transition

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period, as they were created in order to ensure transparency of public spending, equal opportunities for suppliers and to prevent corruption.

3. **From 1st January 2021 a new e-notification service called Find a Tender will be used to post and view public sector procurement notices.** This will replace the requirement to publish notices in the Official Journal of the European Union (OJEU) and will be used to post and view all public sector notices and many third-party procurement portals have already completed the work to be able to provide the new notices on Find a Tender. Currently, the Government has provided high level advice on the new rules for January 2021, and it is thought more information will be released shortly so that contracting authorities can prepare accordingly. Amended iterations of the current procurement Regulations will also come into force on 1st January 2021, although changes to the current Regulations have been kept to a minimum, to ensure they continue to work following the UK's departure from the EU.
4. **Until the end of 2020, the EU Courts will continue to have jurisdiction over UK Public Procurement.** This means that the current legislative escalation process will apply, and the EU Courts will continue to have the 'final say' on UK public procurement cases. From the start of 2021, it is likely that the UK Courts will have full jurisdiction over UK Public Procurement, with the UK Supreme Court having the 'final say' on cases. This outcome fits with the UK's intention to have autonomy from Europe, but at this stage we are unable to confirm that this will be the case.
5. **UK tenders will still be accessible for all EU countries and the Government Procurement Agreement (GPA) in the short term.** The UK has applied for membership of the GPA post-Brexit. The GPA is a less restrictive framework than the EU that gives countries that are members of the World Trade Organisation restricted access to international tenders. The UK was previously a member of the GPA as part of the EU but is in the process of becoming an independent member. The UK will need to separately negotiate trade agreements with European countries such as France, which could take years to agree. A condition of these trade agreements may be for the UK to be bound by the EU Public Procurement Directives, which could remove all UK autonomy over public procurement legislation and the Courts jurisdiction over public procurement cases. However, this is still unknown, and the UK could agree trade agreements that give the UK autonomy over public procurement law at the end of the transition period.

Public authorities are and will continue to be accountable to taxpayers for how public money is spent. Therefore, there will always be a need for some form of legislative framework for public procurement in the UK. The EU Treaty principles of proportionality, mutual recognition, transparency, non-discrimination and equal treatment are fundamental to procurement and will most probably form the foundation of any amendments to UK public procurement regulations. It is essential that the UK Government upholds its responsibility to ensuring transparency of public spending, equal treatment and opportunities for suppliers and actively reducing the risk of corruption throughout the tender lifecycle. Therefore, the long-term changes to public procurement will most likely resemble the current EU framework, which is considered by many to be an effective way to uphold standards across the UK and Europe. It is our hope that any changes the UK uses its' autonomy to make, will look to simplify and clarify the current regulations for public buyers in the Education Sector.

If you have any questions or would like some advice on your own contracts and tenders, please don't hesitate to contact us at the Schools' Buying Club on 08452577050 or email contact@schoolsbuyingclub.com

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