



Information Note

Brexit and Public Procurement

Update – December 2018



National Public Procurement Policy Framework

Public procurement is governed by EU and national rules. The [National Public Procurement Policy Framework](#) sets out the overarching policy framework for public procurement in Ireland and comprises five strands.

1. Legislation (Directives, Regulations)
2. Government Policy (Circulars etc.)
3. Capital Works Management Framework for Public Works
4. General Procurement Guidelines for Goods and Services
5. More detailed technical guidelines, template documentation and information notes as issued periodically by the Policy Unit of the Office of Government Procurement

The framework sets out the procurement procedures to be followed by Government Departments and State Bodies under national and EU rules. The framework supports contracting authorities, including the Office of Government Procurement, the four key sectors (Health, Education, Local Government and Defence), individual Departments, Offices, commercial and non-commercial State bodies, and private entities which are subsidised 50% or more by a public body, when awarding contracts for works, goods and services. It supports and enables public bodies to adopt procedures to meet their public procurement requirements and facilitates compliance with EU and national procurement rules.

This information note is dynamic in nature and will be subject to amendment and review periodically. Therefore in terms of having the most up-to-date version, the Office of Government Procurement would encourage officials to check our website www.ogp.gov.ie for the most up-to-date version.

It should be noted that this information note is not intended as legal advice or a legal interpretation of Irish or EU law on public procurement.

1. Brexit Negotiations

On 29 March 2017, the United Kingdom notified the European Council of its intention to leave the European Union, in accordance with Article 50 of the Treaty on European Union. This triggered the start of a two year negotiation, also known as the Article 50 process. The objective of the negotiations is to agree the terms of the UK's departure from the EU in an orderly manner. The negotiations have been taking place on a phased basis.

A draft Withdrawal Agreement was finalized in November and endorsed by the European Council on 25th November 2018. The Withdrawal Agreement sets out agreement on the withdrawal issues in a legally binding manner. In parallel, discussions on the framework for the future EU-UK relationship have been taking place which has resulted in a Political Declaration on these issues also being endorsed by the European Council on 25th November 2018.

Ratification of the Withdrawal Agreement by the UK and European Parliaments is required before 29th March 2019 when the UK will formally leave the EU. If it is not ratified, the EU Treaties will simply cease to apply to the UK on 29 March 2019. The UK will no longer be subject to all of the EU's agreements, and will no longer have access to the benefits of the Single Market and Customs Union, or to their legal and regulatory frameworks.

2. Getting Ireland Brexit Ready

Making sure that Irish businesses and individuals are preparing for the consequences of Brexit is an important priority for the Government of Ireland. Ireland will be the EU Member State most affected by the UK's decision to leave the European Union. The Government is fully aware of the complexity of Brexit and Ireland is planning for the best but preparing for all scenarios. The Government states that ratifying the Withdrawal Agreement remains the best and realistically the only way to ensure an orderly UK exit, which is in all of our interests.

In parallel to the intensive negotiations in Brussels, detailed work has been well underway across Government and its agencies including contingency planning for all possible scenarios.

3. The Withdrawal Agreement

The finalised Withdrawal Agreement provides for a transition period during which the EU will treat the UK as if it were a Member State, with the exception of participation in the EU institutions and governance structures. This is hugely important in giving certainty to citizens and businesses. The whole of the EU acquis will apply to the UK during the transition, which means that the status quo will be preserved with the aim of avoiding any gaps or cliff edge effects between the UK leaving the EU and when a future relationship agreement enters into force.

The transition period is set to end on 31 December 2020, taking into account the initial request from the UK for a transition period of around two years, and making it coincide with

the end of the current long-term EU budget (the Multiannual Financial Framework 2014-2020).

The Withdrawal Agreement includes the possibility to extend the transition period. This possibility can only be used once and must be decided before 1 July 2020. This provision also offers the opportunity for the UK to request additional time to make sure that a future agreement, including provisions for avoiding a hard border in Ireland, may be reached before the end of the transition period. The extension can only be done by mutual agreement of the EU and the UK.

4. Brexit and Public Procurement

In terms of public procurement, the Withdrawal Agreement deals with ongoing public procurement during the proposed transition period. The Agreement effectively provides legal certainty on public procurement procedures that are pending before the end of the transition period. These should be completed in accordance with EU law, hence under the same procedural and substantive rules as the ones under which they were launched.

Should there be a 'no deal' Brexit, the EU Treaties will cease to apply to the UK on 29 March 2019 and consequently all guarantees associated with the EU procurement law will cease to apply to economic operators interested or participating in public procurement procedures in the UK.

5. Advice for Central Purchasing Bodies (CPBs) and Public Bodies

The OGP has advised that Public Bodies should examine their supplier bases to assess their exposure to the UK market. This information gathering exercise should have identified the extent to which they are relying on this market. The potential impact on their business if there is a disruption to this market was also be considered. CPBs and public bodies should then be in a position to conduct a risk assessment and to consider and implement possible mitigation steps to ensure the continuation of services, including early engagement with suppliers where necessary.

6. Government Brexit Contingency Planning

The Government message is that all public sector organisations should continue to work intensively on Brexit Preparedness and Contingency planning. The impact of Brexit has the potential of adding substantial disruptions to supply routes through tariffs, non-tariff barriers, custom delays and the additional costs of customs procedures.

7. OGP Advice

Accordingly, the OGP advises CPBs and public bodies to continue to manage their risks and to develop a clear understanding of how any change in trading arrangements will impact on the contracts that underpin them. Each contracting authority is best placed to gauge its level of exposure to UK suppliers either directly or indirectly. While it is acknowledged that each organisation will have different supply needs, the following are some areas that should be considered when carrying out new procurement procedures and managing current contracts:

- Consult the OGP website for the latest information on public procurement rules. The current position is that there is no change to public procurement rules and, as such, suppliers from the UK must be treated in the same manner as all potential suppliers from the EU.
- Government Decisions of July 2018 and September 2018 outline that Departments should continue work on Brexit Preparedness and Contingency planning and require Departments to prepare Action Plans to be updated regularly with ongoing progress on planning. Requests for input into Action plans would have been communicated to the agencies by line Departments. Within Action Plans, Departments are required to present their detailed, action-orientated and time-bound Central Case Action Plan as well as Contingency Plans.
- In the context of being prepared for the impact of Brexit, planning is key and the OGP's advice would be not to leave the development of a new public procurement procedure or renewal of a contract until the last minute. Check what public procurement frameworks are in place through the five Central Procurement Bodies (The Office of Government Procurement, Education Procurement Service, Defence, the Health Service Executive and Local Government).
- Tender and contract documents should take account of the possibility of new taxes or tariffs and whom is liable (buyer or supplier). Revenue is the main information source in this area.
- Examine all categories and sub-categories for the following:
 - Location of suppliers and sub-suppliers;
 - Current delivery time and the transport route of the goods or supplies concerned;
 - If there is the possibility of inconsistent or delayed delivery of goods, how might this impact on your organisation's ability to deliver public services;
 - If necessary you may need to plan or develop your organisations capacity to buy in bulk (cash-flow implications) and hold stock (warehousing options should be examined) or manage supply to take account of possible delays in delivery; and
 - Examine the market to gain knowledge of alternative sources or routes of supply.

The OGP has advised that Public Bodies should examine their supplier bases to assess their exposure to the UK market. This information gathering exercise should identify the extent to which they are relying on this market. The potential impact on their business if there is a disruption to this market should also be considered. Public Bodies should then be in a position to conduct a risk assessment and to consider and implement possible mitigation steps to ensure the continuation of services, including early engagement with suppliers where necessary.

In short, Public Bodies should continue to analyse their suppliers to understand each supplier's relative importance, how these products arrive into Ireland, where they come from and what borders they cross. Those with existing UK contractual arrangements should continue to review their existing contracts and start to consider the potential impact on future contracts in light of what legal changes Brexit may bring.

The Department of Foreign Affairs, in their role coordinating the whole of Government response to Brexit, continues to seek to deepen contingency planning and preparedness across Departments and agencies.

Note: Please check the OGP website to ensure that this is the latest information note on this issue.