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Remain or Leave – a Procurement Perspective

Little has been said publicly about the effects of the outcome of the referendum on procurement, although TfC has had many conversations with individuals over recent weeks. These have ranged from “We are not renewing [TfC Membership] because in the event of Brexit there will be no more tendering” to “if we stay we know what the future will be like”. Both extremes are equally flawed.

Option 1. Brexit
Article 50 of the Lisbon amendment of the Treaty of Rome gives any Country wishing to leave the EU two years from the date of application. The text of the Article is set out in Appendix A. The time frame for leaving the EU is:
a) form the date of the agreement; or
b) two years from the notification that the state intends to leave; or
c) at the end of an extension of the timeframe agreed by qualified majority voting (unanimity is not required)

The first point therefore is that the UK would have two (or more years if it chose to extend) within which to negotiate an exit.

Procurement is governed by the UK Competition Act of 1998 whist the Regulations are the PCRs dated February 26th 2015. This legislation would continue in force unless and until the Competition Act is repealed by Parliament. This may or may not happen. Until the Act is repealed procurement continues as normal.

The General Duty for public authorities to achieve “best Value” is set out in sectio3 of the Local Government Act 1999:
(1) A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.
In March 2015 the government published a revised Best Value Statutory Guidance which sets out the details of this statutory duty to include “Social Value”. Apart from Competition and Procurement Law, it is this legislation which drives many aspects of procurement.

Wednesday 15th June the Brexit leaders unveiled a list of six priority pieces of legislation they would demand to be enacted. One of these was membership and acceptance of the rules of the World Trade organisation (WTO). It is interesting to note that the UK acceded to membership of the WTO on 1st January 1995. As a result, no further legislation is required for membership! On the same day a large number of other countries acceded which included the USA and also the European Union. There are now 162 members. In its general statement on Procurement the WTO says:
*Achieving 'value for money' is a primary aim of most procurement regimes. But how? Open, transparent and non-discriminatory procurement is generally considered to be the best tool to achieve this goal as it optimises competition among supplier*s.

In March 2012 the WTO Committee on Government Procurement, which included the EU, Canada, France, the Netherlands and the USA, but not the UK, published Protocol which sets out the rules which govern procurement in the signatory countries. The protocol is driven by the requirement for public authorities in the 162 signatories as in the UK to achieve value for money. It is also true to say that the WTO agreements underpin and are taken into account in the EU procurement rules and Directives.

Although the Protocol covers some services these do not include Health and Social Care. The purchase and use of land and real estate is covered. Each signatory is required to set out the types of goods and services to be covered together with relevant thresholds and crucially where the tenders are published.

From a procurement perspective therefore:

- The UK is already a member of the WTO in its own right and a signatory to the relevant procurement agreements;
- The UK is a signatory to the WTO procurement rules which also underpin the EU rules;
- On leaving the EU the UK would be able to set its own limitations in terms of application and thresholds for tendering in the UK within the WTO rules;
- It is likely that procurement would continue with minimal changes in the short to medium term. In the longer term changes could be introduced into UK law which would benefit Health and Social Care procurement.

Option 2 Remain

Procurement is governed by the relevant EU Directive. Currently services fall under 2014/24/EU. This has been transposed into UK law as the Pubic Contracts Regulations of 26th February 2016.

There had been problems for Health and Social Care procurement with regard to the previous rules set by Directive 2004/18/EC which entered into UK law, also as the Public Contracts Regulations of 9th January 2006 (PCRs). These rules classified Health, Education and Social Care under a heading known as Part B. There was confusion as three only of the Regulations applied to Part B tendering, but many public bodies sought to apply some or all of the rules.

Furthermore, the Directive expanded Treaty principles for procurement to be fair, transparent and to apply equal treatment to all tenders. However, these requirements were not transposed into the Directive or the PCRs. The 2015 rules have moved procurement on in a number of ways a) the Treaty principles are now embedded in the Directive; and b) there is a separate section in the Directive and PCRs which deals with the former Part B services.

During negotiations regarding the new Directive, it was clear that many EU Member States wished to remove the Part B concessions in full. The UK government was able to obtain agreement that a lighter touch set of rules would apply to Health and Social Care procurement below a current threshold of £625,050. Tenders with a total value above the threshold are required to be advertised EU wide in the OJEU. The effect is already becoming clear in that two UK care contracts have been awarded to a company from Spain and at least one to a company from Sweden. It is becoming clear therefore that it will not be possible in the long term to “ring fence” such tenders for UK companies.

The EU Commission on procurement works on a ten-year cycle. Therefore, on conclusion of the 2014 Directive work commenced on the next Directive. It is true that the EU is a continually developing project and as a result not a stable or known force. As more States join, so the voting power of the existing countries is diluted. The EU website states:
The current candidate countries are Albania, the former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey. Accession negotiations were opened with Turkey in October 2005 and with Montenegro in June 2012. In November 2009 the Commission recommended the opening of negotiations with the former Yugoslav Republic of Macedonia, which has however yet to be agreed by the Council.

It is therefore reasonable to suppose that in the not too distant future, the current 28 will exceed 30. This will mean that the UK government will need to fight once more to protect the

tendering system for Health and Social Care in the next Procurement Dircteive with the likelihood of success unknown.

From a procurement perspective therefore:

- The rules which apply to Health and Social Care are known for the short term, probably until 2022 at least but will it be able to do so beyond that in an enlarged EU;
- The UK government may or may not be able to protect concessions which exist towards Health and Social Care tendering;
- The effect of the 2014 Directive is that a small, but increasing number of companies from EU countries have been and will be awarded contracts.

Conclusion
As far as procurement is concerned both options present risks in terms of competition for contracts in the Health and Social Care. The balance of risk is a fine one and difficult to measure. That must be for each individual to decide.

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21st June 2016

NOTE:
There has been much discussion regarding the position of Turkey and the EU. If you wish to read about the EU Commission's position on the subject please go to:
http://ec.europa.eu/enlargement/countries/detailed-country-information/turkey/index_en.htm
You will see that there are 14 accession chapters, negotiations are complete on one and underway on a further three.

Appendix A
Article 50 of the EU treaty of Lisbon - Text

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.