



Procurement Policy Note – Requirements for contracts covered by the WTO Government Procurement Agreement and the UK-EU Trade and Co-operation Agreement

Action PPN 02/21

February 2021

Issue

1. This Procurement Policy Note (PPN) sets out:
 - i) The ongoing requirements for contracting authorities following the World Trade Organisation (WTO) Agreement on Government Procurement (GPA) coming into force for the UK as an independent party on 1 January 2021; and
 - ii) The action required following the UK-EU Trade and Cooperation Agreement (TCA).

Dissemination and Scope

2. This PPN applies to all contracting authorities which come within the scope of the public procurement regulations¹, including Central Government Departments, Executive Agencies, Non-Departmental Public Bodies, the wider public sector, local authority and NHS bodies, and utilities. Together, these are referred to in this PPN as ‘contracting authorities’. Please circulate this PPN within and to relevant organisations that you are responsible for, drawing it to the specific attention of those with a purchasing role.

Timing

3. The provisions of this PPN should be applied with immediate effect.

¹ Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016, the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006 (together “the Procurement Regulations”), as amended by the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020.

Action

Contracting authorities should familiarise themselves with:

1. The UK's commitments under the GPA as set out in this PPN including whether they are “central government authorities” or not in accordance with the definition in the Regulations and the GPA footnote in Annex 1 of the UK’s schedule.
2. The UK’s commitments under the TCA as set out in this PPN, including recognising the rights of EU suppliers and EU-owned but UK-based suppliers in public procurement.

Background

Requirements for procurements covered by the World Trade Organisation Government Procurement Agreement

3. The GPA is a plurilateral agreement between 21 parties² within the WTO framework, including many major economies such as the United States, Canada, the EU and Japan.
4. The UK previously participated in the GPA through its membership of the EU. Contracting authorities should therefore be aware that the requirements relating to the GPA set out in this PPN represent a continuation of current practices.
5. Following a successful negotiating campaign by the UK Government, the UK has now secured independent membership of the GPA, which came into force on 1st January 2021.³
6. The GPA aims to mutually open government procurement markets among its parties, and seeks to address trade barriers, such as preferential treatment of domestic goods and services, in the government procurement sector. The GPA applies to procurement opportunities undertaken by certain types of authorities for certain types of contracts with a value above certain thresholds. The detail of this is set out in Appendix I of the GPA which contains the UK’s coverage schedules as a number of annexes⁴. These define the UK’s commitment with respect to:
 - The procuring entities covered by the GPA;
 - The goods, services and construction services covered by the GPA;
 - The exceptions to coverage.
7. The UK has committed to update the list of central Government entities in Annex 1 of its coverage schedules now that it has acceded to the agreement as an independent party. The update to the list, once made, will reflect the fact that several central

² Armenia, Australia, Canada, the European Union, Hong Kong (China), Iceland, Israel, Japan, Republic of Korea, Lichtenstein, Moldova, Montenegro, the Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine, United States and the UK.

³ https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

⁴ [https://e-](https://e-gpa.wto.org/en/Appendix/Details?Agreement=GPA113&Party=UnitedKingdom&AdvancedSearch=False)

[gpa.wto.org/en/Appendix/Details?Agreement=GPA113&Party=UnitedKingdom&AdvancedSearch=False](https://e-gpa.wto.org/en/Appendix/Details?Agreement=GPA113&Party=UnitedKingdom&AdvancedSearch=False)

Government entities have merged, moved, transferred functions or changed name since the list was originally written. As an interim measure pending this update, the UK's market access schedule includes a new footnote to ensure that successor entities to those listed in Annex 1 are covered as central government entities (and subject to the central government threshold) where functions have transferred from one entity to another entity.

8. Where a procurement is covered by the agreement, the GPA provides that certain basic requirements are met. This includes a requirement to advertise contracts, to observe minimum timescales, and to follow rules on technical specifications and award criteria. Additionally, the GPA continues to require non-discrimination and no less favourable treatment than that accorded to domestic goods, services and suppliers. This imposes a legal obligation on public authorities when awarding contracts above the thresholds to treat domestic and GPA suppliers equally, and not discriminate by, amongst other things, favouring national suppliers. There are remedies available through the courts for breaches of these rules, such as damages, fines and ineffectiveness (contract cancellation) which are extended to suppliers from GPA parties.
9. The UK's public procurement regulations comply with the GPA and the GPA remains implemented into domestic procurement law.⁵ Therefore contracting authorities will comply with GPA requirements by fully complying with domestic procurement law.

Impact of the UK-EU Trade and Co-operation Agreement (TCA)

10. The Government has now successfully concluded negotiations on the TCA, which it signed on 30 December 2020. The TCA is 'provisionally applied'⁶ from 1 January 2021 and is implemented in the UK by the EU (Future Relationship) Act 2020 (the "EU(FR)A") even though it is pending formal approval by the European Union institutions.
11. The TCA will provide market access that go beyond the level set in the GPA based on clear and enforceable rules and standards. It will protect UK-owned businesses based in the EU from the risk of discrimination in EU public procurements due to their UK ownership. The TCA will also open up public procurement markets in utilities in the gas and heat sector and private utilities that act as a monopoly. It also provides market access for an additional set of services, including a range of hospitality services, telecommunications, real estate, and education services. Contracting authorities will benefit as increased competition for public contracts provides value for money for taxpayers and improves the quality of public services.
12. The full text of the TCA with a summary explanation note can be found on gov.uk⁷. Contracting authorities should familiarise themselves with the UK's commitments on

⁵ See for example Regulation 90 Public Contracts Regulations 2015, as amended by the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020.

⁶ Provisional application is not an uncommon mechanism in international agreements and does not affect the UK's obligation to comply with the TCA from 1 January 2021. Provisional application allows the parties to implement an agreement pending formal ratification

⁷<https://www.gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union>

public procurement at “Title VI (Public Procurement)” and “Annex PPROC-1: Public Procurement” of the TCA, which are summarised at Annex A from the UK point of view, although the provisions are to be applied mutually.

13. The EU(FR)A provides that, to the extent that the TCA is not otherwise implemented, it will be read into existing domestic law - this effectively modifies existing domestic law as necessary to ensure the UK complies with its obligations under the TCA. EU suppliers will continue to have access to the UK remedies regime for covered procurement.

Contact

14. Enquiries about this PPN should be directed to the Crown Commercial Service Helpdesk on 0345 410 2222 or info@crownccommercial.gov.uk

UK-EU Trade and Co-operation Agreement (TCA)

What procurements are covered by the TCA?

1. The TCA covers procurements already covered by the GPA (see paragraph 7 above) and additional procurements set out in Section B of Annex PPROC-1 of the TCA.
2. Section B of Annex PPROC-1 is divided into Sub-section B1 (setting out the EU's commitments) and Sub-section B2 (setting out the UK's commitments). These commitments are referred to as "additional market access". NHS clinical healthcare services are expressly excluded from the TCA.
3. Additional market access is made up of additional procuring entities and additional services.
4. The financial thresholds to apply to additional market access are included in the relevant paragraphs and notes in Section B and are the same as the relevant thresholds that apply under the Public Contracts Regulations 2015 (the 'PCR') and the Utilities Contracts Regulations 2016 (the 'UCR').
5. The additional procuring entities (for the UK, see Sub-section B2, paragraph 1) are utilities that operate in the gas and heat sectors that are covered by the UCR and private utilities that act as a monopoly in all utility sectors that are covered by the UCR.
6. The additional services (for the UK, see Sub-section B2, paragraph 2) are:
 - a. Hotel and restaurant services (CPC 641);
 - b. Food serving services (CPC 642);
 - c. Beverage serving services (CPC 643);
 - d. Telecommunication related services (CPC 754);
 - e. Real estate services on a fee or contract basis (CPC 8220);
 - f. Other business services (CPC 87901, 87903, 87905-87907);
 - g. Education services (CPC 92).
7. Hotel and restaurant services, food serving services, beverage serving services, and education services contracts above the relevant thresholds for social and other specific ("light touch") services are included under the "national treatment" regime. This means that the non-discrimination principles of the GPA apply, rather than the detailed GPA or TCA rules. These non-discrimination principles require that each party must provide no less favourable treatment for goods, services and suppliers of any other party than treatment provided to domestic goods, services and suppliers and goods, services and suppliers of any other party. In practice, for these services, this means that the light-touch regime rules at Regulations 74 to 77 of the PCR and Regulations 90 to 93 of the

UCR apply. The other services set out at paragraph 24 above are covered procurement to the extent that they exceed the current threshold for services.

What are the additional procurement rules for procurements covered by the TCA?

8. The TCA incorporates many of the rules of the GPA (set out in Section A of Annex PPROC-1) and also provides for additional procurement rules (over and above the GPA rules) to apply to all covered procurement.

9. Contracting authorities are obliged to apply the rules set out in the TCA to all covered procurements. The procurement rules are set out at Title VI (Public Procurement) and are largely consistent with our domestic regulations. You will be compliant with the TCA if you follow the rules in the PCR and UCR (as relevant) on:

- a. procurement by electronic means (PCR and UCR);
- b. publication of notices (PCR and UCR);
- c. supporting documentation requirements at initial selection or tender stage (PCR and UCR);
- d. dynamic purchasing systems (PCR and UCR);
- e. ensuring genuine competition when reducing the number of candidates or tenderers in a procurement (PCR);
- f. the use of environmental, labour and social criteria in procurements (PCR and UCR); and
- g. the general principle of non-discrimination, which would, for example, prohibit discrimination on the grounds of where a supplier has gained its experience and ownership of the supplier (PCR and UCR).

10. In addition, in order to be compliant with the TCA, you must, in any procurement under the UCR where only qualified suppliers are invited to submit a tender, ensure that the number of suppliers invited to submit a tender is sufficient to ensure genuine competition without affecting the operational efficiency of the procurement. This rule is in the PCR but not the UCR. You will need to treat the UCR as if they have been amended in this way.

What can contracting authorities do if they receive an abnormally low tender?

11. The TCA also provides that if a supplier submits a tender with an abnormally low price, the contracting authority may ask the supplier if the price takes into account subsidies. This is not stated in the PCR or UCR and you will need to treat the PCR and UCR as if they had been amended to reflect this right.

What are the additional procurement rules for non-covered procurements?

12. The TCA provides that with regard to any procurement (which includes non-covered procurement), contracting authorities in the UK must treat EU-owned suppliers based in the UK no less favourably as UK-owned suppliers based in the UK. This is subject to

defence and national security and other general exceptions set out in the GPA and the additional exceptions in Annex PPROC-1.

13. This obligation is a requirement already of the non-discrimination principle in the PCR and UCR. However, the non-discrimination principles in the PCR or UCR do not currently apply to non-covered procurements so contracting authorities must treat the PCR and UCR as if they have been amended to include this specific rule for procurement not currently covered.