Brexit and the Trump Election: Finding a Way Forward for Transnational Procurement

The Year That Changed Almost Everything

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I. Introduction

Since World War II, public procurement systems have generally evolved along convergent tracks, as national procurement systems, including those in the United States and Europe, adopted similar solutions to common problems. At the same time, those procurement systems assimilated the norms that helped shape the postwar world, such as international economic integration, social equity and environmentalism. As a result, even as procurement systems tended to resemble one another in mechanical matters such as competition and transparency, their broader norms (which were often shared, but not always with equal enthusiasm) meant that those systems came to accommodate more ambitious social and political goals such as open borders, furthering the rights of workers and minorities, and environmental sustainability. Supported by a complex web of international agreements fostered in part by the United States, both US and European procurement regimes moved in this common direction, and the United Kingdom, because of its unique cultural and historical posture, often served as a bridge between the US and European systems.

All that changed dramatically with the June 23, 2016 Brexit referendum, which called for the United Kingdom’s exit from the European Union, and the November 8, 2016 election of Donald Trump in the United States. The Brexit vote promises to reduce the United Kingdom’s voice in the European Union, and may mean that the United Kingdom in time will develop its own procurement regime, focused more narrowly on best value and shorn of the political, social and economic goals - European integration with a strong dose of social equity - that inform the European Union’s procurement rules. Donald Trump’s election on a conservative, anti-trade platform in the United States means that, while the fundamental structure of the US procurement system likely will remain unchanged, the United States may play a much smaller role in efforts to integrate international procurement markets.

More broadly, Brexit and the Trump election may shift the evolutionary trajectory of procurement rules, so that procurement will be a less likely vehicle to accomplish environmental, social and economic goals. At the same time, however, as the discussion below notes, it is possible that anti-corruption measures will continue to be an important part of transna-

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8 See Arrowsmith, (n 2), 2-3 (citing authorities).
tional developments in procurement, and that coordination between nations in procurement will continue, albeit on the basis of regulatory cooperation rather than international agreement.

II. The Campaigns and Their Aftermath

Neither campaign - the Brexit referendum or the 2016 presidential election in the United States - was focused on issues of procurement, though both carried important implications for future developments in procurement law. In the United Kingdom, probably the most prominent reference to procurement came from the “Leave” campaign, which argued that European procurement rules cost the United Kingdom dearly. The then-Minister of Justice, Michael Gove, a leading “Brexiteer,” said: “If we vote Leave, we can scrap the EU’s foolish rules on how Whitehall runs procurement processes, which add billions to the cost of government every year.” Despite these strong pronouncements by the “Leave” campaign, however, procurement has played a relatively small role in the post-Brexit debate, and some observers believe it possible that the United Kingdom will simply take up its market access rights under the World Trade Organization (WTO) Government Procurement Agreement (GPA) if Brexit does indeed occur.

There is already a rapidly growing body of work concerning all the possible models for a post-Brexit procurement law. In reality the broad choices are likely to be the product of much larger decisions or agreements (or lack thereof) about the UK’s relationship with the remainder of the EU and the rest of the world. Although that debate has been rather confined to those already involved in procurement law and policy, it has already sparked for the first time some real debate in the UK about the purpose and content of procurement law. English law, at least, has no tradition of procurement law regulation and procurement law has been taken largely to be something that exists as a creature of the EU. While the purpose of the law has sometimes been considered by politicians and courts, it has been assumed that there is little scope, if any, for serious reform in a direction more suited to the needs of the UK. If that were now to change, it is at least possible that the UK will start to engage more energetically with a transnational debate about procurement law and policy. The procurement law debate might move beyond the niceties of interpreting EU directives to bigger questions of direction. Discussions at recent events suggest that there may be some appetite for this wider discussion.

In the United States, candidate Donald Trump drew parallels with the Brexit vote in arguing for a radically new approach to trade and economic development. In contrast to the Brexiteers’ arguments for more spending on the National Health Service in Britain, the Trump campaign called for much higher US defence spending, which would reinforce the status quo in a federal procurement system already heavily weighted towards defence acquisition. Candidate

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11 See, e.g., R Kohli, Brexit: The Impact on Law Firms’ Projects and Procurement Teams, 15 December 2016: “It is also unlikely that simplification of the current UK procurement legislation will be a top priority for the UK government at this time. Public procure-

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Trump also argued for sharply reduced regulations, and for a much narrower approach to international trade, one aggressively focused on US interests alone. On the campaign trail, Donald Trump specifically criticised “China’s disastrous entry into the World Trade Organization,” and called for higher tariffs to protect US industry.

After the election, President-elect Trump’s rhetoric on procurement and trade grew sharper. For example, he attacked the high costs of two prominent procurements, the presidential aircraft slated to be built by Boeing, and the joint strike fighter built by Lockheed Martin, though some observers argued that those were merely opening gambits in a broader negotiation for much higher, but more efficient, defense spending. President-elect Trump’s views on trade were less ambiguous. As part of a post-election victory rally in Florida, for example, President-elect Trump tweeted: “My Administration will follow two simple rules: BUY AMERICAN and HIRE AMERICAN.” At another rally, in Iowa, Trump declared: “The American worker built this country and now it’s time for American workers to have a government [that] for the first time in decades answers to them.”

Donald Trump’s views on climate change were less clearly defined during the campaign, but the incoming administration’s ties to the oil and coal industries make it less likely that the Trump administration will push for strong measures to ensure environmental sustainability in procurement. Social initiatives in procurement also may slow in a Trump administration. President-elect Trump’s choice for Secretary of Labour, Andrew Puzder, a senior executive in the fast-food industry, has consistently (and unsurprisingly) voiced strong pro-management positions on labour and employment issues. The Trump campaign also has called for repeal of burdensome executive orders, presumably including President Obama’s controversial “Fair Pay and Safe Workplaces” executive order (now enjoined by a federal court in Texas) which required contractors to report labour violations.

At the same time, however, President-elect Trump has signalled that he may launch new anti-corruption measures in procurement—despite broad criticism of his own conflicts of interest, including a potential conflict stemming from a long-term federal lease for the Trump International Hotel in Washington, D.C. Since the election, President-elect Trump has criticised the conflicts of interest that former government officials may have if they move to private industry, and has even suggested that procurement officials at all levels should be banned from working for

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16 Trump (14).


18 RealDonaldTrump, Twitter-Account, available at <https://twitter.com/realDonaldTrump/status/809969373754654721> Last accessed on 20 December 2016..


industry. If these criticisms become new elements of US anti-corruption policy, the tightened conflict-of-interest rules could reshape the close relationship between industry and the US government, though more stringent rules (or even the threat of tighter rules) also could cause many procurement professionals to avoid, or abandon, public service.

III. Seeking a Path Forward After the Campaigns

In sum, the Brexit referendum and the election of Donald Trump arguably created three separate spheres of procurement law: the European Union, the United Kingdom, and the United States. These three spheres were previously much more actively intertwined, partly through international efforts such as the WTO’s Government Procurement Agreement; now, however, each is likely to remain more independent. The first, the European Union, appears likely to continue along its traditional trajectory in procurement favouring economic integration while seeking somehow to introduce some degree of social reform into that economics-driven regime. The second is the United Kingdom, which will probably soon leave the European Union, and which may find time to engage with discussion of transnational procurement reforms and may take more interest in these matters to the extent that it is a separate actor in this process. The third, finally, is the United States, which is likely to be aggressively protectionist in the coming years, including in procurement. This may mean dismantling existing trade agreements to accommodate US interests; at the very least, this means that the new administration will be far less likely to use trade agreements, such as the GPA, the Trans-Pacific Partnership (TPP), or the Transatlantic Trade and Investment Partnership (TTIP), to spur important changes in procurement across borders.

What the votes in the United Kingdom and the United States left unclear, however, is what role regulatory cooperation might play in advancing transnational procurement in the coming years. The need for cooperation is obvious in any number of areas, from cybersecurity to accessibility of information technology to strengthened conflict-of-interest standards. What remains unclear, however, is how that cooperation might unfold, and what roles governments, industry and civil society should play. Given the new obstacles to traditional means of transnational cooperation, the international procurement community may opt to use regulatory cooperation to resolve arbitrary technical barriers between procurement systems - barriers that could otherwise impair best value procurement, which remains the core goal of any procurement system.

None of this resolves, of course, the broader questions raised by Brexit and the recent US elections. European integration was born not out of petty bureau-

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28 T Bertuca, Trump Vows to Impose ‘Lifetime’ Ban on F-35 Officials Seeking Defense Industry Jobs, Inside Defense, (16 December 2016) (quoting President-elect Trump, at Pennsylvania rally: ‘The people that gave out those contracts – give me a break. We’re going to impose a lifetime ban on people that give these massive contracts out, or even small contracts. You want to work for the United States, you work for the United States. You are not going to work for the people that build these planes.’), available at <https://insidedefense.com/share/183374> last accessed on 20 December 2016.


30 See, e.g., Belgium: The European Committee of the Regions Asks For Mandatory Green Public Procurement Across the EU, 2016 WLN 31602900 (15 October 2016).


35 See United Nations Convention Against Corruption, Article 9.
cratic megalomania, but rather out of the honest hopes of many to make Europe a better, more peaceful place;\textsuperscript{36} welding Britain back onto Europe through a hodge-podge of trade arrangements only highlights the perils that shadow those hopes. And no matter how often the new US administration may insist that lopsided trade “deals” will make America great again, mankind has recognised for centuries\textsuperscript{37} that trade flows shift because of persistent underlying competitive advantages (and disadvantages), and history has shown that beggar-thy-neighbour trade policies do not reverse those advantages - instead, they typically lead to deeper misery and loss. Continuing a transnational dialogue in procurement, even if tempered for the times, seems a better course.

\textsuperscript{36} See, e.g., T Judt, Postwar: A History of Europe Since 1945 (2005).