



PROPOSED EU REGULATION ON PUBLIC PROCUREMENT OUTSIDE THE EU: FORTRESS EUROPE?

On 21 March 2012 the European Commission published a draft Regulation which seeks to clarify the rules governing the access of third countries to the public procurement procedures of EU Member States. "Third countries" are countries that are not part of the EU, and with which the EU has not concluded an international agreement in the field of public procurement that includes market access commitments.

The rules will promote negotiations aimed at enhancing the access that EU goods and services have to the markets of third countries. The proposed Regulation builds on the priorities set out in the Single Market Act and a Commission consultation launched in June 2011, to promote a spirit of reciprocity in the public procurement procedures between the EU and third countries.

The draft Regulation applies to above threshold public contracts, utilities contracts and concessions. Defence and security public contracts are not included.

There are new powers for the Commission to restrict access to the EU market where third

countries do not offer reciprocal access to their own markets. These powers include:

- Excluding tenders which have more than 50% third country content.
- Imposing a mandatory price penalty on the tender value of the third country content.

Contracts awarded in breach of exclusion measures adopted by the Commission are to be declared ineffective.

A limited range of exceptions are available.

Current situation

There is a framework for public procurement set out in the Government Procurement Agreement (under the auspices of the World Trade Organisation (WTO)) and in bilateral/regional agreements between various countries. In addition, the EU currently has Free Trade Agreements, including procurement provisions, with countries such as Mexico, South Korea,



Switzerland, Colombia, Peru and Chile and is in the process of negotiating agreements with Canada, Singapore, India, Malaysia and MERCOSUR (Brazil, Argentina, Paraguay, Uruguay and associate states).

In December 2011 further revisions were made to the GPA. Most notably, the fifteen signatories (Armenia, Canada, the EU (counting as one party), Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei and the United States) agreed to open up their public procurement markets to foreign companies to a greater extent. New market access opportunities were made by a number of signatories with the EU and US expanding access to their central government level entities. The revisions also made provision for the accession of other WTO members, such as China, in the future.

The Commission believes, however, that there remains a disparity between the current regulation of its internal market and the actual market conditions of public procurement. Statistics show that the EU has an 85% openness of public procurement with GPA countries, in addition to other agreements. In reality, while the EU is acting as a forerunner to openness, there are suppliers of goods and services from many third countries who are able to access the EU public procurement without their own respective countries committing to open their own markets to the same extent. For example, according to the Commission, a range of IT contracts within the EU have been awarded to Indian-owned companies with very few contracts being awarded in return. Lack of reciprocity with China is also

a major concern of the Commission. Two issues of growing significance are abnormally low bids and misappropriated intellectual property.

According to the Commission, some third countries in practice have even introduced a protectionist policy so as to limit their public procurement procedures from certain external goods and services. As a result, the Commission believes that EU companies have been negatively affected, facing competition from foreign companies within the EU yet unable to take advantage of any access to the procurement markets in third countries.

At present the EU provisions setting out the terms of access for third goods and services are not complete. The Utilities Directive provides that contracting entities may reject tenders that contain more than 50% (by value) third country goods, but in the general procurement Directive which is the basis for over 80% of non-defence related procurement, there are no relevant provisions. There have been concerns as a result that several EU Member States have considered taking independent action themselves.

The proposed Regulation

In attempting to create a set of rules to allow both EU and third country companies to compete on an equal footing for contracts within the internal EU market, the following will apply:

- Under Article 6, contracting authorities will be able to reject the tender of a supplier, from any country, of an estimated value of EUR 5 million or above and consisting of more than 50% of goods or services not

subject to the EU's international procurement commitments. The Commission must be notified if the supplier is from a third country. The Commission will then have a two month period, which can be extended to four months, to assess the level of reciprocity that is available to EU company tenders within that country. If there is little reciprocity, the exclusion may be approved. There is a provision however providing that there must be no discrimination against bidders when the value does not exceed the threshold above, in a bid to encourage small and medium-sized suppliers. In reality, it is expected that only around 35-40 contracts per annum will fall to be decided upon.

- Under Articles 8-10, the Commission, on a request of a stakeholder or on its own initiative, will have the power to conduct investigations into third countries that have been seen to discriminate against EU companies' tenders within their own public procurement procedures. The Commission will attempt to open negotiations with the country to eradicate the discrimination, but if the country is unwilling to enter into the negotiations or does not provide a satisfactory solution within a reasonable timeframe, measures may be taken to discriminate against companies from that country when submitting bids within the EU market. Such discrimination could range from the exclusion of a particular third country's companies (more than 50% of whose tenders consist of that third country's goods or



services) from involvement in a sector or the imposition of a price penalty on those companies' bids.

- When public authorities intend to accept a bid that is 'abnormally low', they must inform all other bidders why that bid was chosen in an attempt to show transparency within the procedure. This is aimed at preventing any unfair competition from third country bidders. Whether a bid is deemed abnormally low will depend on the particular market.

It is intended that the possibility of using the above new tools will provide the EU with an unprecedented level of leverage that was lacking in previous discussions with third countries when it came to a reciprocal openness of public procurement.

When making a decision on whether to allow the exclusion of a third country company's bid or whether to open negotiations with that third country, the Commission will look into the following issues on reciprocity:

- Whether, and to what degree, there is transparency within that third country's public procurement.
- The extent to which procurement in that country discriminates against the bids of EU companies.

The Regulation also defines the origins of both goods and services so that treatment of non-EU bids are harmonised across the internal market:

- Goods - the origin of goods will be according to the non-preferential rules of the

Community Customs Code.

- Services - this will be the origin of the service providers:
 - The origin of the services of a natural person will be the country where that person is a national or is a permanent resident.
 - The origin of the services of a company, with no EU branch, will be the country where the company is constituted and where it is engaged in substantive business operations.
 - For the services of a company with an EU branch, the origin will be the Member State where the company is constituted and engages in substantive business operations.

The Commission has stressed that the proposed Regulation is intended to stimulate further access to both EU and foreign markets and not to create a 'fortress Europe' as some commentators have suggested. The aim is to safeguard openness between countries and to use discriminatory or restrictive measures only as a last resort in creating a 'level playing field'. In addition, if these measures are deemed necessary, the Commission notes that any restrictions imposed must be proportionate to those restrictions to which they respond.

It is also important to note that the international commitments of the EU under the WTO GPA and the various trade agreements remain unaffected by the proposed Regulation.

The draft Regulation proposal will

now be presented to Member States for comment before being passed on to the Council and the European Parliament to adopt. It is anticipated that the Regulation will come into effect towards the end of 2013.

EU Member States' views

On 5 April 2012 a notice was published by the UK Government highlighting its opposition to the Commission's proposal. The Government believes that the proposals would compromise the overall objective of the Commission to achieve value for money in public procurement as the exclusion of third country bidders could limit bidders who provide the best value for money and could also limit the effective number of bidders. The Government also cites the potential "tit-for-tat protectionism" which may subsequently occur, hindering EU bidders in those third countries. Other Member States, such as Germany, Sweden, Czech Republic and Finland, appear to share the UK's concerns.

The UK Government is currently seeking the views of any UK stakeholders, particularly those with recent experience of procurement involving tenders from third countries. HFW would be pleased to assist stakeholders in making representations.

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