



European Union EU Tendering for Government Procurement (Updated 2014)

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Summary

Government procurement in Europe is bound by certain international obligations in the WTO Government Procurement Agreement (GPA) and the EU Public Procurement Directives. U.S.-based companies are allowed to bid on public tenders covered by the GPA, while European subsidiaries of U.S. companies may bid on all public procurement contracts covered by the EU directives in the European Union. This report describes the conditions and types of contracts that are open to U.S. companies, and for clarity purposes, distinguishes between U.S.-based companies and European subsidiaries of U.S. companies, as they do not enjoy the same bidding rights. This report also discusses tools and resources that are available to U.S. companies to gain access to government procurement contracts in Europe.

1. The GPA: a benefit for U.S.-based companies

The GPA allows suppliers, contractors and service providers established in the 42 countries which signed the Agreement, including the United States, the European Communities and the 28 EU Member States to bid on public contracts. According to this Agreement, U.S.-based companies have the right to bid on the contracts that are covered by the GPA in the European Union and in return, suppliers from the other member countries are allowed to bid on certain US public contracts. The Agreement was revised and enlarged in December 2011, and should be implemented during 2014.

The GPA specifically covers procuring entities that each country has listed in the Annexes. There are separate lists for central government entities, sub-central government entities and others. The EU lists central government entities for each Member State and typically relies on a definitional approach to identify sub-central entities rather than listing those specifically covered. The category "other entities" comprises all authorities which procure according to the GPA, in general public authorities or such authorities as utilities.

The GPA provisions apply to the procurement of all goods (except the specific goods excluded by a Party from the GPA) and all services and construction services (listed in the Annexes) that are above certain threshold values (for more details, see the WTO/GPA webpage referenced at the end of this report).

Each GPA Party has included certain restrictions on other GPA Parties in the Annexes. The EU has included several restrictions vis-à-vis the United States. For example, the EU does not extend the benefits of the GPA to U.S.-based suppliers in the procurement by entities (in Annex 3) in the water sector, the urban transport sector (bus, trolleybus, tramway, urban railway), the airport sector, or in the procurement of dredging or shipbuilding services. See utilities section below.

2. The GPA thresholds

The GPA thresholds represent contract values and indicate the level above which the EU contracting authorities that are covered by the GPA open up their procurement to U.S.-based suppliers (and suppliers from other GPA Parties) for procurements covered in the Agreement. See the chart in section 4 below.

The GPA creates rights for U.S. suppliers of goods and services in the EU, and vice-versa. Governments that are Parties to the GPA are required to provide the goods and services of any other party to the Agreement treatment "no less favorable" than that they give to their own. GPA Parties are prohibited from discriminating among goods, services and suppliers of other Parties (apart from the exceptions listed in the Annexes of the GPA). Furthermore, each Party is required to ensure that its entities do not treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership, and do not discriminate against a locally established supplier on the basis of country of production of the goods.

3. EU Public Procurement Directives

Currently, there are three EU public procurement Directives. The first two were fully revised and will be published in the EU Official Journal during 2013. A new Directive on Concession was also created. The new laws will be accessible on the EC/Directorate-General for Internal Market website:

http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm

- Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts applies to the general sector;
- Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors
- Directive 2009/81/EC on defense and sensitive security procurement. This Directive sets Community rules for the procurement of arms, munitions and war material (plus related works and services) for defense purposes, but also for the procurement of sensitive supplies, works and services for non-military security purposes. (See our separate Market Research Report on this Directive, which is not addressed here).

The EU public procurement directives allow companies established in the EU to bid on contracts above certain thresholds in any other EU Member State. These directives include provisions on contracting procedures, selection and award criteria, advertising and transparency. The annexes contain the lists of contracting authorities that have to procure according to the provision of the directives.

The European public procurement directives are aimed at European companies *only*, including U.S. subsidiaries in the EU. An American firm legally established and registered in a Member State of the European Union is considered as a European company for this purpose. Those firms may bid on EU public procurement contracts advertised on the TED database for which they are eligible, just as any other European firm (for public contracts with an

estimated value above certain thresholds). The right to bid on contracts in any EU Member State derives from the European public procurement directives, which aim to boost cross-border bidding across the European Union.

The EU public procurement directives deal exclusively with the relations between the contracting entities of the European Union and companies established in the EU. These relationships are, obviously, not affected by the GPA. The EU directives, therefore, do not give third country companies any rights, which they do not already have pursuant to the GPA (or other international agreements). The EU public procurement directives reflect the GPA provisions and thresholds. The GPA entered into force with respect to the European Union on 1 January 1996 and was fully revised in 2011.

4. EU Directives apply above certain thresholds

Two EU Public Procurement Directives, one covering the procurement of supplies, services and works contracts in the general sectors - EU Directive 2004/18- and one covering the utilities sector (water, energy, transport and postal services) sectors – EU Directive 2004/1-, currently govern the way contracting authorities conduct tender procedures and award contracts. However, these two EU Directives were fully revised in 2013, and the publication of the final text in the EU Official Journal is expected in 2014. A new EU Directive covering concessions contracts was also approved but is not yet published.

The thresholds for public procurement contracts covered by the EU Directives and the GPA are the following, as updated since on January 1, 2014:

EU DIRECTIVES	SCOPE	THRESHOLDS (in euro)
Public Supplies & Services	Purchase, lease, rental, hire Central authorities	€ 134,000
	Non-central authorities	€ 207,000
Public Works	Execution, design Central and non-central authorities	€ 5,186,000
Utilities	Water, energy (gas, heat, electricity), urban transport (bus, trolleybus, tramway, urban railway), postal services, airports, ports	Works: € 5,186,000 Supplies/Services: € 414,000

EU public procurement law applies when the contract value is equal to or above those thresholds. If the public authorities are covered under the GPA, and no particular sector restriction targets the United States, then U.S.-based companies are able to bid on such contracts.

When the contract value is below those thresholds, the GPA does not apply, and the national public procurement law of each country applies in accordance with the general principles of the EU Treaty (transparency and non-discrimination). The European Commission published additional guidance on how public authorities should award contracts of low monetary value

in a manner consistent with the principles of the EU Treaty regarding transparency and non-discrimination. However, the EC guidance is in the form of an "[Interpretative Communication](#)", therefore non-legally binding¹.

5. The Utilities: Restrictions

There are restrictions for U.S. suppliers in the EU utilities sector, both in the EU Directive 2004/17 and in the EU coverage under the GPA. Directive 2004/17 concerns the procurement procedures of public entities and private entities with special or exclusive rights operating in:

- Water: production, transport and distribution of drinking water
- Energy: distribution of gas, heat, electricity
- Postal services
- Urban transport by railway, automated systems, tramway, trolley bus, bus or cable

The Utilities Directive allows EU contracting authorities in these sectors to either reject non-EU bids where the proportion of goods originating in non-EU countries exceeds 50% of the total value of the goods constituting the tender, or they are entitled to apply a 3% price difference to non-EU bids in order to give preference to the EU bid². This 50% EU content requirement is only applied when no reciprocal access for EU companies in the U.S. market is offered. The 50% EU content requirement applies to U.S. suppliers of goods and services in the following areas: water, energy (except electricity), urban transport and postal service, as described above.

But there are also restrictions in the EU coverage of the GPA that apply specifically to U.S.-based companies. U.S. companies are not allowed to bid on works and services contracts procured by sub-central public contracting authorities in the following sectors:

- The water sector
- Airport services
- Urban transport sector as described above, and railways in general
- Dredging services and procurement related to shipbuilding

The distinction between central and sub-central public contracting authority is of importance in determining U.S. eligibility for GPA-covered contracts. U.S. suppliers of *goods* may bid on all GPA-covered contracts from *central and sub-central* government authorities in the EU. A major restriction is the fact that U.S. suppliers cannot bid on public procurement contracts for *works or services* procured by *sub-central* European public contracting authorities (as listed in Annex 2 of the GPA)³.

¹ Note that the EU Treaty provides that the form of Community legislation known as the "directive" is binding as to the *result* to be achieved but leaves the national authorities the *choice* of form and methods, which may lead in practice to varying interpretations of the directives across Europe.

² Note that, in the calculation of the total value of supplies for the purpose of calculating the origin as outlined in Article 58 of the Utilities Directive, software used in telecommunication networks by utilities authorities is regarded as a product, a component in its entirety.

³ Note that the U.S. also has certain restrictions in place that impact suppliers of goods and services for all GPA parties.

6. TED

The TED (Tenders Electronic Daily) database is part of the EU Official Journal, as the Supplement S. It is the official online site where tenders that are covered by EU public procurement law have to be published. Tenders published in TED include public purchases of supplies, works and services by European governments at the national and sub-central levels. TED includes GPA as well as non-GPA covered tenders. U.S. companies legally registered and established in an EU Member State are considered to be "European" companies for eligibility purposes, and as such, they may bid on calls for tenders covered by EU public procurement directives in any EU country.

TED contains:

- public contracts for works, supplies and services from all EU Member States;
- utilities contracts (water, energy, transport and telecommunications sectors);
- public contracts from EU institutions (Commission, Council, Parliament, etc.);
- European Development Fund contracts (African, Caribbean, Pacific countries);
- IPA (Instrument for Pre-Accession), and other contracts under EU-funded programs;
- European Investment Bank, European Central Bank and European Bank for Reconstruction and Development financed projects;
- European Economic Area contracts (Norway, Iceland and Liechtenstein);
- All contracts covered by the GPA.

7. Europeans use different codes for identifying supplies & services

The TED database utilizes "CPV" (Common Procurement Vocabulary) codes to identify goods to be procured. Once you have identified the CPV code that matches the supply you want to sell, you can search by typing this code number into the "keyword" selection tool, and it will show all ongoing calls for tender from European public institutions.

Practical exercise: how to find ongoing calls for tender in TED for your product?

1. Identify the CPV code that matches your product by going to the SIMAP website:

http://simap.europa.eu/codes-and-nomenclatures/codes-cpv/codes-cpv_en.htm:

Open the first document (in pdf format) "EU Regulation 2013/2008"

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:074:0001:0375:EN:PDF>

Example: you want to sell a surgical laser to European public hospitals. Type "surgical laser" in the pdf searching tool, which will prompt the following CPV code to appear: 33169100-3. Copy only the number "33169100" (but without the "-3" portion).

2. Open the TED Database in another tab; then open the "Business Opportunities" (top left tab) <http://ted.europa.eu/TED/search/search.do>

- select "all current notices" and "contract notices";

- select "refine search";

- copy the CPV code in the CVP search tool.

3. The database displays all current calls for tender for the selected product.

8. Remedies for Companies

There are three EU Remedies Directives:

- Council Directive **89/665/EEC** of 21 December 1989 applies to general sectors for the award of public supply and public works contracts;
- Council Directive **92/13/EEC** of 25 February 1992 applies to the utilities sector (procurement procedures of entities operating in the water, energy, transport and telecommunications sectors);
- Directive **2007/66/EC** of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC, with regard to improving the effectiveness of review procedures concerning the award of public contracts.

The EU Review Procedures Directives offer remedies for infringements committed during the tendering and contract award procedures. Remedies include: the possibility of taking interim measures (such as the suspension of the award procedure); the setting aside of unlawful decisions and discriminatory technical, economic, and financial specifications in the invitation to tender; the compensation of injured companies. The failure to advertise a relevant contract in the Official Journal of the European Community, the use of non-objective criteria by authorities, the failure to specify qualification and award criteria, the compulsory use of national standards, are examples of potential breaches of the EU procurement law.

Remedies Directive 2007/66 mandates a “standstill period” of ten calendar days after notification of contract award and prior to the official signing of the contract. When this standstill period is not respected, or a contract that should have been covered by the competitive EU procurement rules has not been advertised, local tribunals will have the right to nullify a signed contract. The proposed amendments seek to improve the effectiveness of pre-contractual reviews to prevent illegal direct awards of contracts.

It is up to bidders who feel they have been unlawfully treated in the procurement process to prove that the contracting authorities have broken a particular aspect of the EU directives. Upon request by a company, the European Commission may also launch an inquiry into the procurement process to clarify the situation, as long as the claimed infringement can be related to an article in the EU Directives. This procedure may ultimately result in the case being referred to the European Court of Justice. Local courts are usually entitled to hear public procurement complaints. (See our Report on Remedies in Public Procurement).

9. Green purchasing

With the emergence of the concept of “sustainable environment,” the global economic and political environment of contracting authorities has changed. This change reflects the integration of the environmental dimension into all policy areas, including by increasing the use of environmentally friendly products. The new public procurement directives specifically mention the possibilities for adopting environmental considerations in technical specifications selection and award criteria, and contract performance clauses.

U.S. companies ought to be aware of the growing importance that politicians and contracting authorities place on buying green, and of the necessity to prepare their offer accordingly. Green public procurement covers areas such as the purchase of energy-efficient computers and buildings, office equipment made of environmentally friendly sustainable timber, recyclable paper, electric cars, environmentally friendly public transport, organic food in

canteens, electricity stemming from renewable energy sources, or air conditioning systems complying with state of the art environmental solution.

Contracting authorities are free to require a higher level of environmental protection than that laid down in EU legislation or standards, on condition that the level required does not limit the access to the contract and lead to discrimination to the detriment of potential bidders. Contracting authorities can define technical specifications related to the environmental performances of goods in line with eco-label criteria or an equivalent label.

About the "greening" of public procurement:

http://ec.europa.eu/environment/gpp/index_en.htm

The 2004 Handbook on Environmental Public Procurement describes how the green purchasing principles may be applied to the selection of suppliers, service providers or goods: http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf

For more information, see our separate Report on Green Procurement in the EU.

10. Websites on EU public procurement legislation and the GPA

The European Commission Directorate-General for Internal Market ("DG Markt") is responsible for the drafting of European public procurement legislation, the surveillance of its implementation, the launching of infringement procedures:

http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

The Government Procurement Agreement, on the website of the WTO:

http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

The Government Procurement Agreement, on the U.S. "Export.gov" portal:

http://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/exp_005325.asp

For More Information:

The U.S. Commercial Service at the U.S. Mission to the European Union is located at Boulevard du Regent 27, Brussels BE-1000, Belgium, and can be contacted via e-mail at: Isabelle Maelcamp, Commercial Specialist, (Isabelle.Maelcamp@trade.gov) or by visiting the website: www.export.gov/europeanunion. One can locate the nearest U.S. Export Assistance Center or Commercial Service offices throughout Europe by visiting <http://export.gov>

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