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Public Procurement in the Transatlantic Trade and Investment Partnership (TTIP)

KEY MESSAGES

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- 1** Given the importance of public purchases by governments of goods, services, works and utilities, TTIP should aim to significantly expand the Government Procurement Agreement (GPA) commitments in terms of coverage at all levels of government and public entities. It should also aim to lower the existing thresholds and go beyond the GPA commitments.
- 2** TTIP should aim at reducing the significant obstacles European companies face when trying to access the US public procurement market, including domestic preference provisions such as the Buy America Act and local content requirements.
- 3** The TTIP chapter on public procurement should ensure transparent, open and predictable procedural requirements. The lack of nation-wide uniform procurement criteria and procedures in the US is an impediment to effective market access.
- 4** TTIP should set a high standard for any future agreements and address areas such as non-discrimination, legal and contractual remedies and corruption.



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PUBLIC PROCUREMENT IN THE US

1. Introduction

The US Public Procurement Market is, after the EU, the second largest in the world, representing 11% of GDP. Its growth potential is significant - at the federal, state and local levels – and it is important to further open it up to European contractors. A considerable number of European companies take part in public tenders in the US either directly or through subsidiaries. However, barriers such as the use of Buy-American clauses prevent European companies from realising their full potential in accessing the US procurement market. Therefore, EU companies call for further opening and more business opportunities.

Given the importance of public purchases by governments of goods, services and works, procurement commitments under the Agreement on Government Procurement of the WTO (GPA) should be expanded in terms of coverage, at all level of government and public entities, lowering the existing thresholds and ensuring transparency as well as open and predictable procedural requirements.

EU companies' commercial interests cover a wide range of sectors:

- Civil engineering, infrastructure and vehicles: planning, design and development of airports, rail, light rail, metro and road infrastructure, as well as management and equipment supply, ports, pavements and bridges;
- Transport, including urban transportation as well as sales to municipalities and public authorities;
- Civil construction, both public and private;
- Energy;
- Innovative technologies;
- Public utilities: management of the full water cycle including design, engineering, construction, operation and maintenance of all kinds of large infrastructures and water treatment plants (for drinking water, wastewater, sea water and brackish water desalination, tertiary treatment plants for waste water purification and reuse, zero discharge, etc.);
- Environment and green services: environmental impact assessments, environmental supervision of projects and works, hydrologic forestry restoration, recovery of the natural environment, comprehensive environmental audits, water quality and discharge management, ecological flow, air quality and geological cartography;
- Health services, including pharmaceuticals and medical devices to the public sector;
- Industry (e.g. automotive industry, steel sector, paper sector, etc.) and other services, including information and communication technologies/services and consulting services;



- Some companies are also engaged in supplies in the military and para-military field, including green technologies to the US military.

However, TTIP negotiations should not be opened for procurement necessary for the protection of essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes. This reservation is necessary not only with a view to the very special conditions of this sector, but it also takes account of the fact that the defence and security sector is excluded from the Government Procurement Agreement of the WTO (GPA).

2. GPA coverage and thresholds

EU companies would like to be more active in the US. In addition to a further market opening at federal and state level, there is also considerable interest in a further opening up markets in big cities such as Atlanta & Charlotte, Boston, Chicago, Dallas, Denver, Houston, Los Angeles, Miami, New York, San Francisco, Seattle, Washington and others (please see Annex I for further details).

The US and the EU's commitments in the Government Procurement Agreement (GPA) guarantee national treatment to each other's companies. However, the US has limited state commitment under the WTO GPA in terms of both coverage and thresholds¹. In fact, thirteen US states are not bound by the provisions of the GPA². This gives way to limited foreign competition in the US public procurement market. The EU on the other hand has substantially larger GPA commitments in terms of coverage and thresholds allowing US competitors to bid more easily for EU public procurement.

The agreement should therefore significantly expand coverage beyond existing GPA commitments to include all federal, sub-federal and public entity levels and lower the existing thresholds to ensure a stronger and more transparent access to each other's public procurement markets. States that are already covered by GPA provisions like Florida, Illinois, New York and Maryland, should remove pre-existing restrictions and should engage in "GPA plus" commitments.

Although in practice the US may be more open than what is manifested through its GPA commitments, it is without a doubt that European companies would benefit from a stronger bilateral commitment on procurement.

¹ Foreign companies are excluded from public procurement of services and goods with a value below 130.000 SDRs and 5 million SDRs for construction projects. These limits are of 35.500 and 5 million respectively at federal level.

² States are not covered by the GPA: Alabama, Alaska, North Carolina, South Carolina, North Dakota, Georgia, Indiana, Nevada, New Jersey, New Mexico, Ohio, Virginia and West Virginia.



3. Obstacles related to domestic preferences

Participating in public tenders in the US is often quite problematic for European companies, as they face a number of significant obstacles relating to domestic preference provisions such as the Buy America Act and local content requirements. The United States and the European Union should define products and services coming from either side as meeting these criteria (or exempt one another from them). The major restrictions faced by European companies are the following:

- Several obstacles stem from the **“Buy America” Act**, which applies to a wide range of sectors³, and the lack of clarity on its implementation. The agreement should ensure each side’s non-discriminatory participation in any “Buy National” programmes and should clarify the implementation of the Buy America Act at federal, sub-federal and community level, as this policy creates legal uncertainty for EU companies – especially SMEs.
- Under the **Jones Act**, European companies are not allowed to participate in US public tenders on maritime services. This means that dredging works in the territorial waters of the USA are by law exclusively reserved to US dredgers/vessels or vessels controlled at least by 75% US ownership (US citizens and/or US companies), are US built and manned by US crews. Likewise, under this Act, European contractors are not allowed to build offshore wind farms using floating marine equipment such as jack-up rigs and to transport equipment for the installation of offshore infrastructures. The Jones Act also requires that all waterborne shipping between US ports is carried out by vessels built in the US, which also have to be owned, registered and operated by Americans. The European shipbuilding industry has therefore been effectively excluded from selling vessels to be used in American coastwise trades. Lifting the Jones Act (or ensuring that it is not applicable to European companies) would have tremendous economic benefits for EU companies.
- The **Berry Amendment** regulates supplies in the military and para-military field. This legislation is very restrictive as it imposes the use of whole US made products, including components like fibres, yarn and fabrics.
- The **Local State Content requirements** and preferences for American-made goods that apply to State Administration projects⁴ are similar to Buy America provisions and are on the rise⁵. For instance, the Recovery Act (2009) prohibits the use of recovery funds to public work unless all of the steel used is produced in the US.

³ Under the Fly America programme for example, all government-related air transportation must be conducted by US airlines’ own services or US code shared services, whereas no such conditions exist in Europe. If market share is in line with the overall US-EU market, this means EU carriers could carry 50% of EU-US government air travel.

⁴ US transit projects that receive federal funding must meet 60% Buy America domestic content requirements. Amtrak procurements must meet a 50% domestic content requirement.

⁵ An amendment that we are aware of is the Buy America provision included in a water infrastructure bill, the “Water Resources Development Act”, which was recently passed by the US Senate. If this bill passes the House of Representatives, publicly funded water infrastructure projects will have to ensure that “all of the iron, steel and manufactured goods used in the project are produced in the United States”.



Similar practices are carried out by several federal agencies such as the Federal Aviation Administration, the Highway Administration, the Federal Railroad Administration or the Federal Transit Administration, where there are demands of up to 100% domestic content of steel products.

In addition to potentially shutting the market to EU suppliers, different local content requirements can also have the effect of adding significant costs to projects and delay execution schedules.

To participate in the US government procurement at federal level and avoid restrictions stemming from local content requirements, in some cases EU companies have been required to establish a branch in the US, to buy local companies or to team up as a sub-consultant for local companies. This applies, for example, to classified works and cost-based contracting, or in the railway sector, where the majority of the big projects in the US are financed by federal funds assigned only if 100% of the equipment is of American origin. Other concerned sectors are energy, transportation, industry, healthcare, civil construction (both public and private) and many others.

Several companies, sometimes as sub-consultants of private developers, pursue alternative Delivery Transit projects, as Design & Build and Public Private Partnership projects in US.

4. Procedural obstacles

The EU and the US should ensure transparent, open and predictable procedural requirements, which should be at the core of the procurement chapter. The lack of nation-wide uniform procurement criteria and procedures is an impediment to effective access. The establishment of an expedited consultation process on future issues and concerns related to public procurement should be envisaged. This will increase transparency regarding rules and future developments

Companies also report on the lack of legal certainty: states can fail to meet their commitments without consequences for the Administration but with important damages for the company. Any agreement should set a high standard for any future agreements and address areas such as non-discrimination, legal and contractual remedies and corruption (including self-cleaning mechanism).

In particular:

- There is a general lack of **transparency** on procurement opportunities in the US, determined for example by lack of access to information on calls for tender, as these are not published on a central website. User-friendliness of the information would be greatly improved if the TTIP negotiations could lead to one single electronic procurement website.
- **Complexity of rules** covering federal government procurement, especially if classified work is involved (Special Security Agreement/Proxy company requirements). At the federal level, the number of regulations (FAR, DFAR), as well as the large number of complex, often vague rules that require specialist



knowledge present significant challenges⁶. Difficulties arise at state/local level due to unpredictable procedural requirements including mid-procurement process changes. Specific issues have included a lack of transparency regarding funding sources, limited clarity in contract terms and conditions (which makes risk evaluation especially difficult) and the lack of effective procedures in bid protest/dispute resolution process.

The timeline of the procurement process varies from case to case depending on the complexity of the services which are being required. A complex project will imply a complex procurement process, which can be very demanding for the tenderers. All of these contracts require previous experience with the client/agency and local presence to provide them with a fast response.

A variety of procurement schemes is available in the US that presents different challenges: **the “Task and Delivery Orders”** is a multiannual contract framework that restricts the access to other suppliers that are not on the short list. This practice should be removed or the period of time foreseen (usually five years) shortened. **Public-Private Partnerships** assume particular interest in an economic crisis context characterised by a shortage of funds, however their legal application needs to be clarified. PPPs are an effective mechanism that can deliver infrastructure projects and services to citizens. For example, the US Treasury has had to bail out the Highway Trust Fund to \$41billion since 2008. However, only some states⁷ have adopted broad enabling legislation.

- **Technical specifications** must be clear, transparent and non-discriminatory. On many occasions technical specifications are overly broad or even vague, e.g. the federal and state railways administrations require accreditations as supplier of equipment and systems imposing high and burdensome costs on European companies. Procurements (e.g. in public transport) often use highly prescriptive specifications instead of using performance-based specifications that would better meet customer needs without defining the specific solution upfront⁸.
- Product-linked **award criteria** should be linked to the subject matter of the contract. For instance, social and environmental criteria, which are not product-related, entail risk of discrimination and of narrowing market access unnecessarily.

⁶ Companies that participate in GSA and IDIQ contracts have pointed out that the rules are becoming increasingly complex and require specialist knowledge.

⁷ Washington, Oregon, California, Arizona, Utah, Colorado, Mississippi, Louisiana, Georgia, Alabama, Florida, South Carolina, North Dakota, Wisconsin, Illinois, Virginia, West Virginia, Maine, Massachusetts and Delaware.

⁸ The US railway operators require standards, especially in High Speed Rail, however they do not give priority to innovation: the American legislation does not foresee, for example, the use of new materials that reduce the weight of the trains. This goes against the trend of including leading edge technology that is pursued in the European railway sector. Therefore, European companies that have invested in cutting-edge technology are in an unfavourable position.



Many solicitations require past experience in the United States. This is particularly difficult if companies try to transfer new technology from outside the US.

Requirements for the creation of new jobs in the communities where the equipment and services are being procured, for local hiring of new employees, or preferential treatment to companies that employ or are owned by minorities, disabled veterans and the like discriminate against non-US companies (e.g. in transport) and may add costs and inefficiencies to the project. Also VISAS for professional staff, insurance requirements and professional liability can be problematic.

- **Professional registrations** for each state can pose a problem as well as **licenses** differing from one state to another (e.g. civil engineers face difficulties in being recognised as professional engineers in the US; furthermore, the professional engineer license is only valid in the state that issues it).
- Some US provisions do not reflect the global nature of industrial and especially IT supply chains. For example, Sec. 516 of the “Consolidated and Further Continuing Appropriations Act of 2013” states that funds may not be used to require an IT system without a risk assessment if the system has been “produced, manufactured or assembled by one or more entities that are owned, directed, or subsidized by the People’s Republic of China.” Such a provision would discriminate against any company that relies on a subsidiary based in China or a Chinese company for component parts.



ANNEX 1 - Main procuring entities of interest

At the US Federal level, the Departments of Defense, Energy, State, and Homeland Security as well as the Veterans Administration, US Army Corps of Engineers, and GSA (GSA Schedule) are among the most important. At the state/local levels, public transportation agencies and energy efficiency/security/fire contracts are among the most important.

Some administrations and agencies of interest are:

Central Government entities:

- Federal Transit Administration (FTA).
- Federal Railroad Administration (FRA).
- Federal Highway Administration (FHWA).
- National Railroad Passenger Corporation (AMTRAK).
- Federal Aviation Administration (FAA).
- American Water Works Association (AWWA).
- Environmental Protection Agency (EPA).
- General Services Administration (GSA).
- Government Printing Office (GPO).
- Others: Bureau of Land Management (BLM), Bureau of Indian Affairs (BIA), Bureau of Reclamation, US Army Corps of Engineers, Fish and Wildlife Service.

Federal States:

- States' DOT (Department Of Transportation).

Municipalities:

- Transit Agencies as: MTA NY City Transit (NYCT), Chicago Transit Authority (CTA), L.A. County Metropolitan Transportation Authority (LACMTA), Washington Metropolitan Area Transit Authority (WMATA) and others MBTA, SEPTA, MARTA, MTABUS, NJTransit, ...
- Rail agencies as: NCITD, METRA, Metrolink, BART, VTA, CALTRAIN, CAHSR, LAMETRO, SoundTransit, MUNI.
- The largest municipalities: for example Atlanta & Charlotte, Boston, Chicago, Dallas, Denver, Houston, Los Angeles, Miami, New York, San Francisco, Seattle, and Washington.