

## Public Procurement

Public Procurement no longer has only a purely national meaning (German procurement law). For quite some time, the trans-boundary, international competition for public orders and concessions has been Europe-wide (European procurement law), and, moreover, open (government procurement as part of the WTO, Agreement on Government Procurement – GPA).

### International Market Access

Worldwide, altogether only a quarter of the procurement market is open to **international competition**. **Restrictions applied by the EU's trading partners affect areas** in which the EU itself is highly competitive, such as, e.g., the construction industry, public transportation, medical equipment, electricity generation and pharmaceutical companies.

Under the regulation proposal (Com(2012) 124 final), the Commission has the possibility of approving disqualification or exclusion of offers by public contracting entities in the EU with a value of 5 million Euro or more, if a considerable share of the offer consists of goods and services from non-EU countries (third countries) not subject to existing international agreements. In the case of repeated, grave discrimination against European providers in third countries, the Commission can restrict access to the EU market for companies from these countries, if the third country is not prepared to engage in negotiations to create fair conditions for market access. Any eventual restrictive measures thus take place in a targeted manner, e.g., by means of exclusion of bidders from non-EU countries or by use of surcharges.

### Proposals for Reform (EU)

In December 2011, the EU Commission – as announced in the Single Market Act – accepted proposals for guidelines with respect to regulations for public procurement. These proposals are part of a comprehensive program directed towards the extensive modernisation of the regulations governing public procurement. This program contains the revision of Guideline 2004/17/EC (issuance of awards by contracting entities in the areas of water, energy, and public transport provisioning) and Guideline 2004/18/EC (proceedings for the awarding of public orders for construction, supplies, and services) as well acceptance of a guideline affecting concessions (Text of the Proposal), which have previously been governed at the European level only incompletely. Previously, for service concessions, fundamental contractual freedoms and principles have been applied, which have acquired certain contours from court decisions, but nonetheless are not very manageable.

The guidelines' proposal for concessions covers partnership agreements between a usually public entity and an often private company, in cases in which the latter assumes the operating risk for maintenance and development of infrastructure (harbours, water supply, multi-storey car parks, toll highways, etc.) or yield services of general economic interest (energy, health care, water supply and treatment, waste disposal, etc.).

#### Agreement on Government Procurement (GPA)

The agreement on public procurement governs the awarding activities of its members and is the sole legally binding WTO agreement in the area of public procurement. It is a plurilateral contract with fifteen signatory parties: Armenia, Canada, the EU, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands (with respect to Aruba), Norway, Singapore, Switzerland, Chinese Taipei and the United States.

The GPA was negotiated to a conclusion at the end of 2011 and adopted in 2012. In the application, however, there exists from country to country considerable discrepancies in relation to the initiation of procurement in the utilities sector for foreign competitors; numerous exemption clauses add to the difficulty.

The essential innovations are:

**More Transparent Rules for International Public Procurement:** International public procurement is now subject to transparency rules on the sides of the parties to the agreement. These rules approximately follow the EU regulations for awarding, which are known for their fairness and clarity.

**New Market Access Possibilities:** The EU and the United States of America expanded access to their central contracting authorities, including important US agencies. All GPA members (except for Canada) have promised access to their procurement markets, especially in the utilities sector. Canada offered access to contract awarding through its provinces and territories. Korea established access to contract awarding in the railway sector and in municipal transport, and Japan offered access to public-private partnerships and construction projects. Israel committed itself to allow its offset agreements to expire and to lower the threshold values for building work.

**Entry and Advantages for Developing Countries:** The new text makes it easier for additional countries, such as China and developing countries, to join the WTO in the future.

The personal application area of the GPA is precisely governed for every member state in its appendix, in Annexes 1 to 3. The GPA today is not only applicable to procurements of a country, but also to the procurements of so-called sub-central levels and public institutions.

The functional application area, that is, the positive lists for services and building work, are also specially regulated for every member state in Annexes 4 and 5 of the

Appendix to the GPA. Earlier, only supplier contracts were encompassed by "central government bodies".

Also the threshold values for order amounts, from which the rules are supposed to begin to apply, vary for each member state. However, the threshold values of the EU are tailored to those of the GPA. The values are expressed in the currency known as SDR (Special Drawing Right), an artificial calculating unit of the International Monetary Fund (IMF). The threshold values for the individual types of contracts, as well as the individual countries, can be found on the following website: [http://www.wto.org/english/tratop\\_e/gproc\\_e/thresh\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/thresh_e.htm).

We advise you concerning

- carrying out procurement proceedings under the Procurement and Contracting Ordinance for Construction Services, Part A (by public contracting entities), and the Procurement Ordinances for Services and Services of Freelancers,
- the acquisition of public orders,
- verification proceedings,
- Private-public Partnerships (PPP), and privatisations,
- awarding of concessions,
- drafting expert opinions and studies pursuant to procurement law,
- in GPA cases concerning the performance of consultations between the complaining WTO member state and the opponent, as well as informal efforts during the entire litigation proceedings,
- in GPA oppositional procedures before an impartial court or other independent verification bodies (suspension, annulment, issuing of injunction orders, compensation for damages),
- the application of sanctions for disregarding decisions of the GPA Committee.

We can represent you in all litigated matters before the German Procurement Chamber, the German courts and the EU courts, as well as before the GPA Committee.

For further information, please contact your legal advisor at BSU Legal.