



European Union EU Tendering for Government Procurement

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Summary

Government procurement in Europe is governed by both international obligations under the WTO Government Procurement Agreement (GPA) and EU-wide legislation under 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. Furthermore, the report also discusses tools and resources that are available to U.S. companies to gain access to government procurement contracts in Europe.

Government Procurement Agreement

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 States¹, to bid on public contracts. According to this Agreement, U.S.-based companies have the right to bid on contracts that are covered by the GPA in the European Union and, in return, suppliers from the EU Member states are allowed to bid on certain U.S. public contracts. The Agreement was revised and enlarged in December 2011, with the changes implemented in 2014.

The GPA specifically covers procuring entities that each country has listed in its Annexes to the GPA. There are separate lists for central government entities, sub-central government entities and other entities. 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; these are, in general, public authorities or authorities such 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).

¹ The EU countries are: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK

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 for procurement by entities (in Annex 3) in the water sector, the urban transport sector (bus, trolleybus, tramway, urban railway), the airport sector, or in dredging or shipbuilding services. For information on procurement in utilities, see the section below on procurement in the water, energy, transport and postal services sectors.

GPA Thresholds

The GPA thresholds represent contract values and indicate the level above which the EU contracting authorities covered by the GPA open up procurement to U.S.-based suppliers (and suppliers from other GPA Parties) for areas 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 treatment to the goods and services of any other Party to the GPA that is "no less favorable" than the treatment they give to their own. GPA Parties are prohibited from discriminating against goods, services and suppliers of the 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 discriminate against a locally established supplier on the basis of country of production or treat a locally established supplier less favorably on the basis of degree of foreign affiliation or ownership than another locally established supplier.

EU Public Procurement Directives

Currently, there are four EU Public Procurement Directives, please see these listed below. The first two Directives were revised in 2014, at which time a new Directive on concession contracts was also created. Member States had to transpose the revised Directives into national law within 24 months of their publication date (i.e. by 17 April 2016). The new legislations applicable from April 2016 at the EU level are:

- [Directive 2014/24/EU](#) (replacing Directive 2004/18/EC) on public procurement;
- [Directive 2014/25/EU](#) (replacing Directive 2004/17/EC) on the coordination of 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);
- [Directive 2014/23/EU](#) on the awarding of concession contracts. A concession contract (either for the delivery of works or services) is conducted between a public authority and a private enterprise that gives the company the right to build infrastructure and operate businesses that would normally fall within the jurisdiction of the public authority (e.g. highways).

The purpose of EU procurement rules is to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU. In most cases, the rules require competition between bidders.

The Directives include provisions on contracting procedures, selection and award criteria, advertising and transparency. The annexes to the Directives include the lists of contracting authorities in charge of handling the procurement procedures in the Member States.

The 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 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). As noted by paragraph (17) of the Public Procurement [Directive 2014/24/EU](#): "For contracts covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA, as well as by other relevant international agreements by which the Union is bound, contracting authorities should fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the 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.

EU Directives Thresholds

The EU Public Procurement Directives allow companies established in the EU to bid on contracts above certain thresholds in any other EU Member State. As stated under paragraph (18) of the Public Procurement [Directive 2014/23/EU](#): "*The thresholds laid down by this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds of the GPA.*"

The thresholds for public procurement contracts covered by the EU Directives and the GPA are the following, as of December 18, 2017:

EU DIRECTIVES	Scope	Threshold
Directive 2014/24/EU general procurement (from 18 December 2017)	All service contracts other than those listed in Annex XIV and awarded by central government authorities (CGA), all design contests organized by CGA; all supplies contracts awarded by CGA not operating in the field of defense; supplies contracts concerning products listed in Annex III awarded by contracting authorities operating in the field of defense	€ 144 000
	All subsidized services, all supplies contracts and all design contests awarded by sub-centrals contracting authorities (SC); all services other than those listed in Annex XIV awarded by sc; supplies contracts for products not listed in Annex III awarded by contracting authorities in the defense field	€ 221 000
	Services listed in Annex XIV	€ 750 000
	All work contracts, subsidized work contracts	€ 5 548 000
Directive 2014/25/EU utilities procurement (from 18 December 2017)	All supplies contracts, all service contracts (except for services listed in Annex XVII), all design contests	€ 443 000
	Services listed in Annex XVII	€ 1 000 000
	All work contracts, subsidized work contracts	€ 5 548 000

Every two years, since 30 June 2013, the Commission shall verify that the thresholds set out in the Directives correspond to the thresholds established in the GPA and shall, where necessary, revise them accordingly.

Additionally, although the thresholds for application of the rules will not change immediately, Directive 2014/25/EU on public work contracts includes a binding commitment on the Commission to review the economic effect of the thresholds on the internal market. This review must be completed by 2019. (Title V, article 92)

EU public procurement law applies when the contract value is equal to or above the aforementioned 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](#)", and is therefore not legally binding².

Directive 2014/24/EU on Public Procurement

The revised Directive on public procurement has introduced a number of changes, including some aimed at facilitating SME participation. Contracting authorities are encouraged to break contracts into lots and will not be able to set company turnover requirements at more than two times the contract value except where there is a specific justification.

Cross-border bidding is also encouraged and a central on-line point called "[E-certis](#)" has been introduced to facilitate it. This portal is where suppliers can find out the type of documents and certificates which they may be asked to provide in any EU country, even before they decide to bid.

The Directive cuts administrative burdens and also introduces a simpler process of assessing bidders' credentials, involving greater use of supplier self-declarations and requiring only the winning bidder to submit various certificates and documents to prove their status. Additionally, poor performance under previous contracts is now explicitly permitted as grounds for exclusion.

To prevent abuse and corruption, the Directive has also introduced various improved safeguards:

- Requirements on contracting authorities to put in place appropriate safeguards against conflicts of interest. The rules are not prescriptive on what the safeguards should be, but compliance could be achieved, for example, by requiring declarations to be signed by procurement staff to confirm they have no outside interests with bidders. This is currently a common practice amongst many UK contracting authorities;
- Time limits for the exclusion of suppliers (not more than 3 or 5 years depending on the reason for exclusion);
- Suppliers who have been excluded from public procurement for bad practices can have the exclusion ended if they effectively "self-clean", or provide satisfactory evidence to the contracting authority demonstrating reliability and adherence to good practices.

The Directive also gives more flexibility to bidders and encourages preliminary market consultations between contracting authorities and suppliers. The flexibility offered should facilitate better specifications, better outcomes and shorter procurement times. Constraints on using the competitive procedure with negotiations have also been relaxed so that the procedure will generally be available for any requirements that go beyond "off-the-shelf" purchasing.

² 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.

The distinction between Part A and Part B Services has been removed and a new light-touch regime has been introduced for social, health and some other services. There is also a requirement for contracting entities to publish contract award notices in the Official Journal of the European Union (OJEU) and other specific obligations for this new light-touch regime, along with a much higher threshold of € 750 000.

A new procedure, the so-called “Innovation Partnership”, has been introduced, intended to allow for more innovative ideas. Under this procedure, the supplier bids to enter into a partnership with the authority to develop a new product or service.

The statutory minimum time limits by which suppliers have to respond to advertised procurements and submit tender documents have been reduced by about a third. This flexibility could be helpful for speeding up simpler or off-the-shelf procurements, but it still permits longer timescales for requirements where suppliers will need more time to respond.

In addition to the 28 EU Member States and the 3 states of the European Economic Area (Iceland, Liechtenstein and Norway), the benefits of the EU public procurement rules also continue to apply to suppliers from a number of other countries where the EU has entered into an agreement. The main agreement in this regard is the GPA: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#govt

Directive 2014/25/EU on Procurement Utilities

There are restrictions for U.S. suppliers in the EU utilities sector, both in the EU Directive and in the EU coverage under the GPA. Directive 2014/25 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 and electricity;
- Postal services; and
- Urban transport by railway, automated systems, tramway, trolley bus, bus or cable.

Article 85 allows EU contracting authorities to either reject non-EU bids where the proportion of goods originating in non-EU countries exceeds 50% or give preference to the EU bid if prices are equivalent (meaning within a 3% margin). Moreover, the Directive allows EU contracting authorities to retain the right to suspend or restrict the award of service contracts to undertakings in third countries where no reciprocal access is granted.

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; and
- 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.

It should be noted that the directive's articles 34 and 35 allow contracting entities to apply for exemptions, i.e. not apply the rules of the utilities directive. The condition for granting exemptions is that there is sufficient competition on the market. Requests for exemptions have to be submitted to the Commission, who evaluates and publishes the Decision. For example, Austria obtained an exemption for provision of airport infrastructure for cargo.

Tenders Electronic Daily (TED)

The [TED](#) database is part of the OJEU, included as *Supplement S*. It is the official online site where tenders 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, and 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); and
- All contracts covered by the GPA.

The link to access TED is ted.europa.eu. A user does not have to be registered in order to access TED. Under "business opportunities", click on "contract notices". This will produce a list of all notices in all countries unless the search is refined and a specific country or countries have been selected. Finetuning the search even further is possible by selecting the relevant contract (works, supplies or services) and adding a keyword, such as "medical supplies" or "gas pipeline".

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

Electronic procurement

Electronic versions of the procurement documentation **must be available** through an internet URL immediately on publication of the OJEU contract notice. Full electronic communication (with some exceptions) will become mandatory for public contracts 4.5 years after the Public Contracts Directive 2014/24 comes into force (i.e. October 2018). For central purchasing bodies, the deadline is three years (April 2017). Furthermore, electronic catalogues for public procurement are expressly permitted, removing any doubt as to their legality.

The rules on “Dynamic Purchasing Systems” (DPS) have been greatly simplified, with the removal of the onerous obligation to advertise call-off contracts made under the DPS in the OJEU.

Electronic invoicing (e-invoicing) will be introduced from the 3rd quarter of 2018, based on the requirement set forth in [Directive 2014/55/EU](#). The Directive makes the receipt and processing of electronic invoices in public procurement obligatory. Standards for e-invoicing are being developed by the European Committee for Standardization (CEN).

Remedies for Companies

There are three EU Remedies Directives:

- Council Directive [89/665/EEC](#) of 21 December 1989 applies to general sectors for awarding 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); and
- 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 awarding public contracts.

The EU Remedies 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); setting aside unlawful decisions and discriminatory technical, economic, and financial specifications in the invitation to tender; and compensation of injured companies. The failure to advertise a relevant contract in the OJEU, use of non-objective criteria by authorities, failure to specify qualification and award criteria and 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 between the notification of a contract award and 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.

On 24 January 2017, the European Commission published a report, accompanied by a detailed evaluation, on the operation of the Remedies Directives. The Commission concluded that the Directives have contributed to making the procurement procedure in EU countries more fair, transparent, open and efficient, which is essential to increase trust in public administration. Furthermore, the importance of the Directives is confirmed by the fact that economic operators are using them to challenge deviations from public procurement rules. Over four years (2009-2012), more than 50 000 first instance decisions were taken.

Green Purchasing

With the emergence of the concept of “sustainable environment,” the global economic and political environment of contracting authorities has changed. The [EU’s green procurement communication](#), introduced in 2008, was meant to reflect the integration of the environmental dimension into all policy areas. The 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, electricity stemming from renewable energy sources, or air conditioning systems complying with state of the art environmental standards.

Contracting authorities are free to require a higher level of environmental protection than that laid down in EU legislation or standards, on the condition that the level required does not limit access to the contract and/or lead to discrimination against potential bidders. Contracting authorities can define technical specifications related to the environmental performance 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](#).

Forward Looking

The European Commission's [public procurement strategy](#), adopted in October 2017, focuses on six strategic policy priorities. It aims to improve EU public procurement practices in a collaborative manner by working with public authorities and other stakeholders

The Commission's six policy priorities for public procurement are:

- Ensuring wider uptake of innovative, green, and social procurement
- Professionalizing public buyers
- Increasing access to procurement markets
- Improving transparency, integrity and data
- Boosting the digital transformation of procurement
- Cooperating to procure together

Websites

The European Commission Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs ("DG GROWTH") is responsible for the drafting of European public procurement legislation, monitoring its implementation and launching infringement procedures:

http://ec.europa.eu/growth/single-market/public-procurement/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: brussels.ec.office.box@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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