



Public
Procurement Analysis

Procurement Beyond Price

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Social procurement under international trade agreements: **GPA, CETA and the **EU-Ukraine** **Association Agreement****

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Overview

- Why does it matter?
- EU *modus operandi* for third-party trade agreements
- GPA: scope, enforcement and social clauses
- CETA: scope, enforcement and social clauses
- EU Association Agreements: example of Ukraine

Why does it matter?

- From contracting authority perspective, what obligations apply when tenders are received from non-EU countries?
- From business perspective, can I tender in third countries and what social obligations may be applied there?
- From a trade negotiator's perspective, what is 'off-limits' and where do special rules apply?
- EU Regulation on Third Party Access to Procurement
- Brexit negotiations

Approaches to SRPP

- Some contracts should be protected from competition
- Some contracts should be reserved for social or public interest enterprises
- It should be mandatory/possible to exclude bidders who do not comply with certain social obligations
- It should be mandatory/possible to include certain social obligations in contracts (specifications/contract terms)
- It should be possible to award marks for social aspects of contract performance

EU *modus operandi*

- We consider our own public procurement markets to be open(?)
- Therefore we expect similar access to other countries' public procurement markets
- Scope of coverage and specific obligations should be aligned with the EU procurement directives wherever possible
- Conscious of increasing visibility/controversy associated with agreements (particularly TTIP and CETA)
- Increasing role of European Parliament in procurement & trade

2014 Directives: Social provisions

Contract definition/Pre-procurement	Exclusion and selection	Award	Contract performance
Social and other specific services (74/Annex XIV)	Exclusion for child labour, human trafficking (57.1)	Accessibility for persons with disabilities (42/67)	Compliance with social & labour law (18.2)
Reservation for sheltered workshops/ programmes (20)	Exclusion for non-payment of tax and social security (57.2)	Use of third-party labels (43)	Other social/ employment conditions (70)
Preliminary market consultation (may include social value considerations) (40)	Exclusion for non-compliance with social & labour law, grave professional misconduct (57.4)	Award criteria relating to trading conditions or other social characteristics (67)	Subcontractors' joint liability for compliance with Art. 18.2 (71.6(a))
Reservation for public service organisations (77)	Selection based on technical capacity including supply chain management (58/Annex XII)	Abnormally low tenders - duty to reject for breaches of Art. 18.2 (69.3)	Replacement of subcontractors who don't comply with exclusion grounds (71.6(b))

- Most recent round of revisions resulting in 2012 text
- Several new accession parties (Ukraine, Montenegro, New Zealand) – bringing total to 46 countries
- Basic obligations of non-discrimination, transparency, equal treatment and use of pre-defined criteria
- Less detail than EU directives, and more limited scope of coverage e.g. for utilities sector contracts
- Very little case law interpreting key provisions – system of remedies not widely invoked

Social provisions under GPA?

- Reservation of contracts: not mentioned in GPA text
- Art.VIII-1 conditions of participation limited to those essential to prove legal, financial, commercial and technical capacity
- Article VIII-4 exclusion grounds – list is shorter but more general than equivalent EU provisions – omits non-compliance with social, labour and environmental obligations (but list is non-exhaustive)
- Article X technical specifications - nothing on accessibility for disabled persons, whereas environmental factors are mentioned
- No ‘trading conditions’ in provisions on award criteria, but also no ‘link to the subject-matter requirement’
- Abnormally low tenders: no explicit right to reject, just to clarify

- Chapter 19 on procurement closely modelled on GPA text, but:
- Greater coverage of sub-national contracting authorities – this may be significant for social procurement measures which are often undertaken at local level
- Separate chapters on Trade and Sustainable Development (22), Trade and Labour (23), Trade and Environment (24) – might these influence interpretation of more general provisions?
- Enforcement slightly more likely given high profile and existence of Committee on Government Procurement?
- Model for agreements with other advanced economies?

EU-Ukraine Association Agreement

- Deep and Comprehensive Free Trade Area (DCFTA) applied provisionally from 1 January 2016
- Provides for mutual access to public procurement markets over 8 years from Agreement's entry into force
- Gradual harmonisation of Ukrainian public procurement law with EU Directives
- Same social provisions will eventually apply as under Directives – but note specific Ukrainian context
- Agreement also contains commitment to harmonise with certain EU standards on employment, social policy etc.

Thank you.
Questions/Discussions



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