

# Client Alert.

---

2 April 2012

## UK Public Procurement Law Digest: Non-EU Bids on EU Public Contracts

By Alistair Maughan

The European Union's rules on government procurement have traditionally been admirably open and non-discriminatory, with none of the "Buy Local" preferences found elsewhere in the world.

That seems likely to change in view of a draft Regulation, issued by the European Commission, which will allow EU public bodies to exclude certain bids from outside the EU where such tenders comprise a significant element of non-EU goods and services. Despite denials that this is protectionist in nature, the Regulation will allow EU public bodies to discriminate against some foreign bids if they wish to do so.

### BACKGROUND

The market for procurement by public bodies in the EU is significant. The EU estimates that approximately €420 billion in contracts is open to public tender each year. This corresponds to approximately 19% of GDP across all 27 EU Member states. The EU estimates that 85% of these contracts are subject to harmonised EU-wide public procurement rules that are designed to ensure that all public purchases are transparent, fair and non-discriminatory. This contrasts with the EU's estimates that only 32% of the United States' government procurement market is open to foreign bidders and 28% of Japan's.

Until now, there have only been limited exceptional cases in which the EU public sector procurement market is (or can be) closed to bidders from outside the EU. These restrictions are:

- In the utility sector (*i.e.*, telecommunications, post, water, energy), the Utilities Directive contains provisions allowing public bodies to reject foreign goods that are not covered by any existing EU international commitments. Additionally, the utilities rules permit a preference for EU-based tenders (and tenders covered by EU international commitments) in cases of equivalent offers (*i.e.*, effectively a tie-breaker rule). Under those existing rules, a tender submitted for the award of an advertised contract may be rejected where the proportion of products originating outside the EU exceeds 50% of the total value of the scope of the tender. In practice, this option has only rarely been used.
- In the area of defence, a recital in the Defence Procurement Directive<sup>1</sup> confirms that it is up to Member States to decide whether their contracting authorities can accept bids from foreign countries or not.

In all other cases, the EU's markets are fully open and no discrimination is permitted against non-EU bids.

However, the European Commission has been concerned for some time that the playing field is not balanced and that many other countries have implemented so-called "buy local" rules which close off their own domestic government procurement markets from bidders from the EU. That provides the rationale for the draft Regulation now proposed by the EU. The EU is at pains to say that this is not protectionist legislation and that, rather, the aim of this draft Regulation is to incentivise other countries to make certain that their own domestic government procurement markets are open to entities from the EU.

---

<sup>1</sup> See our April 2010 update [Dedicated Regime for Defence and Security Procurement](#).

# Client Alert.

---

## EXISTING EU INTERNATIONAL COMMITMENTS

By law, the EU cannot override its own existing international commitments to open and non-discriminatory procurement. These include:

- **The WTO GPA.** The EU is a party to the World Trade Organization Government Procurement Agreement (GPA). The GPA was last revised in December 2011 and requires the EU to ensure openness amongst other members of the GPA (which include Japan, the U.S., Korea, Canada and Israel).
- **Other Bilateral Agreements.** Additionally, the EU has concluded a number of other bilateral free trade agreements which include procurement openness requirements. Such agreements are already in place with Mexico, Korea, Switzerland, Colombia, Peru and Chile and the EU is currently negotiating similar agreements with Canada, Singapore, India and Malaysia.

## IMPACT OF THE DRAFT REGULATION

The most direct mechanism in the draft Regulation is a proposal to allow public bodies to reject bids that consist of more than 50% of non-EU-based goods or services. This will not be applied where the bidder is from a country with which the EU has an existing international procurement arrangement (see above). It also applies only to contracts with an estimated value of €5 million or above.

The right to exclude is not automatic. Public bodies will need to notify the European Commission about their intent and the Commission will have two months in order to assess the existence of reciprocity with the country in question and decide whether or not to approve such an exclusion.

For many contracting authorities, the two month delay may be more of a penalty than they are willing to take in order to get a proposed exclusion approved.

Below the €5 million threshold, all EU markets remain open and no discrimination against foreign bidders is allowed.

Additionally, the EU has remedies at the EU-wide level that are not available to individual public bodies. The Commission will have the power to conduct investigations into possible discriminatory procurement practices in countries whose government markets are not open to EU entities and to start consultations with the country concerned to try to resolve those market access problems. If necessary, the Commission may take additional measures to restrict bidders from those offending countries from access to the EU's public contracts market. Those restrictive measures may include the exclusion of tenders originating from that country in a particular sector or the imposition of a price penalty on such non-EU bids.

When a public body applies to the Commission for an exclusion of a particular bid from its competition, the Commission will base its decision on whether or not to approve the exclusion on the existence of "substantial reciprocity". This means that the Commission will assess:

- the degree to which the public procurement laws of the other country ensure transparency in line with international standards and preclude any discrimination against EU-origin goods, services and economic operators; and
- the degree to which public bodies in that non-EU country apply discriminatory practices against EU-origin goods, services and economic operators.

# Client Alert.

---

## CONCLUSION

The Commission has gone to some lengths to justify this proposal on the basis that it is not the EU which has a closed market; rather, it is certain third countries which have closed markets. The Commission reiterates that the EU public procurement market is fundamentally open. It says that the object of this proposal is not to close down the EU's market to foreign bidders and that any restrictive measure affecting the current openness of the EU public procurement market will only be adopted as a last stage of the procedures described either at the contracting authority level or at the EU-wide level.

This initiative ought to have no impact on procurements that the EU has opened up to third country parties under the framework of the WTO GPA or bilateral free-trade agreements. The Commission will stand by its international commitments.

**For a copy of Morrison & Foerster's consolidated digest of recent cases and decisions affecting UK public procurement law, please click [here](#).**

## Contact:

**Alistair Maughan**  
+44 20 7920 4066  
[amaughan@mofocom](mailto:amaughan@mofocom)

**For [Volume 1 \(2008-2009\)](#) of the consolidated digest of recent cases and decisions affecting UK public procurement law, click [here](#).**

**For [Volume 2 \(2010-2011\)](#) of the consolidated digest of recent cases and decisions affecting UK public procurement law, click [here](#).**

## About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofocom](http://www.mofocom).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.*