



International Chamber of Commerce

The world business organization

Policy and Business Practices

ICC Task Force on Public Procurement

Paris, 24 July 2012

The European Parliament
The Council of the European Union
The European Commission

Re: Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the European Union's internal market in public procurement and procedures supporting negotiations on the access of Union goods and services to the public procurement markets of third countries (COM (2012) 124 final)

1 INTRODUCTION

(1) ON THE ICC TASK FORCE PUBLIC PROCUREMENT

The International Chamber of Commerce (ICC) was founded in 1919 to promote free world trade and to fight protectionism. The organisation has members in over 140 countries and is a firm supporter of a multilateral trading system represented by the World Trade Organisation (WTO) at all levels.

The ICC Task Force on Public Procurement was established in 2005 and gathers together business experts on public procurement from commercial organisations, companies, law firms and consultancies interested in promoting the ICC objectives in this field. The Task Force meets with decision-makers, issues statements and initiatives and organises seminars in the field of public procurement.

The policy priorities of the ICC are to:

- maintain and improve the access of business to cross border opportunities;
- maintain the fight against corruption and
- protect the competitive nature of public procurement against extraneous policies and other inappropriate requirements.

The ICC also supports the streamlining of public procurement procedures by promoting adequate electronic procedures and maintaining competition through a sufficiently robust legal framework which provides effective remedies. It believes that the regulatory environment should not be fragmented and that this is key to

preserving and improving internationally recognised rational and competitive policies.

(2) ON THE PROPOSED NEW EU REGULATION

On 21 March 2012, the Commission published its proposal on the restriction of access to EU markets with the aim of it being passed by the two EU legislative institutions, the European Parliament and the Council under an accelerated timetable. According to the Commission, the urgency results from the reluctance of some non-EU countries to open up their markets further in the course of on-going multilateral or bilateral trade negotiations. An example of this is the negotiations on the accession of China to the Government Procurement Agreement (GPA). The Commission claims that, without the adoption of the proposal, Europe will be unfairly accessible to bidders from certain non-EU countries in comparison with the limited opportunities that are available for EU bidders in those same third country markets.

We do support, to some degree, the process of opening up access to trade in certain countries which up until now have neither signed the GPA nor any bilateral free trade agreements with other important trade partners. We agree that this process needs to be accelerated. Nevertheless we are convinced that any steps taken in this context have to be very carefully considered and reviewed in order not to create new barriers to trade, distortions of competition or bureaucratic burdens on international trade.

Given the far-reaching consequences of the envisaged new trade regulation, we feel that before adopting such a regulation in the EU, considerably more in-depth analysis is necessary in order to assess how far Member States of the EU are “open” for tenders from third countries and to what extent they are legally able to reject bidders from countries who are yet to sign any trade agreements with the EU or the individual Member State.

2 INTERNATIONAL DELIVERIES OF GOODS ARE A NETWORK

Public procurement rules at the European or multilateral level include financial thresholds making them applicable to larger transactions only. In today's markets, it is usual that such large transactions are a culmination of goods and services which originate from a network spanning a substantial number of countries. In an international business environment, the production of components is frequently subcontracted to companies in countries which can produce them at a more competitive price. For example, an Airbus aircraft produced in Europe contains thousands of components produced separately throughout the world. Given the often long and complex supply chains around the world, defining the origin of goods in this example or in any similar production structure may be an onerous task likely to lead to arbitrary, unpredictable and inconsistent results.

3 ON THE ORIGIN OF GOODS AND SERVICES

Services form an important part of international trade. It is important, therefore, to safeguard the delivery of services and ensure that this is not harmed by excessive business regulation which would cause unnecessary obstacles to this important element of international trade. In this regard, we must also take into consideration

that electronic commerce has substantially changed the nature of service provision. Although recognisable corporate structures in any given country are found among service providers, the production of services is essentially delocalised. To give an example, although the provision of medical services has not been fully liberalised within the EU, a patient's X-rays could be sent to a service provider in another Member State or to a third country to be developed and analysed.

Geographical limitations as to the origin of the service provision are found primarily in sectors affected by public security. They are not commonplace or welcome otherwise.

In the area of trading goods or services, it is often very difficult to define accurately the origin of those goods or services and in many cases, practically impossible. Where, for example, services have been provided by electronic means, one could take into account not only the locality of the service provider, but also that of the internet server. However, even this may not suffice since the location of the internet server is not necessarily the most determinative connecting factor when attempting to establish the originating place of the provision of the services.

It is also our opinion that, the provisions contained in the proposal relating to services could easily be circumvented which would lead to uncertainty and severe distortions of competition and thus, result in injustice.

4

COMPETENCES WITHIN THE EUROPEAN UNION

The matter of distribution of competences between the EU and its Member States is not a concern for the ICC. However, we understand that the introduction of the system envisaged in the proposal would strengthen the position of the EU and the Commission by giving them powers to determine which countries' bidders are admissible to the EU markets and which are not. At this point, we understand that the contracting authorities of each Member State are able to enlarge the scope of a tender to accept bids from such third countries as they see appropriate. The proposal would allocate the decision making in this context solely to the Commission.

However, there is a defensible corollary to this logic: even if there are, at present, no issues with trade access with the third country concerned, the proposal would introduce a presumption of access, which the authorities in a given Member State could not unilaterally deny at a later stage.

Assessing the interest of the EU or Member States is outside of our remit. However, from an international trade perspective it seems inadvisable to create blanket restrictions to exclude tenders from non-EU countries. This is particularly so where a Member state or contracting authority has legitimate reasons to open up its procurement procedures, which would not of course include a "dumping offer" or an abnormally low bid which would be excluded on the basis of procurement law.

5

CUTTING RED TAPE

The proposals of the European Commission regarding the modernisation of the EU public procurement regime are also under scrutiny by the European legislative institutions. One of the principal objectives of the modernisation is to cut red tape and to streamline the bid and award procedures to make them less costly and time-consuming.

It is the view of the ICC that, if adopted, the parallel proposal for regulation on third country access would substantially complicate the underlying procurement procedures. Given the intricate manner in which goods and services are now produced, the current proposal could disproportionately affect the conduct of public procurement procedures. Moreover, this latest proposal runs counter to the stated overall aim of the EU to cut bureaucratic burdens in line with the basic principle of better, more effective regulation.

6 DANGER OF NEW TRADE CONFLICTS AND DISTORTIONS OF COMPETITION

The ICC views the proposed regulation as resulting in wholesale exclusions of bidders from non-EU countries which could in turn lead to new trade conflicts in the global market. In addition, it should be noted that the draft proposal not only seeks the exclusion of *bidders* from third countries, but also *tenders* which include a certain level of goods from third countries that are not signatories to trade agreements with the EU. The exclusion of these tenders could lead to distortions of competition within the single market. Furthermore, any perceived breaches of the proposed complex new rules could lead to a significant number of proceedings both in the WTO as well as in the EU procurement framework. This can have no other effect than to significantly hinder the proper functioning of public procurement in the EU and international context.

7 CONCLUSION

The ICC cannot support any instrument purporting to limit access to markets irrespective of the developments in trade policy that may have prompted its introduction. The introduction of coercive instruments may well produce concessions from some of the major players in trade policy, but may also lead to many consequences harmful to business within the EU and internationally. Moreover, the present economic climate in Europe dictates against any measures which can foreseeably have a detrimental affect on business if we are to see an end to the current economic crisis.

Against the background of what we have set out above, we would urge the Institutions of the EU to carry out a more in-depth analysis on this issue before any action is taken on the proposed draft regulation in its present form. Before taking the risk of causing the problematic consequences outlined above, alternative options should be considered with a view to maintaining pressure on those countries which refuse to open up their markets. These measures might include:

- a clarification of the rules on “abnormally low tenders” in public procurement, which would not create blanket sanctions against non-EU countries and thus cause new trade conflicts;
- the production of significantly more guidance for contracting authorities and bidders in the EU about the legalities of accepting tenders from non-EU countries and how to combat “dumping practices” of competitors according to EU procurement and international law and
- considering the increase of “anti-dumping” instruments that also cover the provision of services, e.g. in the context of GATS.

To conclude, the ICC is convinced that the best way to proceed is to give support to the GPA system and efforts to harmonise public procurement legislation containing

effective remedy mechanisms such as the recently adopted revision of the UNCITRAL Model Law on Public Procurement.

We are prepared to elaborate further the above views in any suitable setting and stand at your disposal in this respect.

On behalf of the ICC Task Force on Public Procurement

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