

Consultation response

Public Procurement Directives



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

The ongoing review of the Concessions Directive, Public Procurement Directive and Utilities Directive – collectively referred to as the Public Procurement Directives (PPD) – presents a crucial opportunity to modernise procurement rules and foster innovation, efficiency and competitiveness in Europe. The American Chamber of Commerce to the EU's (AmCham EU) members contribute cutting-edge technologies and services to support public sector transformation. However, American and European-headquartered businesses alike face complex procedures, inconsistent implementation across Member States and barriers to competition. The European Commission should prioritise simplification, harmonisation and digitalisation in procurement processes while ensuring fair competition and market access. Protectionist measures, such as 'Buy European' policies, risk undermining choice, competition and innovation for European contracting authorities, who should have access to the best-in-class products and services. A procurement framework that embraces artificial intelligence (AI) and cloud solutions, enhances transparency and promotes fair competition can drive economic growth, resilience and better outcomes for contracting authorities, European taxpayers and businesses alike.

Introduction

AmCham EU members are active in public procurement across most sectors. In some industries, US companies engage in procurement indirectly, relying more on channel partners, while in others, they participate as direct tenderers. In many cases, US companies are active as key suppliers to European bidders such as through distributors or engineering, procurement and construction companies.

US companies bring to market products and programmes that support public sector transformation and skills development. Many AmCham EU members are seen as reliable and trustworthy sources of knowledge and best practices for procurement authorities from jurisdictions around the world.

While the evaluation of the PPD is a vital opportunity to improve the efficiency and effectiveness of procurement across Europe, it has also opened the door for discussions on ways to preference EU-headquartered companies over US-headquartered companies through EU content requirements and other means.

The Clean Industrial Deal explicitly calls for lawmakers to inject a European preference principle into the European public procurement framework. However, excluding US companies from EU public procurement would prevent public authorities from accessing best-in-class technology to lay the foundation for Europe's competitiveness and security. In whatever way they are defined, European preference and EU content requirements would disrupt global companies with highly integrated supply chains, including companies headquartered in the EU.

Goods and services provided by US companies benefit from the sizeable investments made by US companies in Europe, transatlantic supply chains and knowledge bases, often leveraging the best of talent in the US and Europe to excel in research and development (R&D) and production. Accordingly, bids from US companies are often found to have the highest quality, most technologically advanced and most innovative solutions. Similarly, because US companies can leverage global knowledge bases,

they can contribute to procurement in ways that surpass the product alone, often sharing best practices with and offering support to contracting authorities.

If Europe wants to unlock the true potential of its industry and workers, it should ensure that public procurement rewards high-quality products produced by companies headquartered on either side of the Atlantic and incentivises European workers and researchers to continue their innovation regardless of the parentage of their employer.

The paper below provides comments on the sections of the consultation most relevant to US companies as well as general comments on the value of US companies' participation in public procurement.

Public Procurement Directives

Simpler, more flexible rules

Businesses, including small and medium-sized enterprises (SMEs) and international companies, face significant administrative burdens in participating in public procurement processes due to complex procedures and their inconsistent implementation across Member States. As highlighted by the European Court of Auditors,¹ the length and complexity of certain public procurement processes deters many companies from directly participating in auctions. The EU should reduce complexity and improve standardisation to facilitate broader participation and increase competition.

Simplified procedures

The current Directives provide six different procurement procedures that, in principle, give public authorities sufficient flexibility to create the procedures that best fit their needs. However, these procedures create unnecessary complexity and bureaucratic hurdles due to how detailed and rigid they are. Some of these procedures, such as innovation partnerships, are only very rarely used because of their complexity.

For companies that operate in fast-moving sectors like technology development, this flexibility can be stifling. For these sectors, procedures should be simplified to allow contracting authorities to refine award criteria and relative weightings during the procurement process, as long as they inform tendering parties in real time and maintain open and non-discriminatory sets of conditions.

The UK, for example, has recently refined its public procurement regime to opt for two simple procedures: the standard open procedure and the 'competitive flexible' procedure. In the 'competitive flexible' procedure, contracting authorities have the flexibility to design the procedure to reflect ongoing development as long as they outline the different steps of the process clearly to all

¹ European Court of Auditors, 'Special Report 28/2023: Public Procurement in the EU'. 12 April 2023. https://www.eca.europa.eu/ECAPublications/SR-2023-28/SR-2023-28_EN.pdf

participants at an early stage. This type of creative approach could be a best practice for the EU to consider.

Pre-tender engagement is vital as it allows companies to examine what is possible through their technologies before responding to requests for proposal so they can maximise value for the contracting authorities. Any revised procedures should encourage early engagement with industry in a technology-agnostic and cooperative manner.

Similarly, the Commission could better use digital tools and access to data – for example, expanding the European single procurement document or widening transparency rules – to simplify and streamline procurement procedures.

Harmonised implementation

Currently, the directives contain several ambiguities and excessive discretion in some areas that make procurement more complex than necessary and lead to fragmentation. This can occur at the most basic level: national implementation can mean that tenders are not consistently advertised in a central location, complicating access for potential bidders. More fundamentally, the choice of the range of procedures (addressed above) can allow public sector bodies to construct tenders that do not follow transparent or non-discriminatory processes, to the benefit of a single bidder

In one instance that is unrelated to the PPD, public sector bodies impose their own standard terms and conditions (T&C) that are often impractical and unaligned with those of industry. These strict T&Cs create significant barriers for companies.

Greater coherence and better implementation of best practices would make much-needed improvements to procurement processes without requiring the Directives to be overhauled. These could include consistent and modernised approaches to procuring new technologies, including using dynamic purchasing agreements or resolving challenges related to determinations of operational expenditures versus capital expenditures when procuring services, and addressing consistency in award criteria (eg in sustainability, described below).

Coherence

Foreign Subsidies Regulation

The effectiveness of the Foreign Subsidies Regulation (FSR) relies heavily on contracting authorities understanding the legislation and being able to communicate effectively with tenderers and the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) to indicate whether a bid meets the FSR's notification threshold.

Currently, contracting authorities must indicate to a tenderer whether a contract is covered by the Agreement on Government Procurement (GPA) – a requirement that the Commission supported

during the last review of the PPD. It should introduce a similar requirement for contracting authorities to indicate whether specific contracts are covered by the FSR.

Moreover, as the Commission seeks to improve the PPD and their application, it must empower DG GROW to educate and build the capacity of contracting authorities across Europe to comply with the FSR.

Resilience

Resilience and supply chain security

Policies aimed at fostering European resilience should focus on ensuring supply chain security without compromising market competition. To this end, the Commission should prioritise multi-winner tendering and risk assessment of supply chain robustness over exclusionary policies. Resilience criteria can be powerful tools to ensure that tenders choose the highest-quality products, but such criteria should be carefully designed to not reduce US companies' access to public procurement contracts.

This is particularly vital in the pharmaceuticals sector, where many auctions fail to account for resilience in a non-discriminatory way, leading to supply chain risks that could have otherwise been mitigated. In one instance, Italy implemented a budget law in 2017 that mandated multi-winner tenders when more than three biologics, including an originator, were available. This system ensured prescribing freedom and patient therapeutic continuity by favouring access to multiple manufacturers. To implement it, the auctions grouped biosimilars and originators in a single lot per indication, with patients treated using one of the top three ranked drugs in the framework. The tenders strongly favoured price, with 97% of 109 tenders giving 70% or more weight to price. In most cases, the first successful bidder or cheapest drug was favoured, despite minimal price differences, limiting biosimilar access. However, this created risks of shortages in the long term. When the preferred bidder could not meet demand, other manufacturers were required to step in, which was a lengthy process. This system may eventually discourage biosimilar investment, leading to a reduced supply over time.

Resiliency can be implemented through life-cycle cost using more robust most economically advantageous tender (MEAT) analyses. Sophisticated technologies may have higher costs initially but have lower costs over their entire lifecycles, providing the best value in the long run.

Areas for future growth

Innovation in procurement is helping contracting authorities with digital transformation. In general, the Commission should encourage contracting authorities to leverage AI-driven procurement platforms, e-submission tools and cloud-based solutions to streamline processes and increase participation. Encouraging greater adoption of digital procurement tools can ensure efficiency, transparency and access to high-quality bids.

It is vital that the Commission promote digital first and cloud-first procurement. A digital-first approach includes end-to-end online access for the transaction (and not just for the tender notification) so that bidders have greater transparency in the selection process and are able to achieve the goals set out in the beginning of the tendering process. Similarly, for cloud-first procurement, the Commission and Member States should support competence building so that procurers can design their tenders based on commercial cloud industry standards and best practices, including industry-recognised accreditations and certifications. This would avoid placing unnecessary restrictions on the services they use and ensure access to innovative and cost-effective cloud solutions without compromising on security controls, privacy or auditing capabilities.

Taking inspiration from the UK's Public Procurement Act, the Commission could also encourage Member States to incorporate some of the following innovations:

- Digital platforms that compile new procurement notices and allow suppliers to store their data for future bids.
- Obligations for contracting authorities to provide detailed feedback to all bidders following a standardised template to help tenderers understand award decisions and award criteria.
- More transparency related to the future pipeline of procurement notices and contract change notices.

Public procurement and European competitiveness

Non-price criteria

Non-price criteria (NPC) are emerging as a popular policy tool to ensure that ranking addresses non-price economic factors that may not be acknowledged in MEAT analyses. The use of NPC varies across sectors; they are frequently used in technology procurement and less often in the pharmaceutical sector.

NPC, when properly designed, can help ensure that a bid captures all relevant aspects of a project. These may include resiliency and innovation criteria, as well as sector-specific criteria such as cybersecurity and digital resilience. The highest-quality and most future-proof options can create more value for contracting authorities than the lowest-cost one.

In the pharmaceutical sector, many authorities have not adopted NPC and instead use less advantageous tenders simply because they are cheaper. In Denmark, for example, the refusal to include NPC in an auction led a biosimilars and generics-focused company to win a national tender to supply a certain product because their bid was the lowest price. However, the company was unable to ensure consistent supply of the product, which led to shortage risks, potentially impacting patients. As a result, authorities decided to share the national tender with another company. This example demonstrates the need to have multiple suppliers in tenders to avoid over-reliance on a single supplier. Tenders should also take into account the demonstrated robustness and resilience of bidders' supply chains instead of just the price offered.

As ‘resiliency’ continues to take on political overtones, it is vital that it be defined in a country-agnostic way and not be used to discriminate against US companies.

In the cloud computing sector, for example, EU governments and public agencies need to have a broad choice of cloud providers that are best-in-class in privacy and security, comply with European legislation and follow internationally recognised standards or apply voluntary certifications (eg the ISO 27001 series) and European best practices (eg the EU Cloud Code of Conduct or the Cloud Infrastructure Service Providers in Europe Code of Conduct). Geographical criteria and requirements, like data localisation or EU headquartering or ownership requirements, do not enhance the security of the service or its data but rather restrict choice, innovation and resilience in Europe’s economy.

Contracting authorities are increasingly introducing economic NPC relating to cybersecurity, sustainability and environmental criteria. Environmental and sustainability criteria, for example, are playing a more important role in procurement due to their relevance to businesses’ corporate responsibility and sustainability strategies as well as Member States’ access to Resilience and Recovery Funds and adherence to international commitments. Likewise, particularly in the case of award criteria related to environmental, social and governance (ESG) standards, contracting authorities often diverge in the certification and documentation they request to demonstrate applicants’ compliance.

While the PPD should allow contracting authorities to decide whether environmental and sustainability criteria make sense for a particular option, the Commission could support convergence by introducing a shortlist of international standards and best practices suitable for use as award criteria and engage private sector stakeholders in identifying which standards are most applicable to each industry. The Commission should also establish mutual recognition of national ESG certification.

However, overcomplicating procurement with too many competing policy objectives would only introduce more bureaucracy, undermining European competitiveness and potentially counteracting the benefits of any procedural simplification. In particular, the Commission should resist pressures to introduce potentially discriminatory geographical criteria. Redesigning the PPD to address industrial policy priorities may undermine the effectiveness of the procurement process as well as complicate the bidding process and skew ranking against the most advantageous tender. Geographical NPC are a likely tool for this, which would favour bids with certain national labels or indices, as well as reward local employment, content and other nexuses.

The EU already has a broad toolbox to address geopolitical and industrial policy goals, including new investment screening and foreign subsidy rules. Instead of using the PPD to solve for issues addressed by these tools, the Commission should focus on reinforcing the efficiency and effectiveness of public procurement to ensure that European public authorities can continue to rely on best-in-class and competitive technology and services as it invests in building and reinforcing the infrastructure that underpins Europe’s growth and economic prosperity. This requires the Commission to clarify and harmonise the use of NPC while actively ensuring that implicitly discriminatory criteria are not used against foreign tenderers, particularly from GPA signatory states.

‘Buy European’ and national security exceptions

There is much discussion about injecting ‘Buy European’ requirements into public procurement and using other procedures, like security exemptions, to favour EU-headquartered tenderers over US-headquartered ones.

While national security is vital, most US-headquartered companies active in procurement have operated in Europe for decades and employ European workforces to build European products that are vital for European supply chains. Therefore, these US-headquartered companies should be recognised as European companies – that simply have American parentage.

US investment in the EU totals €2.7 trillion – three times the amount of US investment in the entire Asia-Pacific region. Discriminating against US companies in Europe for the sake of security is counterproductive to the EU’s resilience goals as it limits procurers’ access to best-in-class technologies on the basis of companies’ parentage. It would also slow down industrial decarbonisation, increase costs and reduce the efficiency of the clean transition, particularly in procurement markets. Similarly, this approach would have broader economic consequences by negatively impacting the European workers who make up the vast majority of US companies’ EU-based workforces, as well as the vast ecosystem of European partners and contractors who are active in US companies’ supply chains.

Protecting national security in procurement should start by ensuring that auctions are calibrated to selecting the highest-quality products and not the cheapest, regardless of if the bidder is headquartered in the EU or the US.

Conclusion

The modernisation of the PPD is essential for enabling the EU’s public sector to drive digital transformation, improve efficiency and remain globally competitive. By embracing AI and cloud technologies, streamlining procurement processes and fostering an open and competitive market, the EU can ensure that public procurement becomes a tool for economic growth rather than an administrative bottleneck.

A procurement framework that prioritises transparency, standardisation and adaptability would not only enhance service delivery but also strengthen Europe’s digital sovereignty and security.