


Third country bidders and goods in the EU procurement market

On 24 July 2019 the European Commission issued 'Guidance on the participation of third country bidders and good in the EU procurement market' which provides practical advice to EU contracting authorities on how to deal with bidders from outside of the EU.

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On 24 July 2019 the European Commission issued '**Guidance on the participation of third country bidders and goods in the EU procurement market**' which provides practical advice to EU contracting authorities on how to deal with bidders from outside of the EU. In light of Brexit this is particularly pertinent for UK companies. The guidance is the first deliverable of the **10 actions set out by the European Commission** ('**EU-China – A strategic outlook**') and supported by the European Council.

"ACTION 7:

To ensure that not only price but also high levels of labour and environmental standards are taken into account, the Commission will publish guidance by mid-2019 on the participation of foreign bidders and goods in the EU procurement market. The Commission, together with Member States, will conduct an overview of the implementation of the current framework to identify shortcomings before the end of 2019."

The European Union has an open procurement market, which is the largest in the world, with an estimated annual value of €2 trillion – representing a significant part of the EU economy. The EU wide publication of tenders ensures transparency and creates opportunities for companies across the EU.

EU and Non-EU bidders

Prior to the guidance, 3rd country bidders, goods and services were not always bound by the same standards as those applied to economic operators within the EU, nor are they subject to the same state aid rules. The effect of this is that EU bidders may face a disadvantage.

The intention of this new guidance is that better implementation of the rules in cases involving foreign (non-EU) bidders will ensure high quality standards, value for money, sustainability of projects and a level playing field better EU and non-EU companies who participate in the tender procedures. Clearly, this will be an important consideration for UK companies should we leave the EU on 31st of October particular if no deal has been agreed.

"All bidders – European or foreign – have to play by the same rules. Public buyers may use the flexibility of the legal framework to set and enforce high social, environmental and other quality standards for all bidders, regardless of their origin. This creates a balance between them."

- Elżbieta Bieńkowska, Commissioner.

Guidance for buyers

The guidance seeks to help contracting authorities to review bids efficiently.

Access by foreign bidders

- **International procurement agreements**

Buyers should check whether any third country bidder who expresses an interest in their tender is covered by a GPA or bilateral agreement.

If the bidder is not covered then they do not have secured access to procurement procedures in the EU.

Procurements under such agreements still have to respect the Treaty principles of transparency, equal treatment and non-discrimination and contracts may not be awarded directly.

- **Defence and security procurements**

Such procurements are not included in international procurement agreements and public buyers do not have to give access to such procurement to third country bidders.

- **Procurements under the utilities directive**

Article 85 of Directive 2014/25/EU sets out a specific regime for tenders comprising of products originating in 3rd countries. Public buyers operating in the water, energy, transport and postal services sectors may reject supply contracts if the tender comprises of over 50% of the total value of the products.

If instead of rejecting such a tender the buyer allows its participation the buyer is required to give preference to equivalent tenders with less than 50% of the products originating in third countries.

Rejecting abnormally low offers

The Commission have used the guidance to remind contracting authorities about the possibilities under the EU procurement regime to reject offers that appear to be unjustifiably low.

The guidance provides a checklist of considerations both on receipt of a bid and when seeking to reject a bid.

It should be noted that these provisions apply to all tenders, regardless of whether the bidding companies are established in the EU or not.

Quality based procurement

The guidance reiterates the importance of strategic procurement which puts innovation, social responsibility and sustainability at its heart.

The guidance provides examples of such procurement and sets out how authorities may procure in this way.

It should be noted that these provisions apply to all tenders, regardless of whether the bidding companies are established in the EU or not.

Practical assistance from the European Commission

The guidance serves as a reminder of the practical assistance that the European Commission offers to both public authorities as buyers and to Member States.

- A helpdesk and notification process is available for large infrastructure projects.
- Regularly held, high level conferences, on various thematic issues including: award criteria, strategic procurement, transparency, professionalism and large infrastructure.
- Network of stakeholders on green and social procurement and professionalism.
- E-competence centre offering support tools for contracting authorities.
- Guidance issued on various subjects, including innovation procurement, green public procurement, social procurement, defence procurement.

Whilst not specifically Brexit related, it is an important guidance note for UK companies as to how they may be treated if the UK leaves the EU particularly without a deal. Prior to that time, contracting authorities should make sure they have been through this guidance in case any of their procurements may involve bodies outside of the EU.

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