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Global Legal Group

The International Comparative Legal Guide to:

Public Procurement 2009

A practical insight to cross-border Public Procurement

Published by Global Legal Group with contributions from:

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

In the United States, federal procurement is generally conducted under a different legal structure than state and local procurement. Because of the focused nature of this work, and the importance of the market, the discussion here looks to the legal structure governing the first category of procurement -- procurement by the federal government -- which currently totals more than $400 billion per year.

In World Trade Organization Document No. GPA/23, delivered to the WTO Committee on Government Procurement ("WTO Committee"), dated July 15, 1998, and available at http://www.wto.org, the United States provided a review of its rules and laws applicable to procurement.

In World Trade Organization Document No. GPA/50, delivered to the WTO Committee, dated June 15, 2001, and available at http://www.wto.org, the United States responded to the questions put to the delegation of the United States. The document sets forth the responses given and comments made during the review of national implementing legislation. *Id.*

The discussion below refers to these WTO documents respectively as "WTO Document No. GPA/23" and "WTO Document No. GPA/50."

WTO Document No. GPA/23 outlines the following aspects of the rules governing federal procurement:

> The Federal Acquisition Regulation (FAR) System codifies and publishes uniform policies and procedures for acquisition by all United States executive agencies (central government entities). The FAR System consists of the FAR, which is the primary legal document, and agency specific acquisition regulations that implement or supplement the FAR.

The United States cited, inter alia, the following laws and regulations relating to federal government procurement, beyond the Federal Acquisition Regulation (48 Code of Federal Regulation parts 1 99), and the agency supplements to the Federal Acquisition Regulation:

- The Armed Services Procurement Act (10 U.S. Code §§ 2301 et seq.).
- The Federal Property and Administrative Services Act (40 U.S. Code §§ 471 et seq. and 41 U.S. Code §§ 251 et seq.).
- The Office of Federal Procurement Policy Act (41 U.S. Code §§ 401 et seq.).

These leading statutes, and their implementing regulations, can be located electronically by accessing various online databases, including the databases available through http://www.findlaw.com.

1.2 How does the regime relate to supra-national regimes including the GPA and/or EC rules?

The position of the United States is that the federal procurement regime conforms with the Government Procurement Agreement. The European Commission's rules have no bearing on U.S. federal procurement law.

1.3 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The leading principles governing U.S. procurement are integrity, transparency and competition. Other important governing principles include socioeconomic goals (roughly 23 percent of all federal contracting dollars, for example, are to go to small businesses), uniformity in procurement regulations (since 1984 almost all executive agencies have followed a common Federal Acquisition Regulation, for example), and accountability (federal contracts are, for example, regularly subject to audit by the U.S. Government Accountability Office). *See generally* Steven L. Schooner, Desiderata: *Objectives for a System of Government Contract Law*, 2002 Pub. Proc. L. Rev. 103, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620.

1.4 Are there special rules in relation to military equipment?

U.S. military procurement of equipment and other materiel, generally effected through the U.S. Department of Defense and its constituent agencies, is subject to the same general statutes and regulations cited above, including the Federal Acquisition Regulation which governs all federal executive agency procurements. The Defense Department and its constituent agencies have developed supplements to the Federal Acquisition Regulation (for example, the Defense Federal Acquisition Regulation Supplement (DFARS), which governs all Defense Department procurement); those supplements, however, are by definition subordinate to, and fully consonant with, the master Federal Acquisition Regulation. Agency subordinate supplements to the Federal Acquisition Regulation are available online at http://farsite.hill.af.mil, a website maintained by the U.S. Department of the Air Force.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law and is it possible to obtain a ruling on this issue?

All executive agencies are governed by the general statutes and regulations cited above, with certain narrow exceptions. The Federal Aviation Administration, for example, has been made generally exempt from general federal procurement law and has its own separate procurement law structure. Those exceptions are viewed with strong disfavor, however, under the general principle of uniformity discussed above. Coverage of agencies by federal procurement law is generally subject to independent review.

2.2 Which private entities are covered by the law and is it possible to obtain a ruling on this issue?

Private persons are governed by federal procurement law insofar as their actions are governed by federal procurement requirements. Most vendors engaged in federal procurement are, for example, required to institute corporate compliance programmes that ensure that violations of federal civil and criminal laws will be disclosed to the government. Coverage of private persons by federal procurement law is also subject to independent review.

2.3 Which types of contracts are covered?

The Federal Acquisition Regulation covers all contracts for goods, services, and works (generally referred to as "construction" contracts under U.S. law).

2.4 Are there threshold values for determining individual contract coverage?

In contrast to the use of thresholds under the European procurement directives, the federal procurement legal regime applies directly to all contracts. That said, there are important thresholds of which vendors need to be aware. For example, the nondiscrimination afforded goods and services from other signatory nations to the WTO Government Procurement Agreement applies only when the procurement is above a certain threshold amount, currently $194,000 for goods. *See generally* Federal Acquisition Regulation Subpart 25.4, 48 C.F.R. Subpart 25.4; Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 36 Georgetown J. Int'l L. 529 (2007). There are also important thresholds that govern application of socioeconomic rules; all contracts below $100,000, for example, are presumptively to be awarded to small businesses. *See generally* Federal Acquisition Regulation Part 19, 48 C.F.R. Part 19.

2.5 Are there aggregation and/or anti-avoidance rules?

As a matter of law, U.S. federal agencies are not to disaggregate procurements in order to avoid legal thresholds. As a matter of practice, however, U.S. procurement officials are highly conscious of applicable thresholds, which may have a material impact on procurement planning. Agency action in this regard is subject to independent review.

2.6 Are there special rules for concession contracts?

The U.S. federal law regarding concession contracts continues to evolve. *See, e.g., National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803 (2003) (Supreme Court held that question of whether agency could exempt its concession contracts from the Contract Disputes Act was not yet ripe for review). Generally speaking, to enhance certainty in applicable law and procedure, as a practical matter vendors in the U.S. federal system will prefer that concession contracts come under the highly developed legal regime for U.S. claims and disputes, under the Contract Disputes Act.

3 Procedures

3.1 What procedures can be followed, how do they operate and is there a free choice amongst them?

There are myriad procedures available for federal procurement, ranging from formal tendering (generally referred to as "sealed bidding") to negotiated procurements (analogous to "competitive dialogue" under the European directives). Practically speaking, the leading forms of procedure are sealed bidding (under Federal Acquisition Regulation Part 14), negotiated procurement (Federal Acquisition Regulation Part 15), and "indefinite-delivery/indefinite-quantity" contracts, which are known as "framework agreements" under the European directives (generally governed by Federal Acquisition Regulation Subpart 8.4 (for agreements overseen by the U.S. General Services Administration) and Federal Acquisition Regulation Part 16 (for agreements overseen by other agencies). There are also streamlined procedures available for certain procurements, especially commercial-item procurements, under Federal Acquisition Regulation Part 12. Agencies have substantial discretion in their choice of procurement procedures.

The questions and discussions below focus on tendering procedures. As a practical matter, however, formal tendering (known in the U.S. federal system as "sealed bidding" is now used in only a small minority of federal procurement. Detailed statistical information on federal procurement is available through the Federal Procurement Data System, at https://www.fpds.gov/. A January 2007 study by a distinguished commission on procurement reform, the Acquisition Advisory Panel, available at http://www.acquisition.gov/comp/aap/24102_GSA.pdf, included extensive statistical reviews of various methods of procurement, and concluded that IDIQ contracting (or "frameworks," as it is known in the European directives) is a rapidly growing method of procurement in the U.S. federal procurement system.

3.2 What are the rules on specifications?

Specifications must be drafted to ensure maximum practicable competition, as the U.S. Government Accountability Office (formerly the U.S. General Accounting Office) has confirmed in a long line of precedents in remedies procedures (called "bid protests" under U.S. federal procurement law) under the Competition in Contracting Act of 1984, 10 U.S.C. § 2301. *See, e.g., Military Waste Management, Inc.*, Comp. Gen. B-240769 et al., 91-1 CPD para 135 (1991) ("it is a general rule of federal procurement that specifications should be drafted in such a manner that competition is maximised unless a restrictive requirement is necessary to meet the government's legitimate minimum needs").

3.3 What are the rules on excluding tenderers?

Federal Acquisition Regulation 14.301, 48 C.F.R. § 14.301, provides that to be considered for an award, a bid must comply in all material respects with the invitation for bids. Per Federal Acquisition Regulation 14.103-2, in a sealed bidding (tender) procedure, an award is to be made to the responsible bidder (as defined by Federal Acquisition Regulation Subpart 9.1, 48 C.F.R. Subpart 9.1) (analogous to "qualified" bidder in other procurement systems) whose bid is responsive to the terms of the invitation for bids (the invitation for tenders, or solicitation) and is most advantageous to the government, considering only price and the price-related factors included in the invitation, per Federal Acquisition Regulation Subpart 14.4, 48 C.F.R. Subpart 14.4. Bidders who are not "presently responsible," debarred, suspended, proposed for debarment or declared ineligible may not receive award, per Federal Acquisition Regulation 9.4, 48 C.F.R. Part 9. In addition, there are procedures to allow an agency to establish pre-qualification requirements, which could have the effect of excluding nonqualified offerors. Federal Acquisition Regulation Subpart 9.2, 48 C.F.R. Subpart 9.2.

3.4 What are the rules on short-listing tenderers?

Federal Acquisition Regulation Subpart 14.5 describes a "two-step sealed bidding" process, specifically as follows in section 14.501:

14.501 General.

> Two-step sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. An objective is to permit the development of a sufficiently descriptive and not unduly restrictive statement of the Government's requirements, including an adequate technical data package, so that subsequent acquisitions may be made by conventional sealed bidding. This method is especially useful in acquisitions requiring technical proposals, particularly those for complex items. It is conducted in two steps:
>
> (a) Step one consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal. No pricing is involved. The objective is to determine the acceptability of the supplies or services offered. As used in this context, the word "technical" has a broad connotation and includes, among other things, the engineering approach, special manufacturing processes, and special testing techniques. It is the proper step for clarification of questions relating to technical requirements. Conformity to the technical requirements is resolved in this step, but not responsibility as defined in 9.1.
>
> (b) Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Bids submitted in step two are evaluated and the awards made in accordance with Subparts 14.3 and 14.4.

The conditions for use of two-step sealed bidding are set forth in Federal Acquisition Regulation 14.502. In practice, however, federal agencies very seldom use this procurement method. If a procurement presents performance uncertainties that make traditional sealed bidding unattractive, agencies are much more likely to use a negotiated procurement (analogous to a "competitive dialogue" under European procedures), per Federal Acquisition Regulation Part 15.

3.5 What are the rules on awarding the contract?

The rules for awards of contract under sealed bidding procedures are set forth in Federal Acquisition Regulation Subpart 14.4, 48 C.F.R. Subpart 14.4. The rules governing awards of contracts under negotiated procedures (analogous to competitive dialogue) are set forth at Federal Acquisition Regulation Subpart 15.3, 48 C.F.R. Subpart 15.3. The rules governing awards of contracts under Multiple Award Schedule contracts (a form of "frameworks" agreement administered by the U.S. General Services Administration) are set forth in Federal Acquisition Regulation Subpart 8.4, 48 C.F.R. Subpart 8.4. There are other rules governing award, such as those for simplified procurements under Federal Acquisition Regulation Part 13, 48 C.F.R. Part 13. Each of these sets of rules may be supplemented by agency-specific supplements to the Federal Acquisition Regulation.

3.6 What methods are available for joint procurements?

The term "joint procurement" is not used in U.S. federal procurement. An analogous concept, "cooperative purchasing," through which, for example, state and local governments may purchase through contracting vehicles sponsored by the federal government, is growing in importance in U.S. procurement. Further information, for example, on efforts of one centralised purchasing agency, the U.S. General Services Administration (broadly analogous to the United Kingdom's Office of Government Commerce) to encourage cooperative purchasing is available at http://www.gsa.gov/cooperativepurchasing.

3.7 What are the rules on alternative bids?

Federal Acquisition Regulation 14.404-2, 48 C.F.R. § 14.404-2, addresses how alternate bids may be handled in a formal tendering process, under U.S. procurement rules.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

The exclusion of "in-house" procurements from general European procurement rules was described as follows:

> Defining the exact scope of "in-house" arrangements has proved to be one of the most controversial and ambiguous topics of public procurement law. A contracting authority may either use its own resources to perform public tasks "in-house" or conclude a contract with a separate legal entity following a tender procedure. Whether the maintenance of a municipal building, for instance, is assigned to an "in-house" unit or "contracted out" to a third entity plays a decisive role on the application of the EC public procurement rules. Consequently, the delimitation of "in-house" relations is of high practical relevance for contracting authorities and economic operators throughout the European Union.

Fotini Avarkioti, *The Application of EU Public Procurement Rules to "In House" Arrangements*, 2007 Pub. Proc. L. Rev. 22.

There is no broadly analogous concept in U.S. procurement law. If a contracting authority in the U.S. federal system purchases goods or services, that procurement will generally be subject to the U.S. procurement rules; there is no recognised exception for "in-house" work. All functions that are "inherently governmental" must be performed by government employees, but other work can be performed by contractors, and may be outsourced.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

If one agency procures goods or services through another, that procurement may be subject to the Economy Act. See Federal Acquisition Regulation Subpart 17.4, 48 C.F.R. Subpart 17.4. There are, however, many other means of interagency procurement, under other statutory authorisations.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to *locus standi*?

In its submission to the WTO Committee on Government Procurement, WTO Document No. GPA/23, supra, the United States described its remedies process ("protest" procedures, in the U.S. federal procurement lexicon), as follows:

> 13. *Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.*

The United States General Accounting Office [now renamed the U.S. Government Accountability Office] is authorised under 31 U.S. Code §3552 to hear protests. The GAO has promulgated procedures for the filing of protests; these regulations are found at Title 4 of the Code of Federal Regulations, Part 21 [and are available at http://www.gao.gov]. In addition, suppliers and potential suppliers may protest directly to the procuring agency. In 1995, President Clinton ordered all agencies to establish alternative dispute resolution procedures for bid protests in Executive Order No. 12979 (60 Fed. Reg. 55171 (1995)). Thus, all agencies are directed to create systems that allow for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Suppliers may also take protests to United States federal courts under 28 U.S. Code §1491, although most suppliers prefer to use the GAO and procuring agency procedures because they are less costly and less disruptive to the procurement process.

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

As the response of the United States to the WTO, quoted above in question 5.1, reflects, a disappointed offeror may seek relief in:

- Government Accountability Office.
- U.S. Court of Federal Claims (per 28 U.S.C. § 1491).
- Procuring agency (per Federal Acquisition Regulation Subpart 33.1, 48 C.F.R. Subpart 33.1).

5.3 Before which body or bodies can remedies/enforcement be sought?

Aside from those fora enumerated in question 5.2, above, a contractor under an IDIQ contract (a "framework" agreement, in European terms) that has been denied a fair opportunity to compete may seek relief under a theory of breach of contract. This is a very novel approach under U.S. procurement law, and has not been extensively treated under the case-law.

5.4 What are the legal and practical timing issues raised if a party wishes to make an application for remedies/enforcement?

For most vendors, as the U.S. submission quoted above (question 5.1) suggests, the favored forum is the Government Accountability Office, for a number of practical and legal reasons. If a timely protest is brought at the GAO (generally within 10 days after award, or within 5 days after a required debriefing), by law the agency must presumptively stay the procurement during the pendency of the protest. *See* 31 U.S.C. § 3553; Ralph C. Nash, *The Protest Role of the Government Accountability Office: An Assessment*, 22 Nash & Cibinic Rep. para 27 (2006).

5.5 What remedies are available after contract signature?

All remedies are equally available after contract signature; the restraints on remedies after contract signature that are a recurring issue in European procurement law do not arise under U.S. federal procurement law, which allows agencies to take broad remedial actions even after contract signature. In its submission to the WTO Committee on Government Procurement, the United States described the remedies available through GAO (now the Government Accountability Office) procedures as follows:

> (v) *How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?*

If the GAO determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation, it must recommend that the contracting agency implement any combination of the following remedies:

- refrain from exercising options under the contract;
- terminate the contract;
- recompute the contract;
- issue a new solicitation;
- award a contract consistent with statute and regulation; or
- such other recommendation(s) as GAO determines necessary to promote compliance.

If the GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the contracting agency pay the protester the costs of:

- filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees; and
- bid and proposal preparation costs.

WTO Document No. GPA/23, *supra*.

In only very rare instances does an agency fail to follow GAO's recommendation.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

By statute, a protest at the GAO must be resolved within 100 days after filing. An agency-level protest, brought at the procuring agency, may as a practical matter take several months to resolve, although the governing regulation requires that agencies "shall make their best efforts to resolve agency protests within 35 days after the protest is filed." Federal Acquisition Regulation 33.103(g), 48 C.F.R. § 33.103(g). Protests brought at the U.S. Court of Federal Claims are not subject to a fixed schedule, and may extend over several months. Whether to stay the procurement pending such a protest is discretionary with the judge hearing the matter at the U.S. Court of Federal Claims.

5.7 Is there a culture of enforcement either by public or private bodies?

There is a strong culture of enforcement among vendors in the U.S. system. Over 1,000 protests are brought every year in the Government Accountability Office; over 1,300 were brought in fiscal year 2007 alone. *See* http://www.gao.gov/special.pubs/bidpro07.pdf. That said, there are millions of contracting actions every year in the U.S. federal procurement system, so clearly only a small percentage are ever protested.

There is a strong and growing focus of U.S. enforcement agencies on misconduct by contractors who offer or supply goods/services to the U.S. government.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

Unlike the European Union, where remedies and enforcement issues are being significantly shaped by judicial rulings, in the United States the law regarding the protest process is more mature and quite extensive, and so individual rulings are relatively less important.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?

Unlike many other countries' procurement systems, the U.S. federal procurement system has extensive and specialised rules and case-law directly governing contract administration, including changes to specifications, schedule changes, and changes to contract terms. *See generally* Ralph Nash, John Cibinic, Jr. & James Nagle, *Administration of Government Contracts* (4th ed. 2006).

6.2 In practice, how do purchasers and providers deal with these issues?

Contract administration issues are generally first dealt with, in practice, through a request for equitable adjustment, directed by the contractor to the cognizant contracting officer. If the agency demurs, then the contractor may submit a formalised claim, which in practice generally tracks the prior request for equitable adjustment. The contracting officer must grant or deny the claim; if denied, the claim may then be appealed by the contractor, either to the U.S. Court of Federal Claims or to a board of contract appeals (civilian or defence). The decision of the court or the board may be appealed by right to the U.S. Court of Appeals for the Federal Circuit; appeals from that court are discretionary, by writ of certiorari, to the U.S. Supreme Court.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

There are no special rules regarding privatisation in the U.S. federal system; instead, these actions are addressed through a myriad of statutes and regulations relating to procurement law, fiscal law, and government property. In practice, individual privatisation efforts are left to the discretion of the relevant agency. Outsourcing of work previously performed by federal employees is governed by OMB Circular A-76, "Performance of Commercial Activities."

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

Public-private partnerships are not yet common in the U.S. federal system. There are no special rules on point, although budgetary pressures in the coming years are likely to spur the use of public-private partnerships among U.S. federal agencies.

8 Other Relevant Rules of Law

8.1 Are there any related bodies of law of relevance to procurement by public and other bodies?

General statutes governing administrative and criminal law are regularly applied in U.S. federal procurement, as are general laws regarding disclosure of public information.

9 The Future

9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Federal procurement law in the United States is constantly evolving. For example, the defence authorisation legislation passed by Congress every year typically includes important changes to all agencies' procurement laws. Important developments in procurement reform are tracked by a number of publications, including the *Government Contractor* (Thomson/West) and *Federal Contracts Reports* (BNA). A leading, if informal, source of information on reform is the website at http://www.pubklaw.com.

Indefinite-delivery/indefinite-quantity (IDIQ) contracts, known as "framework" agreements outside the United States, are the current subject of debate. For example, the law regarding the remedies (protests) available for IDIQ contracts is rapidly changing. The previous U.S. federal law was described by the United States in its response to the WTO Committee, WTO Document No. GPA/50, *supra*, at 9. Generally speaking, orders under IDIQ contracts were immune from protest. Because of concerns regarding accountability, competition, transparency and integrity in IDIQ contracting, Congress has opened the door to protests (remedies) of larger awards under standing agreements (task and delivery orders). This movement to open IDIQ contracts to normal remedies and review is likely to continue. *See, e.g.*, Christopher R. Yukins, *Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting*, 37 Pub. Cont. L.J. 545 (2008).

Special Acknowledgement

Special acknowledgement is due Christopher Yukins, Associate Professor of Government Contract Law and Co-Director of the Government Procurement Law Program at The George Washington University Law School, in Washington, D.C., who was invaluable in preparing this summary. In private practice, Professor Yukins has been an associate, partner and of counsel at leading national and international firms; he is currently of counsel to the firm of Arnold & Porter LLP.

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