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EU-US NEGOTIATIONS ON PUBLIC PROCUREMENT

Summary

Agreement on expanding the GATT Government Procurement Agreement (GPA) was reached in Geneva in December 1993. It will come into force at the beginning of 1996. The previous agreement was concluded during the Tokyo Round in 1979, and came into force in 1981. That agreement covered only the purchase of goods at central government level (Category A). The new agreement is a much more ambitious one, however, and will cover the procurement of goods, services and construction at the central government level, at local government level (Category B) and in a number of utilities sectors (Category C). In value terms, the 1996 GPA will be more than ten times larger than its predecessor, creating market opportunities in the EU and third countries of around ECU 350 billion a year. The GPA was agreed between 23 countries: the twelve from the EU, five from EFTA, the US, Japan, Canada, Korea, Hong Kong and Israel. The EU has also concluded an extensive agreement with the US on procurement, worth around $200 billion, most of which will be made available to other parties through the GPA. However, during bilateral negotiations, the EU and US could not agree a deal covering telecommunications procurement as the US was unable to remove all Buy America restrictions on federally-funded programmes.

Background

The impetus behind the new GPA was the Memorandum of Understanding agreed between the EU and the US in May 1993. Following the breakthrough, talks restarted in earnest between all parties with a view to completing negotiations on expanding the GPA by the 15 December deadline. This was achieved, though there were a number of exemptions built into the final deal. In essence, the deal that was struck was on the basis of MFN in Category A, and on the basis of reciprocity in Categories B and C. The EU was able to conclude substantial deals with all signatories and in all Categories, except with the US and Canada, by 15 December. There was complete agreement amongst parties on Category A, where all agreed to offer the totality of their respective central government entities in the Code. However, at B level, it was recognised by the EU that not all parties were willing or able to offer all sub-central government entities and bodies governed by public law (i.e. those entities, such as the Housing Corporation in the UK, that are not directly controlled by government, but which are subject to the EU directives on public procurement). Where the offers of other parties did not match the completeness of coverage being offered by the EU, we reduced our offer accordingly.

In Category C (utilities sectors), access will be granted to EU utilities sectors (electricity, water, urban transport, ports and airports) only where a party is prepared to offer "comparable and effective" access to the EU in that sector, as is stipulated in Article 36 of the consolidated Utilities Directive. This meant that the EU agreed to open its electricity generating sector to EFTA (which already has access under the EEA), Israel and Korea (and the

US - see below).However, in the water sector, contracts let by water authorities in the EU would be open to bids from all GPA signatories except the US and Canada. The reciprocity rule was also applied to services in all Categories. It was also agreed with other parties that, despite their failure to offer access to some utility sectors, talks would continue on a bilateral basis until 1996 with a view to reaching agreement on completing coverage across all utility sectors.

The deal that the EU was able to strike with the US in Geneva covered Category A only. The EU rejected the US offer on B and C as insufficient. It was agreed that negotiations would continue until 15 April with the US on Categories B and C. Talks would run concurrently on an agreement with the US on telecoms outside the GPA. As these talks continued, Deloitte and Touche were carrying out their report to assess bidding potential on both sides of the Atlantic, as agreed under the MoU. The figures in the report, which has now been finalized, show the EU to be by far the greatest provider of opportunities in the procurement market. It demonstrates that the Category A offers of both sides are roughly balanced at around ECU 42 billion. On Category B, the EU are at ECU 80 billion against ECU 20 billion for the US (four times larger), and on Category C the EU figure is ten times that of the US (ECU 30 billion against ECU 3 billion). The US has accepted these figures.

EU-US bilateral agreement

Following discussions in Brussels over the weekend of 9-10 April, both sides met again in Marrakesh during the signing ceremony for the Uruguay Round. A conclusion was finally reached on 13 April, and the legal text of the agreement was initialled alongside the rest of the Uruguay Round on 15 April. The deal was far more comprehensive in coverage than both sides had at one time thought possible, and covered sectors in all Categories. The agreement is already being seen as a classic case of moving from position bargaining to agreement on the basis of objectives and interests. The first three years of negotiations had involved little more than mutual recriminations until the Commission moved to broaden the agenda in the wake of the signing of the MoU. DG XV put together a vast array of different options and scenarios for agreement and presented them in negotiations and agreement was finally reached on the basis of the 22nd option that DG XV proposed. The US agreed to the deal which was made up of the following elements:

- on Category A, the coverage of central government entities agreed during the MoU was reconfirmed. The annual value of procurement opportunities here is $50-55 billion each;

- on Category B, the US offered to bind 37 states in the GPA (including California, New York and Texas), and offered national treatment on two others. The states not offered by the US are for the most part states which do not have any protectionist procurement legislation in any case. The US also offered to grant national treatment in 7 cities, including Chicago, Detroit, and Boston, and the utilities sectors controlled by those cities (such as Chicago O'Hare airport). The annual value of procurement here is around $21-24 billion each;

- on Category C, the US agreed to put the New York/New Jersey Port Authority (which includes JFK, La Guardia and Newark airports) and Baltimore port into the GPA. The US also agreed to give national treatment on the Massachusetts Port Authority (which includes Boston Logan airport). In return the EU agreed to waive Article 29 on procurements by ports in the EU as regards the US. However, the EU excluded from this dredging services and procurements related to shipbuilding. The annual value of procurement here is $0.5-1 billion each;

- on the electrical sector, the US agreed to add procurement of services to the procurement of goods and construction already covered by the MoU. The US also added procurements by the New York Power Authority, and agreed to waive 'Buy America' restrictions on projects financed by the federal Rural Electrification Administration fund. The EU will continue to disapply Article 36 against the US in teh electrical sector. The annual value of procurements covered here is 25-30 billion each;

- the US also agreed to cooperate with the EU to improve transparency in its procurement practices. This is so that the relevant tender notices in the US make clear to international bidders that procurement opportunities are open to them;

- procurement of telecommunications equipment was not dealt with in this agreement, as the US was unable to remove sufficient Buy America clauses from federally-funded programmes. Although Buy America was waived on the REA and all procurements (except for steel) under the Federal Highways programme, Buy America restrictions will remain in place for the urban transport, waste water and airport improvement funds.

Conclusion

This was a very successful deal for the EU, which gained access to the lion's share of sub-central procurement in the US and opened up transatlantic bidding opportunities worth more than $200 billion. The deal should provide a significant boost to EU-US trade. EU companies should now begin to modify their approach to the public sector market in the US, and prepare for increased competition from US companies operating in the EU.