



THE GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL

GW Law School Public Law and Legal Theory Paper No. 2014-36

GW Legal Studies Research Paper No. 2014-36

Breaking the Impasse in the Transatlantic Trade and Investment Partnership (TTIP) Negotiations: Rethinking Priorities in Procurement

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July 23, 2014

The Government Contractor, Vol. 56, No. 27 / July 23, 2014

This paper can be downloaded free of charge from the SOCIAL SCIENCE RESEARCH NETWORK:
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THE GOVERNMENT CONTRACTOR[®]



THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 56, No. 27

July 23, 2014

Focus

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FEATURE COMMENT: Breaking The Impasse In The Transatlantic Trade And Investment Partnership (TTIP) Negotiations: Rethinking Priorities In Procurement

Last year, the European Union and the U.S. embarked on ambitious negotiations to establish a new free trade area under the Transatlantic Trade and Investment Partnership (TTIP). Now, according to numerous press reports, the TTIP negotiations are foundering because of the U.S.' unwillingness to yield to European demands to open U.S. procurement markets further. The equivocal comments offered by the U.S. and European chief negotiators as the latest round of TTIP negotiations closed on July 18, 2014 did nothing to dispel concerns that the parties have deadlocked on procurement. But it may be that impasse was predictable because of the structural obstacles to the European demands, and perhaps the impasse could be resolved—or at least eased—by a slight shift in the EU's negotiating position.

This FEATURE COMMENT suggests that instead of pressing to open “sub-central” (state and local) procurement markets directly, the EU might seek to leverage existing U.S. law to gain better access to procurements carried out, at sub-central levels, using federal grant dollars. And instead of pressing to remove explicit federal “Buy American” preferences, the Europeans may be better served to use TTIP to erect a permanent cooperative structure with the U.S., to resolve regulatory anomalies that themselves create burdensome—and often unnecessary—barriers to procurement markets.

TTIP and Procurement—When the TTIP negotiations began, the Europeans signaled that they might make important concessions in other market sectors (such as agriculture) in return for broader access to U.S. procurement markets at the federal, state and local levels. See, e.g., “Procurement, Ag Market Access at Fore in Froman-De Gucht TTIP Meeting,” *Inside U.S. Trade*, June 20, 2014, 2014 WLNR 16766051. The EU hoped to use the TTIP agreement to increase both sides' access to procurement markets, beyond the open markets already required by the World Trade Organization (WTO)'s Government Procurement Agreement (GPA). See generally Yukins, “The European Procurement Directives and the Transatlantic Trade & Investment Partnership (T-TIP): Advancing U.S.-European Trade and Cooperation in Procurement,” 2014 Gov't Contracts Year in Review Briefs 3. Though the U.S. and the EU are among the leading members of the GPA, the TTIP agreement was envisioned to be “GPA-plus”—a more advanced agreement, which (it was hoped) would point the way for future liberalization among the GPA's widening membership, as more developing nations (including China) move to join the GPA. See “EU Aims For New Coverage, ‘GPA-Plus’ Disciplines In TTIP Chapter,” *Inside U.S. Trade*, July 12, 2013, 2013 WLNR 16951445.

As they entered the TTIP negotiations, the EU sought, among other things, (1) broader access to U.S. sub-central procurement markets, and (2) a reduction in federal procurement preferences (commonly known as Buy American restrictions). See, e.g., European Commission, Directorate-General for Trade, “Note for the Attention of the Trade Policy Committee of the Council of the European Union re: Transatlantic Trade and Investment Partnership (TTIP)” (Doc. 238/13, June 21, 2012); Attachment: “EU-US FTA negotiations, Non paper on Public Procurement,” at 2 (June 20, 2012), available at www.iaatp.org/files/TPC-TTIP-non-Papers-for-1st-Round-Negotiations-June20-2013.pdf; Manuel, Dolan, Merrill and Perry, “Domestic Content Restrictions: The Buy American Act and Complementary Provisions

of Federal Law” (Cong. Res. Serv. No. R43354, Jan. 6, 2014).

These are lingering problems that European vendors face in U.S. procurement markets—stubborn domestic preferences at the state and local levels (despite many states’ free-trade commitments under the GPA), and an array of Buy American exceptions to the U.S.’ general commitments to open federal procurement markets. See, e.g., “TTIP—Progress in Public Procurement Is Key,” Targeted News Serv., May 20, 2014 (noting statement from BusinessEurope, an alliance of European business federations) (available on Westlaw); BusinessEurope, “Public Procurement in the Transatlantic Trade and Investment Partnership (TTIP),” Dec. 11, 2013, available at www.business-europe.eu. These key issues thus ultimately helped frame the European negotiating position. See, e.g., “Text On A/V, Procurement, Remedies, SOEs Altered In New Mandate Draft,” 31 Inside US Trade, No. 21, May 24, 2013, 2013 WLNR 12791882 (draft EU position on procurement in TTIP negotiations).

The Ambitious European Negotiating Strategy—Crafting a negotiating agenda around the more acute complaints of U.S. protectionism may have been a tactical mistake, however, for the EU’s more ambitious negotiating demands may well have been unattainable:

- *Broader Access to U.S. Sub-Central Procurement Markets:* As noted, one key European complaint has been that U.S. sub-central governments (state and local governments, primarily) have discriminated against European vendors. Gaining access to those sub-central markets is increasingly difficult, however. Partly as a result of pressure from organized labor and the American political left, see, e.g., “AFL-CIO, ETUC Urge Exclusion of Public Services in Joint TTIP Declaration,” Inside US Trade’s Daily Report, July 10, 2014, 2014 WLNR 18699297 (noting organized labor’s opposition to procurement provisions that would constrain state and local socioeconomic preferences); Public Citizen, “States’ Rights and International Trade: A Legislator’s Guide to Reinvigorating Federalism in the Era of Globalization” (Feb. 2007), state governments are now less likely to agree to broaden access to their procurement markets. The number of states willing to open their procurement markets under U.S. free trade agreements, for

example, has dropped dramatically, from the 37 that joined the GPA to the nine that joined the recent U.S.-Colombia free trade agreement. See Sheffler, “A Balancing Act: State Participation in Free Trade Agreements with ‘Sub-Central’ Procurement Obligations” (July 2014) (submitted for publication; manuscript on file with authors); WTO Doc. No. GPA/113, at 417-26 (2012) (states that have agreed to join GPA), available at www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm. Even if the Federal Government had the constitutional authority to force more states to open their markets—which the Federal Government denies, see generally Mehra, Note and Comment: “Federalism and International Trade: The Intersection of the World Trade Organization’s Government Procurement [Agreement] and State ‘Buy Local’ Legislation,” 4 B.Y.U. Int’l & Mgt. Rev. 179 (2008)—many states would likely be out of compliance with the GPA’s procedural requirements, see, e.g., National Association of State Purchasing Officers, “Research Brief: State Bid Protests” (not all states have GPA’s required remedy (bid protest) systems in place), www.naspo.org/documents/FINAL_NASPO_Bid-Protests_Research_Brief_042413.pdf. Further, some state and local governments, even if forced to open their procurement markets, might spend years waging a war of administrative resistance to foreign vendors. Immediate, sweeping access to sub-central markets is, in other words, a prize that the EU is unlikely to gain in the TTIP negotiations.

- *Eliminating Buy American Requirements in the Federal Market:* Nor are the European negotiators likely to persuade their U.S. counterparts to eliminate many of the Buy American requirements that pock the federal marketplace. See, e.g., “EU Announces TTIP Round Dates; Froman Says Deal Must Address Overfishing,” Inside US Trade’s Daily Report, June 19, 2014, 2014 WLNR 16617543 (noting U.S. reluctance to afford concessions on federal procurement preferences before November 2014 mid-term elections). These deeply rooted domestic preferences—such as the preference for U.S.-based small businesses, which helps keep foreign companies out of nearly a quarter of the \$500 billion federal procurement

market— are generally protected by sophisticated interest groups in the U.S. Congress. Those interest groups are, moreover, often aligned with the Obama administration’s political base. Charging hard at these preferences was, therefore, perhaps a quixotic effort.

Impasse in TTIP, and Possible Solutions—Although the original EU negotiating goals on procurement may have been doomed to failure, the risks they posed were largely lost in the din of a much broader TTIP negotiating effort. Now, however, these problems with procurement have come to the fore, and may delay the entire TTIP endeavor. On July 11, *Inside U.S. Trade* reported that the two sides have reached deadlock in the TTIP negotiations, largely because of problems with procurement:

Heading into the sixth round of the Transatlantic Trade and Investment Partnership (TTIP), prospects are growing dim that the U.S. and EU will meet their goal of tabling all market access offers by the end of the summer because of a deadlock over what constitutes a sufficiently meaningful government procurement offer.

“U.S., EU To Miss TTIP Market Access Target Amid Procurement Deadlock,” *Inside U.S. Trade*, July 11, 2014, 2014 WLNR 18845022.

The *Inside U.S. Trade* article preceded the latest round of TTIP negotiations, which were held in Brussels from July 14–18, 2014. At the conclusion of that sixth round of negotiations, the chief EU negotiator, Ignacio Garcia Bercero, and the chief U.S. negotiator, Dan Mullaney, held a joint press conference, available online at www.ustr.gov/ttip/live-stream6. Nothing the chief negotiators said indicated that the parties’ problems regarding procurement had been resolved.

In their opening statements, the chief negotiators hardly mentioned procurement. While the EU negotiator emphasized that procurement remains “one of the most fundamental elements of these negotiations” for the European Union, he did not suggest that any significant progress had been made on this issue. His U.S. counterpart was even more opaque in his prepared statement; he said only that the negotiating “teams ... worked closely together this week to identify ways to improve access to each others’ public procurement markets.”

In response to reporters’ questions, the negotiators provided more detail—but did not dispel the sense that the parties’ positions remain far apart on procurement. The EU negotiator again confirmed that

procurement stands as an “absolutely critical” issue to the European Union. He noted that the parties had discussed access to state procurement markets in the United States, which he acknowledged is a “complex” topic. He said that after their discussions, both sides will need to “reflect on what is the best way forward” on procurement, which suggests that the parties, having hit something of a roadblock, seek a path forward. The EU negotiator appeared to confirm a possible impasse, for he avoided a reporter’s very direct question as to whether the parties had exchanged formal offers on public procurement.

Given these developments, it may be an appropriate time to reconsider the EU negotiating positions on procurement, to break this deadlock.

- *Gaining Assurances that Federal Grantees Will Not Discriminate*: One way forward would be for the EU to ease its demands for *direct* access to sub-central markets, and instead to seek broader U.S. assurances that federal grantees (local governments, for example, using federal dollars to procure) presumptively will not discriminate against European vendors. As the table below reflects, federal *grants* to states, local governments and other entities have consistently exceeded federal procurement *contracts* over the last five years. Opening sub-central contracts that use federal dollars to European competition would, therefore, be an important step forward for European exporters, especially since the federal grants typically cover only *part* of each grantee’s project. Thus, the hundreds of billions of dollars of federal grants would have a multiplier effect across many procurements in the sub-central markets. The legal framework for opening the market supported by federal grants is already there—the next step is to clarify foreign firms’ access to that market.

Nor is this idea new to the negotiations, for many in the European procurement community have already suggested that European vendors could gain nondiscriminatory access to state procurement markets *indirectly*, through the Federal Government’s grantmaking authority. See, e.g., “European Commission Non Paper on Public Procurement,” *supra*, at 3. Although Congress has often imposed severe domestic content requirements on grantees to preserve U.S. jobs, the argument is that the

Federal Government could also use its grant powers (and over \$500 billion in annual grants) to *open* opportunities for foreign vendors.

Notably, the Office of Management and Budget, a part of the U.S. Executive branch, recently revamped the various circulars and guidance that govern federal grants to states, local governments and other grantees, in revised guidance (known as the Super Circular) that was issued in final form in late December 2013. 78 Fed. Reg. 78590 (Dec. 26, 2013), www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30465.pdf.

For over two decades, the common rule that governed federal grants barred grantees from discriminating based on state or local procurement preferences, see 53 Fed. Reg. 8034, 8097 (1988), although this rule apparently did not apply to the states themselves, see *id.* at 8096. Even when OMB’s procurement standards for state grantees were largely abolished during the Reagan administration, the revised rule still banned state and local procurement preferences. See *id.* at 8039. When OMB published the revamped Super Circular in December 2013, the new guidance again barred federal grantees (aside from states themselves) from “the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.” 78 Fed. Reg. at 78631.

The real question, therefore, is not whether federal grantees can be barred from discriminating based on geography, but instead how broad that bar should be. Should, for example, states themselves also be barred from discriminating when they procure using federal grant dollars—and will the bar be one that explicitly protects foreign vendors? Cf. Grier, “‘Buy American’ Requirements in Federal Financial Assistance to Sub-Federal Enti-

ties,” trade.djaghe.com/?p=564 (Apr. 28, 2014) (discussing past federal waivers of domestic preference requirements for grantees). These would, it seems, be productive points for discussion in the TTIP negotiations, because requiring that federal grantees not discriminate against European vendors would, in practice, give Europeans much of the access to sub-central procurement markets they currently seek—access, because denied, which has led to the apparent impasse in TTIP negotiations.

- *Using TTIP as a Flexible Structure for Harmonizing Procurement Regulations:* At the same time, rather than fixing static provisions regarding procurement in TTIP, the parties could bring procurement into their broader effort to establish permanent structures for cooperation in regulation. As the Office of the U.S. Trade Representative noted, in other regulatory spheres the negotiating parties “seek greater compatibility of U.S. and EU regulations and related standards development processes,” so as to reduce “costs associated with unnecessary regulatory differences and facilitating trade.” To do so, the parties would promote “transparency in the development and implementation of regulations,” and pursue “regulatory cooperation initiatives where appropriate.” Office of the U.S. Trade Representative, “U.S. Objectives, U.S. Benefits in the Transatlantic Trade and Investment Partnership: A Detailed View,” www.ustr.gov/about-us/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View.

European business groups have suggested that TTIP be used to establish “an expedited consultation process on future issues and concerns related to public procurement,” to increase “transparency regarding rules and future developments.” BusinessEurope, “Public Procurement in the Transatlantic Trade and Investment Partnership (TTIP),”

Federal Fiscal Year	2009	2010	2011	2012	2013
Grants	\$664.9B	\$614.4B	\$567.0B	\$540.9B	\$519.2B
Contracts	\$540.4B	\$540.1B	\$539.4B	\$518.1B	\$461.7B

Source: USASpending.gov. Dollar figures are in billions of dollars.

supra, at 5. However, the EU statements of negotiating position (including the public comments made by the chief EU negotiator at the end of the latest round of negotiations) have consistently treated procurement separately from the broader U.S.-EU initiative to cooperate in regulation writing. See European Commission, “EU-US Transatlantic Trade and Investment Partnership: Initial EU Position Paper” (July 2013), trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151623.pdf; European Commission, “State of Play of TTIP Negotiations Ahead of the 6th Round of the Negotiations” (July 11, 2014).

Making procurement part of a broader effort to coordinate transatlantic regulations makes a good deal of sense, however:

- First, the U.S. and European procurement systems are in many ways converging. Article 57 of the new European “classic” procurement directive, 2014/24/EU, for example, brought Europe much closer to a U.S. system of debarment. See Federal Acquisition Regulation subpt. 9.4, 48 CFR subpt. 9.4. Article 29 of the new directive (“competitive procedure with negotiation”) allows for relatively unstructured, simultaneous exchanges very similar to competitive negotiations under FAR pt. 15. The EU and U.S. systems should not converge by accident though, for they are likely to collide; the EU and the U.S. would be well served to establish a formal mechanism for sharing best practices in their regulatory processes.
- Second, cooperation does not mean neutering either system. Take, for example, the very controversial question of environmental standards, which governments on both sides of the Atlantic are ever more likely to incorporate into their procurements. Those standards will almost invariably diverge, and so cause discrimination against foreign vendors. The Court of Justice for the EU has already addressed this question, however, in what is known as the *Max Havelaar* case. There, the court held that differing socioeconomic and environmental standards (including the “Max Havelaar” label for fair trade) can be imposed as procurement requirements so long as the standards are open and clearly state the goals being sought, so that other vendors, new to

the standards, can explain how they, too, meet those standards. *European Commission v. Kingdom of the Netherlands*, Case C-368/10, Court of Justice of the European Union (May 10, 2012) (agency erred by stating in solicitation that “products to be supplied [that] bore specific [socioeconomic and environmental] labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means”). The court’s thoughtful approach is an excellent example of how differences in procurement regulations can be bridged, rather than erased.

- Finally, regulatory cooperation in procurement would not be a revolutionary innovation. When negotiations on the revised GPA closed, the GPA parties agreed to continue to work to address procurement regulations that raise barriers to trade, including preferences for small- and medium-sized enterprises, and standards for sustainability. See Grier, “Work Programs for Unfinished Business in Revision of GPA,” Nov. 18, 2013, trade.djaghe.com/?p=162; WTO Doc. GPA/113, at 438–47 (listing work programs). As noted, the EU and the U.S. hope through the TTIP agreement to develop a “GPA-plus.” By expanding on the GPA work programs—by establishing a permanent structure for cooperation on these and other issues in procurement regulations—the EU and the U.S. will be reducing barriers to procurement trade across the Atlantic, and helping to develop durable rule systems for the many nations around the world that look to the EU and the U.S. for best practices in procurement.

Conclusion—The TTIP negotiations between the EU and the U.S. have faltered, in part because the EU set high negotiating goals for procurement—goals regarding access to sub-central markets and Buy American requirements which may not be achievable, for practical and political reasons. There are possible ways forward, however.

The EU could, for example, press for U.S. assurances that European vendors will not be dis-

criminated against when competing for sub-central procurements funded with federal grants, because long-standing federal guidance already bars many sub-central entities from imposing geographic preferences when they procure with grant funding from the Federal Government. And the EU and U.S. could find common ground by incorporating procurement into their broader efforts to coordinate regulations across the Atlantic, as procurement regulations in Europe and the U.S. are already very similar and would benefit from a thoughtful sharing of best practices.



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