

Presentation at the Ludwig Maximilian University
of Munich

The Transatlantic Trade & Investment
Partnership (TTIP) Negotiations:
Rethinking Procurement

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T-TIP

PRESIDENTS BARROSO AND OBAMA
ANNOUNCE LAUNCH OF TTIP
NEGOTIATIONS



June 2013



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SIMON MCKEAGNEY, EDITOR

06 JUNE 2014

30 Reasons why Greens oppose TTIP

The Transatlantic Trade and Investment Partnership raises a whole host of concerns in a variety of areas. In no particular order, here's a list of some of the reasons why we are currently against the deal.



The lies behind this trade deal

Plans to create an EU-US single issue governments using secretive parliaments

Investor-State Dispute Settlement

8. Because corporations will get a chance to screen future legislation



TTIP also envisions the establishment of a Regulatory Cooperation Council that 'would allow early intervention by US and EU regulators in each other's rule-making processes'. In December 2013 [Corporate Europe Observatory](#) and EU business groups have lobbied for such that such a body could result in business lobbied privileged access at this early stage of policymaking. Businesses could impact our social, environmental and consumer standards level.

9. Because it formalises never ending negotiations



It is no secret that negotiators on both sides have worked out a deal in recent months. But many of the most difficult areas could be left unaddressed until after the deal is officially signed. Commissioner for Trade Karel De Gucht wants TTIP to be ["a living agreement that promotes greater compatibility of our regimes and accelerates the development of global approaches."](#) In essence, politically sensitive issues could be worked out at a later date, once the public focus on TTIP has dissipated. A 'living agreement' could also mean that new policy changes could be influenced on an on-going basis without the need to renegotiate the

Ongoing Regulatory Coordination

17. Because supporting local economies is a good thing



The EU wants to prohibit US states from continuing support for local economic activity at state level or local organic farming for school nutrition programs. Such laws are discriminatory and act as "localism" efforts to support local businesses are essential for local economies. According to [Sharon Treat, a State Legislator from](#)

Local Procurement Preferences

'In our state of Maine, which is a rather low-income state with little industry (and now that our textile and shoe factories have almost all moved overseas through trade agreements), a bright spot is local food initiatives. Our land use and procurement policies are encouraging young people to take up farming, and developing new markets for farmers to sell their produce to schools, hospitals, and other institutions.'

Responses to Concerns

Ongoing Regulatory Coordination

- Coordination in Procurement Not Threatening
- GPA Weaker Solution
 - Coverage Issues
 - Accommodating Developing Nations

Local Procurement Preferences

- U.S. Has Reserved
 - Notes to GPA U.S. Annex 2 leave states right to protect environment
- EU Access Goals Difficult
- Sustainability Issues Can Be Addressed Through Transparency (see below)

Investor-State Disputes

- Procurement Discrimination Not Addressed Effectively
- Issues in Contract Administration?



SNAPSHOT OF PROBLEM: CANADIAN OPPOSITION TO U.S. PREFERENCES



Recent Developments in Domestic Legislation

Committee on Government Procurement

Intervention by Canada

June 25, 2014

Thank you, Mr. Chair.

In recent months, Canada has taken note of a number of legislative initiatives in the United States which increase domestic content requirements in procurement conducted by federal, state and municipal-level entities.

Canada would like to register our concern with these new forced localization requirements, concerns that have been repeatedly expressed by Canadian stakeholders, who regularly compete with US companies in the Canadian market.

As a general point, Canada seeks clarification from the United States on the specific steps it has taken to comply with paragraph 6 of Article XXII which provides that “[e]ach Party shall seek to avoid introducing or continuing discriminatory measures that distort open procurement”.



- Canada objected to federal law requiring local grantees to buy U.S. iron and steel
 - Local governments not covered by WTO GPA
- In fact. U.S. OMB guidance bars local grantees from discrimination *except where federal legislation specifically requires*

First, on June 10, the President of the United States signed into law the *Water Resources Reform and Development Act (WRRDA)*. The WRRDA includes a program that will provide financial assistance to large water infrastructure projects. The legislation imposes new Buy America restrictions on all iron and steel used in such projects. The WRRDA also imposes new and permanent Buy America restrictions on procurements funded by the Environmental Protection Agency's Clean Water infrastructure fund – the Clean Water State-Revolving Loan Fund (CWSRF).

While the WRRDA includes a provision requiring that the new Buy America restrictions be applied consistently with the United States' international trade obligations, we understand that the EPA – a covered federal entity – does not actually conduct the procurement under this program. Canada understands that the actual procurement under the CWSRF is conducted by local government entities, which are not covered by the United States in the GPA. With this in mind, Canada requests, pursuant to Article VI:1(b) of the Agreement, that the United States provide an explanation of the practical effect of the provision requiring consistency with its international obligations.

Federal Grants to State and Local Governments (\$billion)

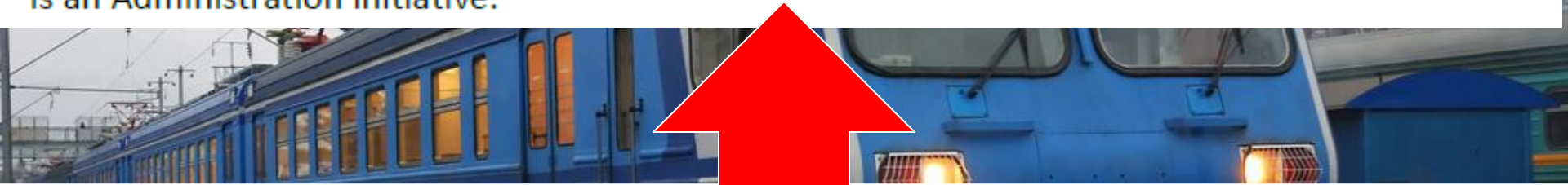


The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.

78 Fed. Reg. at 78,631

Second, the United States federal government has tabled in Congress a new law that seeks to expand domestic content requirements attached to federal funding for urban transportation – the Generating Renewal, Opportunity, and Work with Accelerated Mobility, Efficiency and Rebuilding of Infrastructure and Communities throughout America Act – or the “GROW AMERICA ACT”. Section 3006 provides for an increase in the Buy America domestic content provisions for so-called “rolling stock” – buses, urban rail cars – from the current 60 percent to 100 percent by 2019. If passed, this bill would force GPA suppliers to localize production in the United States, in order to participate in these procurements.

Again, in light of paragraph 6 of Article XXII, Canada seeks clarification from the United States as what, if any, specific actions it took to “seek to avoid introducing” these new “discriminatory measures that distort open procurement” – particularly, given the fact that GROW America Act is an Administration initiative.



- Canada also objected to U.S. discrimination in purchases of “rolling stock” with federally funds
- U.S. has reserved this under GPA, in Annex 2 (“For the state entities included . . . this Agreement does not apply to restrictions attached to federal funds for mass transit and highway projects.”)

Third, Canada is concerned with the growing list of “Buy America” legislative initiatives at the state government level. Since November 2013 alone, there have been seven state initiatives that have been brought to our attention. I will just highlight a few.

Minnesota – In May, the Minnesota State Legislature passed the \$1 billion Capital Investment Bill. This legislation contains a Buy America provision requiring any public entity that receives funds under the Bill to use American-made steel. The bill makes no reference to compliance with the international obligations the United States has assumed on behalf Minnesota. In the GPA, the United States has covered procurement by all Minnesota’s “executive branch agencies”. Canada requests confirmation from the United States that Minnesota will apply these new forced localization requirements consistently with the United States’ international obligations –

(2) Legal challenge

(A) In general

No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.



European
Commission

EU - US TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

Public Procurement

**Initial EU Position Paper
July 2013**

Initial EU position paper



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Provisions should also be made for a mechanism for adjustments related to modifications and rectifications to coverage.

3.3 Horizontal disciplines

In the EU's views, the PP Chapter should as noted above under 2.2. also include rules allowing the Parties to take into account possible changes in the GPA disciplines.

4. Market Access discussions

4.1 Scope of market access discussions

Improvement of GPA market access schedules

Both Parties have accepted to enter into discussions affecting all the elements of their schedules at central as well as sub-central levels.

This implies that the negotiations should look for an expansion of coverage, to the extent possible, for all these schedules, by the removal of existing carve-out and by the offer of additional commitments.

In concrete terms, Parties should seek to improve access to and/or expand the coverage of:

- Central Government entities
- Sub-central entities
- Other entities with a view to specific sectors*
- Services
- Construction services
- Information society services, in particular cloud-based services

*Including market access negotiations on transit/railways, urban railways and urban transport.

The EU suggests - without prejudice - that the discussions on coverage would explore possible inclusion of:

For **Annex 1**, all central government entities and any other central public entities, including subordinated entities of central government.

For **Annex 2**, all sub-central government entities, including those operating at the local, regional or municipal level as well as any other entities

whose procurement policies are substantially controlled by, dependent on, or influenced by sub-central, regional or local government and which are engaged in non-commercial or non-industrial activities.

For **Annex 3**, all entities governed by public law, state owned companies and similar operating in particular in the field of utilities.

The elements required are here presented in the form of positive lists, but for the actual commitment the EU expects this to be done in the form of negative lists. It would also include procurement currently subject to restrictions related to domestic preferences programmes for example linked to federal funding or procurement pursuant to multi-jurisdictional agreement.

For the US system this would imply:

Annex 1

This would include entities not yet covered. It would also cover procurement currently subject to restrictions or domestic preferences related to federal funding as well as procurement regulated by specific policies and rules, such as those related to Buy America(n) provisions as well as those related to SMEs. The coverage would follow the projects funded by FAA even if they were channelled to a sub-federal level for actual spending.

Annex 2

It would concern all states and would imply a substantial expansion of coverage.

Annex 3

For example entities not yet covered by neither the GPA nor by our bilateral agreement, such as procurement currently subject to restrictions or domestic preferences related to federal funding.

Annex 4

All related goods not yet covered by the GPA or our bilateral agreement.

Annex 5

All services procured by entities listed in Annexes 1 through 3 in the coming EU/US agreement.

Annex 6

All construction services not yet covered by the GPA or our bilateral agreement, including for example transportation services that are incidental to a procurement contract.

European Goals for Market Access/Coverage in T-TIP Negotiations



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- Additional entities
- Funding-related restrictions
- SME restrictions

- All states
- Substantial expansion



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- Additional entities
- Funding-related restrictions
- SME restrictions

- All states
- Substantial expansion

- States sovereign
- Political support for domestic preferences strong at state level

- Changing transportation-funding restrictions politically unworkable
- U.S. tradition of barring non-state grantees from discrimination
- SME 23% set-aside politically sacrosanct



EU's Proposed Approach to Text

First section: Substantive approach proposed by the EU

2. Overall architecture and scope of application of the PP chapter

2.1 Text structure

This negotiation would present an important opportunity for the EU and the U.S. to develop together some useful "GPA plus" elements to complement the revised GPA disciplines, with a view to improve bilaterally the regulatory disciplines. A model text agreed between the EU and the U.S., being the two largest trading partners in the world, could thus possibly set a higher standard that could inspire a future GPA revision and where appropriate serve as a basis for the works conducted under the work program outlined in the WTO GP committee's decisions adopted on the 31st of March 2012. Beside this aspect the main focus of these negotiations will be to ensure better market access terms for EU and U.S. companies.

No discussion of ongoing harmonization of procurement regulatory regimes

Compare



EU - US TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

Trade Cross-cutting disciplines
and Institutional provisions

“Elimination, reduction and prevention of unnecessary regulatory barriers are expected to provide the biggest benefit of the TTIP”

Possible Areas of Harmonization

- Sustainability
 - European vs. U.S. Approaches
 - *Max Havelaar*
- Anti-Corruption
 - Article 57
 - Exclusion/Debarment
 - Corporate Compliance
- Anti-Fraud
- Procurement Methods
 - Competitive Dialogue



SUSTAINABILITY



Evolution of European Procurement Goals

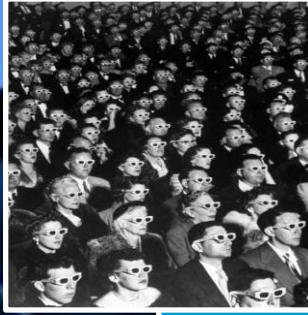
“For many years, the single most important indicator in the practice of public purchasing **was the economic factor**. Environmental and social factors were seldom if ever taken into account. However, the importance of non-economic factors in public procurement increased significantly with the **development of the concept of sustainable development**, understood as

‘Development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.



Three “Pillars” to European Sustainable Procurement

• Economy



• Society



• Environment

Compare: Portland, Oregon



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- Sustainable Procurement Resources for Employees
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- Sustainable Procurement Reports
- Sustainable Procurement Policies

Sustainable Procurement



In 2008 the City of Portland City Council passed the Sustainable Procurement Policy, which is an effort to spend public funds on goods and services that minimize negative environmental impacts, are fair and socially just, and make economic sense, now and in the long term. The Sustainable Procurement Policy compliments and builds on many other environmental and social programs in the City. The links below provide more information and resources regarding the City's work on integrating sustainability principles into procurement decisions.

CITY EMPLOYEES: "Sign In" to PortlandOregon.gov to view the Sustainable Procurement for Employees website that contains employee-specific resources for identifying and specifying safer products and services.



Sustainable vs. Green Procurement – European Model

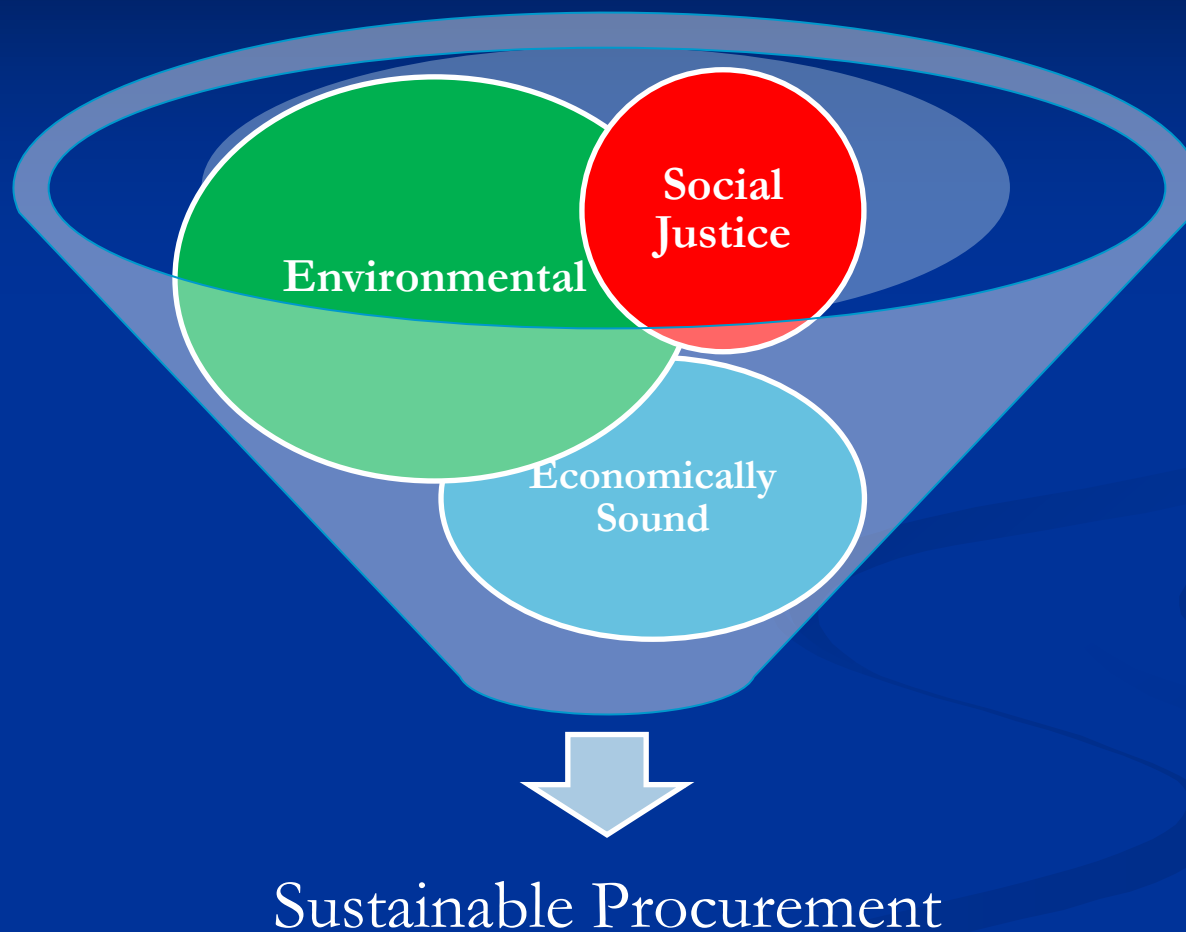
Sustainable Public Procurement

Sustainable Public Procurement means that contracting authorities take into account all three pillars of sustainable development when procuring goods, services or works at all stages of the project.

Green Public Procurement

Green Public Procurement means that contracting authorities take into account environmental elements when procuring goods, services or works at all stages of the project and within the entire life-cycle of procured goods

Sustainability – In Tendering?



POSSIBLE
SOLUTION:

*COMMISSION V.
NETHERLANDS (MAX
HAVELAAR)*

Court of Justice of the European Union
(May 2012)



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U.S. “Eco-Label” Requirements

23.103 -- Sustainable Acquisitions.

- (a) Federal agencies shall advance sustainable acquisition by ensuring that 95 percent of new contract actions for the supply of products and for the acquisition of services (including construction) **require that the products are—**
- (1) Energy-efficient (ENERGY STAR® or Federal Energy Management Program (FEMP)-designated);
 - (2) Water-efficient;
 - (3) Biobased;
 - (4) Environmentally preferable (e.g., EPEAT-registered, or non-toxic or less toxic alternatives);
 - (5) Non-ozone depleting; or
 - (6) Made with recovered materials.
- (b) The required products in the contract actions for services include products that are—
- (1) Delivered to the Government during performance;
 - (2) Acquired by the contractor for use in performing services at a Federally-controlled facility; or
 - (3) Furnished by the contractor for use by the Government.
- (c) The required products in the contract actions must meet agency performance requirements.
- (d) **For purposes of meeting the 95 percent sustainable acquisition requirement, the term “contract actions” includes new contracts (and task and delivery orders placed against them) and new task and delivery orders on existing contracts.**



European Procurement Directive 2014/24/EU (published 28 March 2014)

eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2014_094_R_0065_01

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Title and reference

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance

OJ L 94, 28/03/2014, p. 65-242 (BG, ES, CS, DA, DE, ET, EL, EN, FR, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV)

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28.3.2014 EN Official Journal of the European Union L 94/65

DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

Sustainable Procurement in the

European Union

New Directive – On Eco-Labels

Article 43 - Labels

1. Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled:
 - (a) the label requirements **only concern criteria which are linked to the subject-matter of the contract** and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;
 - (b) the label requirements are based on **objectively verifiable and non-discriminatory criteria**;
 - (c) the labels **are established in an open and transparent procedure** in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
 - (d) the labels are accessible to all interested parties;
 - (e) the label requirements are set by a third party over which the economic operator applying for the label **cannot exercise a decisive influence**.



GPA (as effective 2014) on Social and Environmental Criteria

- “The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, **environmental characteristics** and terms of delivery.”

Art. III “Measures [may] not [be] applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade”



How Has the Court of Justice Dealt with Social and Environmental Requirements?

- The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.



Commission v. Netherlands (Max Havelaar) (May 2012)

- “The province of North Holland has a contract for the management of automatic coffee machines. The contract expires on 1 January 2009. The province intends to enter into a new contract from 1 January 2009 by means of a European tender procedure. An important aspect is the desire of the province of North Holland to increase the use of organic and fair trade products in automatic coffee machines.”
- 17 Section IV, point 2.1 of the contract notice states that the **contract will be awarded to the most economically advantageous tender. . . .**
- ““The tenders shall be **evaluated both on the basis of qualitative and environmental criteria and on the basis of price.**”



Court of European Justice Held, First . . .

30

- It must therefore be held that the contractual documents which determine the subject-matter and criteria governing the award of the contract required, first, that the coffee and tea to be supplied were to bear the EKO and MAX HAVELAAR labels



Court on Eco-Labels

- “[B]y requiring, in the contract documents, that certain products to be supplied were to bear a specific eco-label, rather than using the detailed specifications defined by that eco-label, **the province of North Holland established a technical specification** which was incompatible with Article 23(6) of Directive 2004/18 [the prior directive]



Court Barred Specifying Eco-Label, Without Explanation

“[B]y providing, in the specifications, that the fact that certain products to be supplied bore specific 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 province of North Holland established an award criterion that was incompatible with Article 53(1)(a) of Directive 2004/18.”



ANTI-CORRUPTION



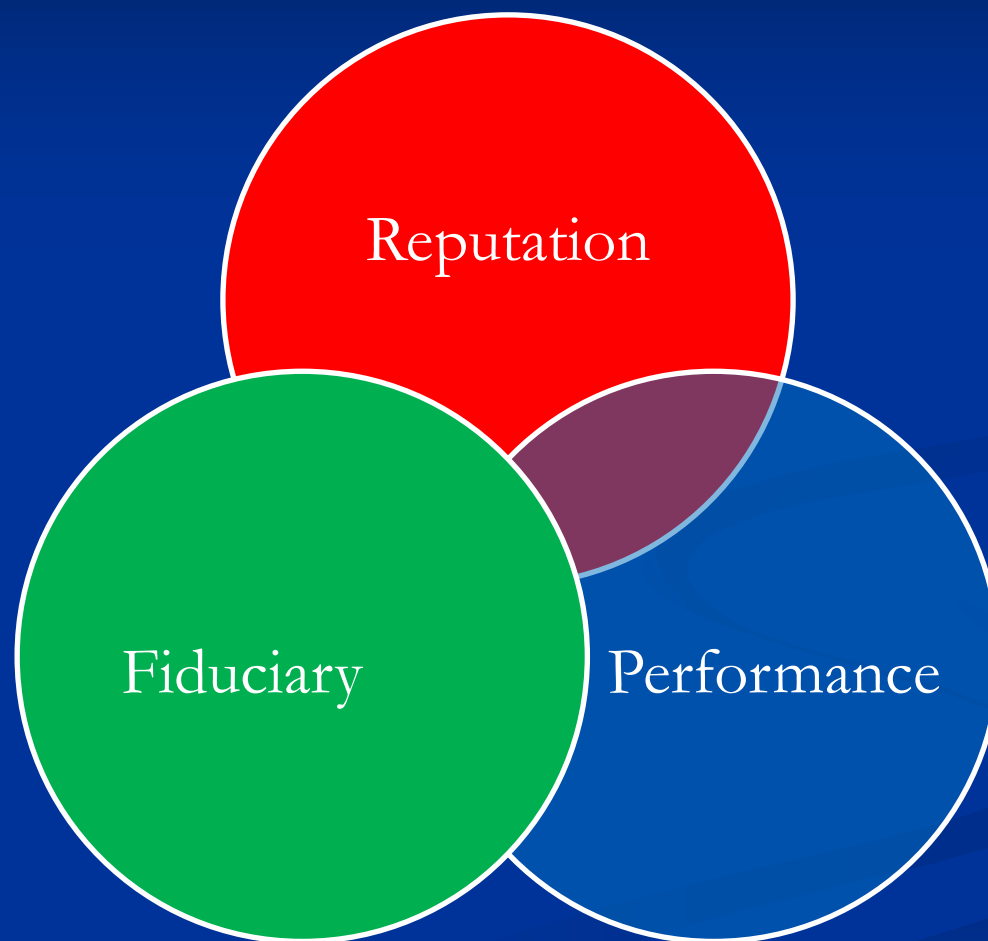
Principal-Agent Model



How do
“debarment” and
“anti-fraud” fit into
this framework?

What Risks Does “Qualification” Assessment Address?

35



United States:

Procurement Suspension or Debarment = “Meta”- Responsibility Determination

FAR 9.402 Policy.

- (a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with **responsible contractors only**.

Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.



U.S. Federal Discretionary Debarment



Other problems:

- No uniform procedures
- Huge disparity in actions



Comparing Causes for Debarment/Exclusion

United States

- Conviction of a crime or civil fraud
- Poor contract performance
- Other serious misconduct showing the contractor is not responsible



World Bank

- Misconduct, as narrowly defined by Anti-Corruption, Guidelines, and Consultant and Procurement Guidelines: fraud, corruption, collusion, coercion and obstruction



European Union

Mandatory:

Corruption, fraud, money laundering

Non-Mandatory:

- Bankruptcy
- Convicted re: professional conduct
- Grave professional misconduct
- Social security / taxes



World Bank Sanctions System

Compliance

Integrity Compliance Officers (within INT)

- Monitors integrity compliance by sanctioned companies (or codes of conduct for individuals)
- Decides whether the compliance condition established by the SDO or Sanctions Board as part of a debarment has been satisfied.

Adjudicative

Sanctions Board

- Comprised of 4 external members and 3 Bank staff
- Reviews case 'de novo'
- May hold a hearing with parties and witnesses
- Imposes sanctions (not bound by SDO's recommendation)
- Decisions are final and not appealable
- **39% of cases resolved at this level**

Suspension and Debarment Officer (SDO)

- Evaluates evidence presented by INT
- Issues Notice of Sanctions Proceedings to respondent
- Temporarily suspends respondent
- Recommends a sanction (becomes effective if respondent does not contest)
- **61% of cases resolved at this level**

Integrity Vice Presidency

- Investigates allegations of fraud, corruption, collusion, coercion and obstruction
- Prepares and submits a Statement of Accusation and Evidence (SAE) to the Office of Suspension and Debarment



COMPARING SYSTEMS	United States (FAR) Federal Procurement	World Bank
Causes of Debarment	Broadly defined	Per Guidelines
Referral and Sources of Evidence	Any source; any investigation	INT investigation; reports provided to third parties
Temporary Suspension	Allowed, e.g., notice of proposed debarment	Allowed, if sufficient proof
Standards for Debarment	Preponderance; then contractor must show responsible	Preponderance, by Sanctions Board
Hearing	Yes	Yes, before Sanctions Board
Resolution	Debarment to Admin. Agreement	Debarment to Settlement (reviewed)
Cross-Debarment	All agencies	All multilateral development banks
Judicial Review	Yes	No

Four Paradigms

Responsibility (Qualification) Only

Only

- On a case-by-case basis
- In U.S. – done by contracting officer
- Allowed by new EU Directives

Discretionary Debarment – U.S. Federal

- Based on “present responsibility”: focus on present status
- Debarment is a cross-government “meta-qualification” determination

Adjudicative Debarment for “Bad Acts”

- E.g., World Bank

Court-Ordered Debarment, After Judicial Proceedings

**Performance
Risk**

**Fiduciary
Risk**

**Reputation
Risk**

Looming Issue: Cross-Debarment

Guidelines

Investigation; reports
provided to third parties

Options:

- Automatic cross-debarment
- Debarments to be considered in other systems
- Adverse performance information to be considered
- Do nothing



A low-angle, upward-looking photograph of several modern skyscrapers with glass facades. The buildings are set against a bright blue sky filled with large, fluffy white clouds. The sun is visible in the upper center, creating a lens flare effect. The overall composition is dynamic and emphasizes the height and scale of the urban environment.

CORPORATE COMPLIANCE



1. Standards and procedures

✓

✓

✓

✓

2. Knowledgeable leadership

✓

✓

✓

3. Exclude risky personnel

✓

✓

✓

✓

4. Training

✓

✓

✓

✓

5. Monitor, evaluate, reporting hotline

✓

✓

✓

✓

6. Incentives and discipline

✓

✓

✓

✓

7. Adjust program to risk

✓

✓

Victim compensation?

Questions Regarding Directive Art. 57

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that **measures taken by the economic operator are sufficient to demonstrate its reliability** despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has **paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct**, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and **taken concrete technical, organisational and personnel measures** that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

Questions Regarding Directive Art. 57

6. Any economic operator who has been convicted in a Member State of an offence referred to in paragraphs 1 and 4 may be excluded from the public procurement process **by the economic operator** despite the existence of a criminal offence considered as sufficient grounds for exclusion, unless excluded from the procurement process.

For this purpose, the economic operator shall be **undertaken to pay compensation** for **the criminal offence** committed. The economic operator shall take a comprehensive range of measures, which the competent authorities and **taken** **measures** that are appropriate to prevent further misconduct.

The measures taken by the economic operator shall take account of the gravity of the offence and the nature of the misconduct.

Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

- How does this square with UK Bribery Act of 2010, which in effect requires prior anti-corruption systems?
- Does this make victim compensation a mandatory part of corporate compliance?
- Is this a first step to required suspension/debarment systems?

ANTI-FRAUD



Exclusion Under New EU Directive 2014/24/EU

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations . . .
- (g) where the economic operator has shown **significant or persistent deficiencies in the performance** of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;



Brazil's Anti-Corruption Law

Art. 5th. For the purposes of this Law, acts harmful to the public administration, national or foreign, are those performed by the legal persons cited in the paragraph of Art. 1st, which violate the national or foreign public patrimony, principles of the public administration, or the international commitments assumed by Brazil, defined thus:

...

IV – insofar as requests for bids and contracts:

...

- f) to obtain an improper advantage or benefit, **fraudulently**, for modifications or extensions in contracts entered into with the public administration, not authorized by law, the invitation to the public request for bid, or the respective contractual instruments; or
- g) to **manipulate or defraud the economic and financial balance** of contracts entered into with the public administration;



World Bank Sanctions Procedures

- (a) ***Fiduciary Duty.*** *It is the duty of the World Bank . . . under its Articles of Agreement, to make arrangements to ensure that funds provided by the Bank are used only for their intended purposes. In furtherance of this duty, the World Bank has established a regime for the sanctioning of firms and individuals that are found to have engaged in specified forms of fraud and corruption in connection with Bank-Financed Projects (as hereinafter defined, “Sanctionable Practices”). This regime protects Bank funds and serves as a deterrent upon those who might otherwise engage in the misuse of the proceeds of Bank financing.*



World Bank Sanctions Procedures

(a) *Fiduciary Duty*. It is the duty of the World Bank under

“Fraudulent practice” is any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation

Practices”). This regime *protects Bank funds and serves as a deterrent* upon those who might otherwise engage in the *misuse of the proceeds of Bank financing*.



Qui Tam Relator:
Recovers 10-30%
Plus Atty. Fees

FALSE CLAIMS ACT:⁵² CIVIL (& CRIMINAL)

Basis for Liability

1. Submission of “claim for payment” to the federal government;
2. The claim is “false” or “fraudulent;” and
3. The defendant acted “knowingly.”

Does Not
Mean
Specific
Intent . . .

DAMAGES:

1. Triple the amount of damages suffered by the United States PLUS
2. A civil forfeiture of between \$5,500 and \$11,000 per false claim; damages can be reduced in some cases from triple to double

1. Actual knowledge;
2. Acts in deliberate ignorance of the truth or falsity of the information; **or**
3. Acts in reckless disregard of the truth or falsity.



METHODS OF PROCUREMENT



Methods of Procurement: Areas of Potential Harmonization

- Parallel historical evolution
 - Open tenders – competitive negotiations – frameworks
- Emerging issues with open tenders
 - Overuse of reverse auctions
- Competitive negotiations and frameworks
 - Common issues regarding corruption & procedures



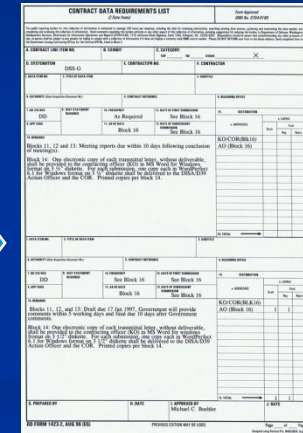
Historical Progression



Sealed Bids



Negotiated Procurements

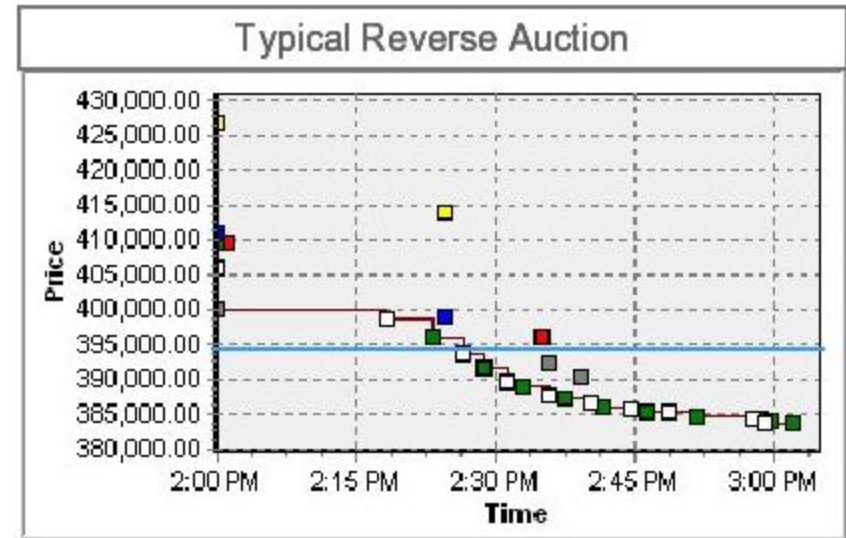


Frameworks



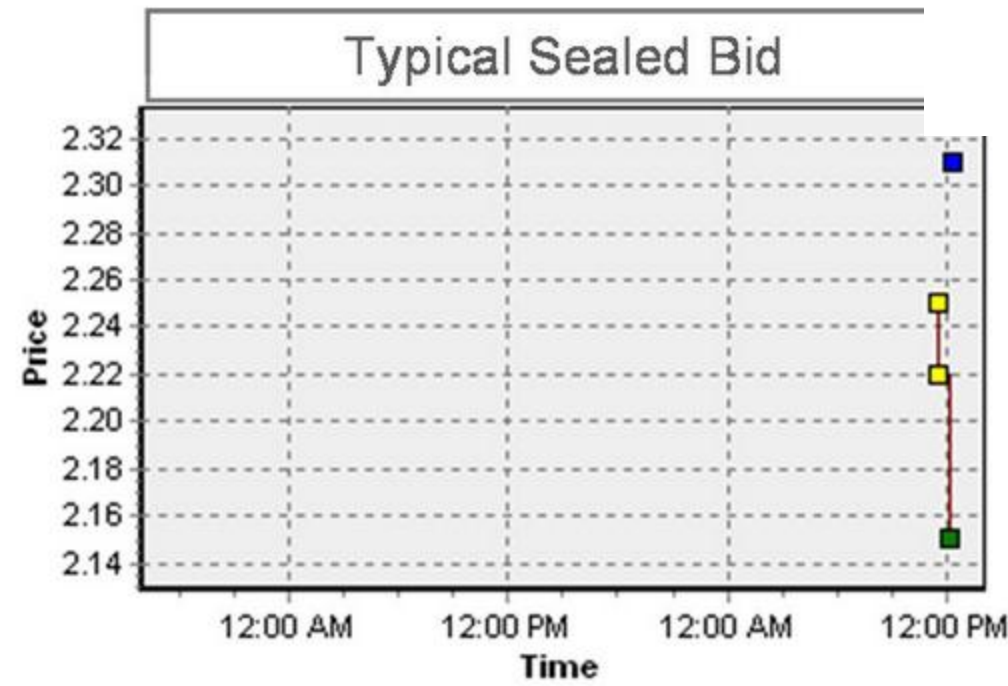
Electronic Reverse Auctions

- Open or reduce competition?
- Rules adequate?
- Assess quality?



Reserve price ———

Source: http://www.esourcingwiki.com/index.php/E-Auctions_in_Sourcing



Number of suppliers: 4

საბჭოთაო მისწრაფების სააგენტო
STATE PROCUREMENT AGENCY

Welcome to the Georgian electronic Government Procurement (Ge-GP) system – the official portal of State Procurement in Georgia. It ensures open, transparent and competitive environment for any participant of state procurement procedures. Ge-GP system is operated by the State Procurement Agency.

The registration at the Ge-GP system is obligatory only for the procuring entities and the suppliers.

Registered User Password

Case Study: Georgia

← → ↻ [COMPETITION AND STATE PROCUREMENT AGENCY \[GE\] https://tenders.procurement.gov.ge/public/?lang=en](https://tenders.procurement.gov.ge/public/?lang=en) ☆

Sign in Users Exit


საქართველოს მსხვილიძების სააგენტო
STATE PROCUREMENT AGENCY

Tender Registration Number
Procuring entities
Supplier
Tender proceeding status
Tender type
Procuring category
CPV codes
* CPV * CPV (ENG)
Date
registration date
Estimated value of procurement (from/up to)
SEARCH

← Back

Tender SPA140002354 Tender documentation Offers Result

Tender type Electronic Tender
Tender Registration Number SPA140002354
Tender proceeding status Contract awarded
Procuring entities The Department of Corrections of the Ministry of Corrections and Legal Assistance of Georgia
Tender announcement date 24.01.2014 19:17
Bids accepted from 12.02.2014 00:09
Deadline for bid submission 17.02.2014 12:30
Estimated value of procurement 39'150.00 GEL
Bid should be submitted Including VAT
Procuring category 39100000-Furniture
CPV codes
• 39160000 - School furniture
Additional Info
Amount or Volume of Procurements იხსატენდერო დოკუმენტაცია
Supply Period ხელშეკრულების გაფორმებიდან 65 კალენდარული დღის განმავლობაში
Bid reduction step 395.00 GEL



The map shows Georgia in the Caucasus region, bordered by Ukraine, Russia, Armenia, Azerbaijan, Turkey, and Iran. Major bodies of water like the Black Sea, Caspian Sea, and Mediterranean Sea are also labeled.

Sign in Users Exit

Tender Registration Number

Procuring entities

Supplier

Tender proceeding status

Tender type

Procuring category

CPV codes

* CPV * CPV (ENG)

Date
registration date

Estimated value of procurement
(from/up to)

SEARCH

← Back

Tender SPA140002354 Tender documentation Offers Result





Tender Registration Number
Procuring entities
Supplier

Tender type: Electronic Tender

Tender SPA140002354 Tender documentation Offers Result

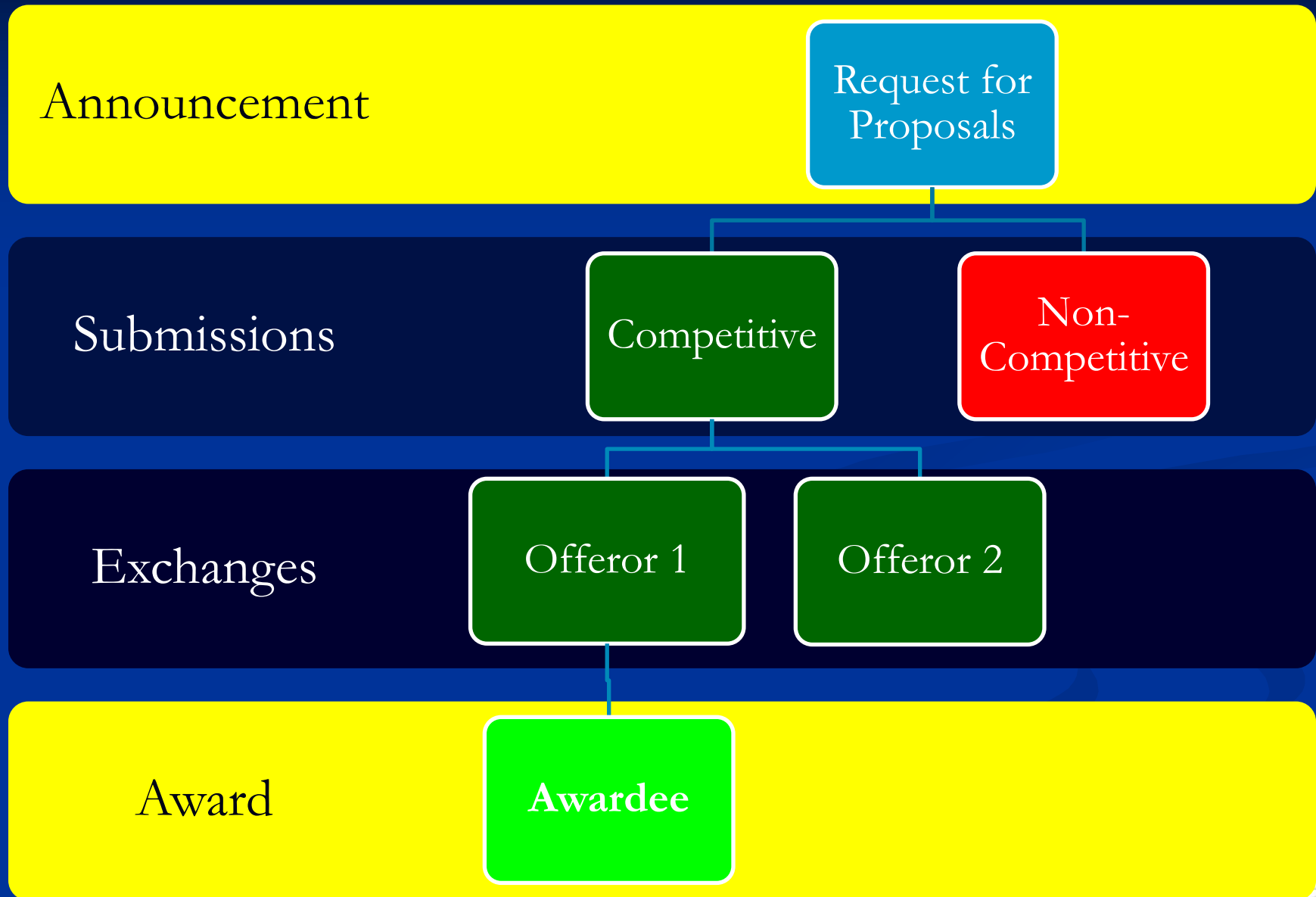
Refresh Technical Documentation

Prime time trading results

Bidder	Offered Amount	Date
insta jorjia	39'150.00	14.02.2014 13:09
sh.p.s "atasoi jorjia"	35'990.00	17.02.2014 12:14
shps golbi	35'100.00	17.02.2014 11:00
shps oda	33'355.00	17.02.2014 12:29
hepi treveli	32'955.00	17.02.2014 11:09
tbilis saskolo inventaris pabrik	27'766.00	17.02.2014 12:27

1st round of trade

Competitive Negotiations





USTDA

UNITED STATES TRADE AND DEVELOPMENT AGENCY

[Home](#) > [Program & Activities](#) > [Global Procurement Initiative - Understanding Best Value](#)

GLOBAL PROCUREMENT INITIATIVE UNDERSTANDING BEST VALUE

Introduction

Welcome to the *Global Procurement Initiative: Understanding Best Value* website. This initiative is dedicated to assisting public officials in emerging economies to better understand the total cost of ownership for procurement of goods and services related to infrastructure projects.

The Global Procurement Initiative: Understanding Best Value (GPI) is designed to educate public procurement officials in emerging markets about how to establish procurement practices and policies that integrate life-cycle cost analysis and best-value determination in a fair, transparent manner. Adopting these practices and standards will improve governments' capacity to make better informed decisions that take into account all relevant costs of goods and services over their entire life-cycle. This will not only lead to smarter, longer-term investments with overall savings to the government, but will also level the playing field for U.S. firms in international tenders.

The Global Procurement Initiative: Understanding Best Value (GPI) is designed to educate public procurement officials in emerging markets about how to establish procurement practices and policies that integrate life-cycle cost analysis and best-value determination in a fair, transparent manner.



Corruption Risks in Competitive Negotiation

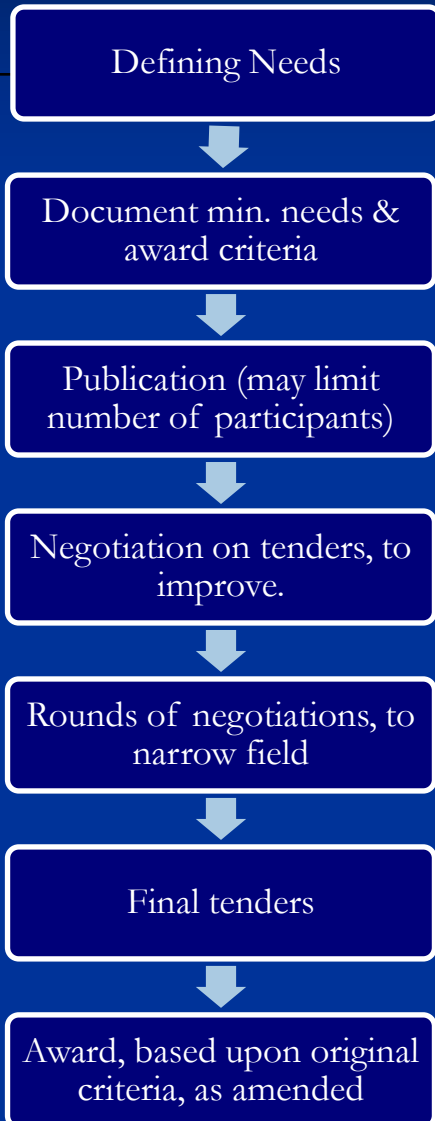
Darleen Druyun

- Previously highest-ranking civilian official in Air Force procurement systems
- Convicted of improper job negotiations with Boeing during tanker procurement
- Admitted favoring Boeing in hundreds of millions of dollars in procurement
- Sentenced to prison
- \$650M Boeing settlement



Competitive Procedure with Negotiation: 2014

Procedures Allowed Under 2004 Directive



Competitive dialogue	Negotiated procedure	Open/restricted procedure
	defining needs (pre-tender)	defining needs (pre-tender)
descriptive document of needs	contract specifications	contract specifications
publication of notice	publication of notice	publication of notice
dialogue on possible solutions		
submission of tenders	submission of tenders	submission of tenders
assessment of tenders	negotiating tenders	assessment of tenders
award of contract	award of contract	award of contract





Half Price
on all
iPhone
and
iPod cases



\$10



\$15

Dress top
to toe for under
\$16

EVERYONE'S A
WINNER

with
Australia's
lowest
prices

CHA-CHING

Product	Price	Category
iPhone Case	\$10	Electronics
iPod Case	\$10	Electronics
Lexar 16GB SDHC	\$15	Storage
Dress Top	\$16	Clothing

Frameworks

Understanding Frameworks/IDIQs: Example - Computers



1. Open Competition

Lose

Lose

Master Agreement

Master Agreement

2. Awards by Centralized Purchasing Agency



Lose

Order Awarded

3. Purchase By Customer Agency

Issue: Notice of Competition
Issue: Notice of Award
Issue: Challenge (Protest)



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