

Brussels, 2nd February 2010

**Comments by the European Commission on
Draft Implementing Regulation of the Government Procurement Law of China**

General remarks:

1. The European Commission (hereafter referred to as "EC" for the purpose of this document) welcomes the opportunity to present its comments. The EC appreciates that China is ready to receive comments from its international trading partners on a draft regulation.

2. The EC recalls the commitment of China to join the WTO Government Procurement Agreement (GPA). In this context the EC takes the view that China shall endeavor that the draft implementing regulation of the Government Procurement Law is in line with the principles and rules of the GPA.

3. The EC also expresses the view that the drafting of the implementing regulation is an opportunity to confirm the commitments undertaken in the G20, in terms of trade opening, and therefore this regulatory activity should not lead to worsening of the existing regime, which already has discriminatory features.

4. In this respect, the EC would like to share its concerns on several elements of the draft implementation regulation that are likely to affect bilateral trade in government procurement and to backtrack from the objective to put progressively Chinese legislation in line with GPA requirements, especially in terms of treatment of foreign companies.

5. The EC is looking forward to the follow up of the present exercise and it is ready to offer assistance to China in its efforts to re-design its procurement regulatory framework.

Detailed Comments:

6. General objectives in procurement: The EC understands, that **Article 9 of the draft regulation** details the provisions of the government procurement in relation to the overall policy objectives in government procurement. However, some of the specific policy objectives mentioned in the draft regulation refer clearly to **discriminatory measures towards foreign or foreign invested companies** such as the scheme for the procurement of indigenous innovative products (as implemented through the circular on accreditation procedure issued in September 2009). The EC takes the view that **policy objectives such as fostering innovation, inclusion of social and environmental considerations and assistance to the**

SMEs can be achieved in a non discriminatory manner. As expressed several times, the EC stands ready to share its long standing experience in these areas.

7. (Domestic goods, domestic preference): the **provisions of article 10** bring more clarity and certainty for the implementation of the preference for domestic products. Nevertheless, this new set of rules is still worrying to European businesses. It is rather unclear whether goods produced in China by foreign-invested companies will be regarded as domestic products, especially with the requirement of a specified percentage of domestic production costs, not yet defined. The EC takes the view that this definitional exercise should be a good occasion to reflect recent China's commitment not to discriminate against Foreign-invested companies. On the other hand, the percentage of price gap required to purchase goods produced outside of China's territory proves very high, even in comparison with other countries providing for local contents requirement or preferential treatment. With a view to the accession of China to the GPA, a positive signal concerning the level of price discrimination would be welcome.

8. **Article 11** also raises additional concerns on the **administrative procedures imposed** for the purchase of products produced outside of China or not recognized as domestic products. The requirement of filing a report for each purchase may discourage procuring officers to select imported products, even when those products meet the substantial criteria set by the law and the implementing regulation. This deterrent might be increased by the criminal sanction provided for in case of infringement, **as described by article 96.**

9. **Concerning the scope of application** of the Government Procurement law (GPL), **article 4** of draft regulation helps to define more closely notions of goods, construction projects and services that will improve the understanding of procurement in China. However, it is customary that a secondary legislation defines the scope of the primary legislation in much more precise manner, including references to relevant nomenclature(s). Additionally, concerning the procurement of construction projects, the articulation between the Bidding Law and the GPL remains unclear to the EC. It is especially difficult to identify which construction projects are subject to the GPL, given that most of them seem to fall under the Bidding Law. The EC would like to point out that a secondary legislation should be also very precise in defining the addressees of the legislation (central, sub-central levels), as this does not seem to be the case of the present draft.

10. On publication (transparency requirements): The draft implementing regulation fails to clearly list the publication media, where the procurement shall be advertised (See in particular Article 12)

11. On **qualification procedures for suppliers**, the draft regulation raises several unanswered questions.

The requirements are listed in Article 23. However, they shall be however detailed and clarified in particular as regards the type of supporting documents/evidence which shall be furnished.

Also the Article 24 on the access to information regarding qualification process remains general and merely re-states the legal obligations from the primary legislation. It does not give any guidance to contracting authorities and/or supplier how to proceed. The **preliminarily review of qualification** under article 25 raises doubts about its compatibility with the GPA. The conditions under which this system may be deployed remain unclear. The implementation of the actual system (for example extremely short deadlines of publication) will be impossible and it will sure lead to restriction of competition (foreign or Chinese) to the detriment of the public purchaser. Additionally, the EC would like to point out that the relation of the preliminary review of qualification with the **database of suppliers** referred to in article 27 remains confusing. Is the database to be understood as a multi-use list of suppliers, implying that the review of qualification is done once for several procurement procedures? It is also questionable whether foreign suppliers or foreign-invested companies have an equal access to this database.

As regard the implementing provisions of article 22 of the GPL included in article 26, the notion of "illegal activities happened in the course of business operation" also deserves to be clarified.

12. Exclusion of suppliers (blacklist): The EC understands the wish of the Chinese authorities to eliminate criminal activities in procurement. It shall be however recalled that this must be done under clear and transparent conditions as to avoid even potential discrimination.

13. The use of limited tendering: **Criteria indicated in article 31** for the use of limited tendering are vague and do not seem to be in line with the GPA requirements, in particular, regarding the notion of urgent need. Also the last option given in the Article 31 (i) allows for arbitrary decision of the contracting authorities and can be easily misused as a catch all justification for the use of the limited tendering. In the light of criteria set by the GPA for the limited tendering, it would be desirable to refine the criteria in a more objective manner. Overall, the EC would like to point out that a secondary legislation shall become a toolbox for the contracting authorities for the conduct of procurement, it shall not merely state criteria which leave room for arbitrary interpretation.

14. The EC has difficulties to understand the provision of the Article 46, which seems to introduce features of limited tendering into open bidding process, in cases where less than three bidders have submitted offers.

15. Article 32 allows for the use of limited tendering for small value and sporadic items. These terms are however not further defined, which should clearly be the task of a secondary legislation.

16. Time limits for submission of bids: The minimum time-period of 20 days (which can be shortened to 10 days) set by article 39 is not in line with the GPA requirements and it is certainly not sufficient for the suppliers, especially in cases when international tendering is allowed. In comparison, the GPA text provides for a 40 days time period for open tendering and a period of 65 days for selective tendering.

17. Invitation based bidding in Article 41: The EC understands that this method corresponds internationally to the selective tendering. In this case, the qualification process foreseen in article **41** is not GPA compliant, as it is based on a random-choice among suppliers already qualified during preliminary review of qualification. The EC takes the view that the selection of candidates shall be done on the basis of objective and non-discriminatory criteria linked to professional capacities, financial standing etc.

18. Award criteria (Article 44): The possibility to base **the selection of bids on the lowest price or on a comprehensive evaluation method**, as described in article **44**, is a substantial step on the way to a modern procurement system under which the technical quality as well as delivery conditions can be taken into account. The EC welcomes this evolution. However, the draft implementing regulation remains **very vague on the set of criteria that can be used, as well as on the way to combine those criteria**. For the sake of an objective choice, it would be extremely useful if secondary legislation would clarify conditions for applying the comprehensive evaluation method.

19. As regards the performance of procurement contracts, the EC questions why the procurement, which is subject to certain policy objectives (as listed in Article 55) cannot be performed through subcontracting, as provided for by **article 58**. Those provisions may lead to the conclusion that the entire procurement regime is meant to obstacle the participation of foreign suppliers, even through the performance of specific tasks in a broader operation. The EC would appreciate the explanation of the grounds for this restriction.

20. E-procurement (Articles 14 and 33): The EC welcomes the introduction of the general provisions relating to the use of electronic means in procurement. At the same time, it obvious that that further legislation including implementation and methodical guidance is needed for this area.

21. Supervision and Inspection (Chapter 7): As the control mechanisms of procuring officers are usually not part of the international procurement rules such as the GPA, the EC will comment in a general manner only. The Chapter 7 of the draft implementing regulation does seem to be very extensive and in some cases fairly burdensome on the public purchasers. This part of the regulation is significantly more detailed and precise in comparison to the guidance given in relation to the actual conduct of the procurement (procedures, selection/award criteria). The EC is of the view that concerning **criminal sanctions**

punishing misconducts in government procurement, it might be helpful to target more specifically illegal behaviors.

22. Challenges and complaints (Chapter 6): The EC welcomes the precisions to the Government procurement law, which are given by this draft regulation. The EC considers the relevant provisions of the draft regulation as a step into the right direction. Nevertheless, a basic element for a functioning review procedure is the obligation placed on the contracting authority to inform the bidder about each decision it makes during the tender. This is a necessary prerequisite for the bidder to challenge the procedure. In particular, the options providing for a dismissal of the challenge (listed in Article 79) leave room for arbitrary interpretation and this way discriminatory treatment of the bidders.

23. Non-application of the procurement regulation(s) (Articles 113, 114). The draft implementing regulations in this respect does not offer any addition to the Government procurement law; it merely restates its provisions. In this respect, the objective of a secondary legislation which shall be to define criteria and to guide the contracting authorities remains unfulfilled.