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# Public Procurement Law: Key International Developments in 2014 — Part I: An American Perspective on the New European Public Procurement Directives

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**PUBLIC PROCUREMENT LAW: KEY INTERNATIONAL DEVELOPMENTS  
IN 2014—PART I: AN AMERICAN PERSPECTIVE ON THE NEW EUROPEAN  
PUBLIC PROCUREMENT DIRECTIVES**

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**I. INTRODUCTION**

This past year saw major developments in European public procurement law, as a number of new procurement directives, discussed in draft form last year, *see* Christopher R. Yukins, *The New European Procurement Directives: A Critical Perspective*, 2014 Gov. Con. Year Rev. Briefs 3 (Feb. 2014), finally came into force. This paper will focus on the two elements of the new European Union procurement directive, 2014/24/EU, most likely to affect the U.S. procurement community: new flexibility in the use of best-value negotiations, and expanded grounds for excluding potential contractors. The paper also will discuss how the new directive may affect ongoing trade negotiations regarding procurement markets.

**II. POINTS OF CONVERGENCE IN THE NEW EUROPEAN DIRECTIVES**

The new European procurement directives came into force on April 17, 2014. Each European member state now has two years to implement the new directives into their own laws. *See, e.g.*, UK Cabinet Office, *Guidance: Transposing EU Procurement Directives* (updated Oct. 6, 2014), available at <https://www.gov.uk/transposing-eu-procurement-directives>. The new directives govern procurement at all levels of government across Europe (what we would consider national, state and local governments in the United States). *See, e.g.*, Pedro Telles, *The Good, the Bad, and the Ugly: The EU's Internal Market, Public Procurement Thresholds, and Cross-Border Interest*, 43 Pub. Cont. L.J. 3 (2013) (discussing role of directives); Sue Arrowsmith, *The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?*, 35 Pub. Cont. L.J. 337 (2006). *See generally* Sue Arrowsmith, *The Law of Public and Utilities Procurement*, Vol. 1 (Sweet & Maxwell, 2014).

While there are several new European procurement directives -- including directives on concessions, *see, e.g.*, Richard Craven, *The EU's 2014 Concessions Directive*, 2014 Pub. Proc. L. Rev. 188 (available on Westlaw); Michael Burnett, *The New European Directive on the Award of Concession Contracts - Promoting Value for Money in PPP Contracts?*, 9 EPPPL 86 (2014) (available on Westlaw), and utilities, *see, e.g.*, Totis Kotsonis, *The 2014 Utilities Directive of the EU: Codification, Flexibilisation and Other Misdemeanours*, 2014 Pub. Proc. L. Rev. 169 -- the focus here will be on the core public procurement directive, covering purchases of goods and services by procuring entities across Europe, Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65. Although this new directive is not intended to address defense procurement, under Article 15 it does sweep up those defense- and security-related purchases not covered by the European directive specifically directed to defense procurement, Directive 2009/81/EC. *See generally* Christopher R. Yukins, *supra*, 2014 Gov. Con. Year Rev. Briefs 3 (discussing scope of draft directive); Christopher R. Yukins, *Feature Comment: The European Defense Procurement Directive: An American Perspective*, 51 GC ¶ 383 (Nov. 4, 2009).

For the U.S. procurement community, the new directive, which covers many different aspects of procurement, from planning to bidding to award, is vitally important for a number of reasons. *First*, although the discussion below is necessarily limited by space, a review of the directive's many provisions clearly shows that European procurement law is *increasingly similar* to U.S. procurement law. Experienced contracting professionals from the United States will be able to use these similarities to their advantage, for the more the procedures converge, the easier it is for market participants to move from one market to the other. *Second*, however, in some ways the European directive is strikingly *different from* U.S. laws, and these differences create competitive traps for outsiders, some of which are touched on below. *Third*, understanding where the most serious traps lie -- where divergence creates serious competitive barriers to procurement markets -- may help frame how the United States should approach its trade negotiations with Europe, and with other regions and nations following the same lines of convergence, for those negotiations provide an ongoing and important opportunity for harmonization.

### **A. European Union's Embrace of Flexible Negotiations**

For U.S. exporters, perhaps the most important development under the new directive is the European Union's embrace of flexible negotiations as a procurement method, much as flexible competitive negotiation methods have been widely adopted in the federal government. *See* Christopher R. Yukins, *supra*, 2014 Gov. Con. Year Rev. Briefs 3. Of the competitive procedures available under federal rules, *see, e.g.*, Kate M. Manuel, *Competition in Federal Contracting: An Overview of the Legal Requirements* 8-9 (Cong. Res. Serv. Rep. No. R40516, June 30, 2011), *available at* <https://www.fas.org/sgp/crs/misc/R40516.pdf>, multilateral competitive negotiations under Federal Acquisition Regulation (FAR) Part 15, 48 C.F.R. Part 15, are by far the most commonly used method for complex procurements (information technology and weapons systems, for example). As the discussion below reflects, these developments in European Union procurement policy may open new opportunities for the U.S. export community, and more broadly may suggest new ways of thinking about more flexible approaches to public procurement.

#### **1. Importance of Best-Value Negotiations to High Technology Exporters**

For some time, high-technology firms have recognized that they may not be able to compete effectively in world procurement markets if buyers are locked into "sealed bidding" procurement methods (which are sometimes called "open tendering" methods in foreign procurement systems). *See, e.g.*, Defense Acquisition University, *Acquimedia -- Sealed Bidding Procedures* (narrative discussion of sealed bidding process under FAR Part 14), *available at* <https://dap.dau.mil/acquimedia/Pages/ArticleDetails.aspx?aid=da800e14-bf23-44fc-892c-6f5b26dc0363>. Open tendering (sealed bidding) methods typically emphasize *price*, and quality is typically set by the government's previously fixed specifications, against which bidders often must compete on price alone. In a bidding environment of this kind, high-value, high-price products and services built on the latest technology

will typically lose; the low-priced bidder, offering a technically compliant but perhaps mediocre product or service, will nearly always win.

## 2. Comparative U.S. Federal Trend: LPTA Procurements

Within U.S. federal procurement, the tensions between sealed bidding and competitive negotiations have played out, in recent years, in an ongoing controversy over the use of the “Lowest Price-Technically Acceptable” (LPTA) method. *See generally* Vernon J. Edwards, *Lowest Price Technically Acceptable Source Selection: When and How Should Agencies Use It?*, 26 *Nash & Cibinic Rep.* ¶ 62 (Nov. 2012). While the LPTA method is *technically* a form of competitive negotiation under FAR Part 15 (and exchanges are permitted during the procedure, per FAR 15.101-2), in practice the LPTA method often is not materially different from sealed bidding: offerors propose against technical requirements set by the agency, and the lowest-priced technically acceptable offer typically wins. Under the LPTA approach, there is no best-value tradeoff between price and quality. FAR 15.101-2(b)(2).

In part because of growing budgetary pressures, federal agencies have resorted more to the LPTA method, *see, e.g.*, Timothy Bunting, *Lost and Found: In Search of A Uniform Approach for Selecting Best Value*, 44 *Pub. Cont. L.J.* 1 (2014), despite strong criticism from industry, *see, e.g.*, Vernon J. Edwards, *supra* (discussing industry criticism), and concerns from Congress, *see, e.g.*, Robert Nichols & Jad C. Totman, *Feature Comment: Myth-Busting the LPTA Conundrum*, 55 *GC* ¶ 392 (Dec. 18, 2013) (discussing congressional concerns); House Rep. No. 113-102, 113<sup>th</sup> Cong., 1<sup>st</sup> Sess. 185-86 (June 7, 2013) (House Armed Services Committee noted that it was concerned that “careful consideration must be given to each contract . . . [W]hen the requirement is complex, performance risk is high, or failure to perform has significant consequences . . . then a best-value tradeoff approach may be more appropriate”); *see also* GAO Report No. GAO-14-584 (July 2014) (study of use of best value procurements); *DOD’s Best-Value Processes Consistent With Guidance*, *GAO Says*, 56 *GC* ¶ 264 (Aug. 13, 2014).

Nor, it seems, are federal agencies using the LPTA method solely to drive down costs; as one federal acquisition official noted, quite bluntly, the LPTA method may be favored because it reduces potential criticism and accountability of federal officials. *See* Sean Lyngaas, *DHS’s Borkowski: Acquisition Officials Must Get Tougher with Industry*, *Federal Computer Week*, Aug. 6, 2014 (senior acquisition official noted: “You want to know why we do LPTA [lowest price, technically acceptable]? Because it’s safer. The idea in government, what we are all trained by history to do, is avoid consequences.”), *available at* <http://fcw.com/articles/2014/08/06/borkowski-gets-tough-on-acquisition.aspx>; *see also* Daniel I. Gordon, *Bid Protests: The Costs Are Real, but the Benefits Outweigh Them*, 42 *Pub. Cont. L.J.* 489, 506 (2013) (“Contracting Officers have told the author that they are acting to avoid bid protests when they decide that a contract should be awarded to the lowest-priced, technically acceptable (LPTA) proposal, rather than to allow for a trade-off.”).

### **3. World Bank Endorses Best-Value Negotiations**

While U.S. federal agencies have turned to the LPTA method -- which some might say is turning back the clock to a time, several decades ago, when awards based on low price alone were more common in federal procurement -- the World Bank has signaled that it will take the opposite approach, and endorse a broader use of negotiations and best-value awards in Bank-financed projects. *See generally* Jeffrey Gutman, *World Bank Evaluation Group Issues Procurement Review: Do the Conclusions Fit the Analysis*, <http://www.brookings.edu/blogs/up-front/posts/2013/12/23-world-bank-procurement-gutman> (Dec. 23, 2013) (discussing background to current round of World Bank procurement reforms). This is a change in World Bank practice, and, because of the large role that the World Bank plays in the developing world, the new policy marks an important new direction. The report on consultations regarding proposed reforms to the Bank's procurement policies stated, for example:

A point made frequently in the external consultations was that the Bank's procedures allow for awarding contracts on the basis of the lowest price alone. This is not the case. The Bank's Procurement Guidelines allow considerable latitude to include factors other than price, such as quality and after-sales service. However, *in applying the policy, Bank staff and counterparts often choose the lowest evaluated bid based on price alone, perhaps because it is less complicated to do or is perceived to be less risky.* It may also conform to local practices and procurement rules that require decisions to be made on the basis of the lowest price. A further contributing factor may be that economy is commonly understood as "the least expensive good," "something not extravagant," "which avoids unnecessary waste," "the careful, thrifty, frugal, and prudent management of money," and "restraint." While positive attributes, *these definitions are insufficient to accommodate modern concepts of sustainability, quality, and whole-life costs that underpin value for money.*

World Bank, *Procurement in World Bank Investment Project Finance - Phase I: A Proposed New Framework* 4 (Oct. 2013) (emphasis added), available at <http://siteresources.worldbank.org/PROCUREMENT/Resources/ProcurementProposedNewFrameworkOctober2013Final.pdf>. In undertaking these reforms, the Bank has specifically cited the need to embrace "[m]odern procurement methods such as competitive dialogue, negotiation, [and] best and final offer." World Bank, *Procurement in World Bank Investment Project Finance -- Phase II: Developing the Proposed New Procurement Framework, Framework Paper for Consultation* 7 (July 8, 2014), available at <http://consultations.worldbank.org/consultation/procurement-policy-review-consultations>.

### **4. New European Directive Opens Door to Broader Use of Negotiations for Best-Value Awards**

Now the European Union has offered its own renewed support for best-value-based multilateral negotiations, for reasons both predictable and

surprising. The new directive specifically allows the use of “competitive dialogue” (carried over from the prior directive, 2004/18/EU) and “competitive procedure with negotiation” (a new procedure). See Jonathan Davey, *Procedures Involving Negotiation in the New Public Procurement Directive: Key Reforms to the Grounds for Use and the Procedural Rules*, 2014 Pub. Proc. L. Rev. 103; Christopher R. Yukins, *supra*, 2014 Gov. Con. Year Rev. Briefs 3 (discussing two methods in detail). The new directive also places renewed emphasis on the use of best-value awards, where appropriate. See Paula Bordalo Faustino, *Award Criteria in the New EU Directive on Public Procurement*, 2014 Pub. Proc. L. Rev. 124.

While U.S. rules do not set a preference between sealed bidding and competitive negotiations, see FAR 6.401, traditionally the European Union directives had strongly favored open tendering (as noted, akin to U.S. sealed bidding). The recitals to the new directive, however, now endorse the use of more flexible negotiations:

There is a great need for contracting authorities to have additional flexibility to choose a procurement procedure, which provides for negotiations. *A greater use of those procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders.* Member states should be able to provide for the use of competitive procedure with negotiation or the competitive dialogue, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. It should be recalled that use of the competitive dialogue has significantly increased in terms of contract values over the past years. It has shown itself to be of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing.

Directive 2014/24/EU, Recital 42 (emphasis added). Although this recital to the public procurement directive is not legally binding, see, e.g., Michael Koeding, *Active Transposition of EU Legislation*, EIPASCOPE 2007/3, at 29 (“recitals are not legally binding, but intend to help civil servants in Member States to interpret the purpose of the directive’s provisions”), available at [http://aei.pitt.edu/11064/1/20080313162050\\_MKA\\_SCOPE2007-3\\_Internet-4.pdf](http://aei.pitt.edu/11064/1/20080313162050_MKA_SCOPE2007-3_Internet-4.pdf), this recital does raise two important points.

- The **recital’s italicized language points to recent European research which indicates that competitive dialogue and other forms of negotiation resulted in *more cross-border procurement*** -- significantly more than the average share of procurement, 1.4%, which is traditionally done across borders in the European Union. See Figure 1, *infra*; Zornitsa

Kutlina-Dimitrova & Csilla Lakato, *Determinants of Direct Cross-Border Public Procurement in EU Member States*, at page 7 & Fig. 5 (European Commission Chief Economist Note, July 2014) (“compared to the average in EU Member States of 1.4%, other types of procedures such as the ones awarded through competitive dialogue, negotiated with competition and accelerated negotiated procedures are found to be significantly above the average in terms of number of contracts awarded to foreigners[, and] [i]n terms of value, the same pattern[s] are revealed”), available at [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152700.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152700.pdf).

- The recital **gives examples of procurements**, such as for “large computer networks” or “projects involving complex and structured financing,” **which are well-suited to competitive dialogue or a competitive procedure with negotiation**. While these examples are not binding or exclusive, *see, e.g.*, Jonathan Davey, *supra*, 2014 Pub. Proc. L. Rev. at 106-07, the examples could prove extremely persuasive if firms, involved in the cited types of procurements, hope to convince procuring authorities that they should use these more flexible methods. *See also* Directive 2014/24/EU, Art. 26(4) (discussing conditions for use of two methods).

### 5. European Data Offer New Perspective on Negotiations’ Benefits

The first point cited above, regarding new European data on cross-border procurement which was endorsed by the directive, bears special emphasis, because that data may reshape the debate regarding multilateral competitive negotiations. For years, that debate has focused on the benefits of flexible negotiations *to the buyer* -- observers have argued that methods such as competitive dialogue give *buyers* badly needed new flexibility in procurement. *See, e.g.*, European Commission, *Public Procurement Reform -- Factsheet No. 3: Simplifying the Rules for Contracting Authorities*, at 1, available at [http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/reform\\_proposals/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals/index_en.htm).

The new European data offer, in contrast, a completely new perspective: that cross-border trade may be boosted by a more flexible approach to procurement, using negotiations. This, in turn, suggests that more flexible negotiation procedures *may be good for suppliers*, for suppliers may be willing to risk more in cross-border procurements if the procedures are more flexible, based on more open exchanges regarding best-value solutions for the purchasing agency. This point -- that negotiated-best-value methods may be better for suppliers, too, because the more flexible methods reduce risk and accommodate vendors’ new sources of value -- echoes U.S. industry’s opposition to price-based (LPTA-type) procurements in the federal government (discussed above), though the European data seem to lend new support, from a different perspective, for this proposition. Further analysis will be needed, but the initial European data, embraced in the new procurement directive, suggest that more flexible procurements with negotiations ultimately

may deliver better value and enhanced competition in international procurement markets.

**Table 5:** EU public procurement covered in the dataset by type of procedure (2008-2012)

<i>Procurement procedure</i>	Number of awards per year			Award value (€ millions) per year		
	Total	Cross-border	Share	Total	Cross-border	Share
Accelerated negotiated procedure	602	17	2.8%	629	34	5.4%
Accelerated restricted procedure	1,957	48	2.5%	2,399	124	5.2%
Award without publication	6,067	69	1.1%	1,990	50	2.5%
Competitive dialogue	411	17	4.0%	5,289	115	2.2%
Negotiated procedure with competition	8,429	286	3.4%	19,106	1,275	6.7%
Negotiated procedure without competition	8,400	415	4.9%	8,544	743	8.7%
Open procedure	207,651	2,327	1.1%	114,155	3,343	2.9%
Restricted procedure	10,272	203	2.0%	29,100	977	3.4%

*Source:* TED, own calculations

**Figure 1:** *Determinants of Cross-Border Trade, supra*, Table 5. Chart illustrates the share of covered European procurement done cross-border, by type of procurement procedure.

## B. Corruption and Compliance Challenges Under the New Directive

The new European procurement directive also highlights another major point of convergence -- and difference -- between U.S. and European procurement: corruption and compliance. *See* Christopher R. Yukins, *supra*, 2014 Gov. Con. Year Rev. Br. 3 (discussing problems with draft directive's provisions on corruption). Unlike the Federal Acquisition Regulation, which addresses issues of corruption extensively in FAR Part 3 (Improper Business Practices and Personal Conflicts of Interest) and FAR Part 9 (Contractor Qualifications), the new European directive reflects only a partial, if positive, step towards addressing corruption and compliance in procurement. *See, e.g.*, Hans-Joachim Priess, *The Rules on Exclusion and Self-Cleaning Under the 2014 Public Procurement Directive*, 2014 Pub. Proc. L. Rev. 112, 123 ("Although art. 57 leaves several questions unanswered, it must be regarded as a significant step towards a greater harmonisation of the public procurement law in the EU."); Rhodri Williams, *Anti-Corruption Measures in the EU as They Affect Public Procurement*, 2014 Pub. Proc. L. Rev. NA95 (discussing studies of corruption in the European Union leading up to new directive).

### 1. Grounds for Exclusion

Article 57 of the new directive sets forth a number of mandatory grounds for exclusion for corruption, including:



- Participation in a criminal organization;
- Corruption under the national laws of the contracting authority or the vendor, including potentially corruption under *other* nations' laws, *see* Hans-Joachim Priess, *supra*, at 115 (“Therefore, in case the economic operator has its seat of business outside the EU, the local definition of corruption must also be considered. Hence, a conviction for corruption by a court of the country—even one outside the EU or EEA area—where the economic operator is located may arguably also constitute a ground for exclusion.”);
- Fraud -- though only with regard to “fraud affecting the European Communities’ financial interests,” as defined by Article 1 of the Convention on the Protection of the European Communities’ Financial Interests;
- Terrorist offenses;
- Money laundering or terrorist financing; and,
- Child labor and other forms of human trafficking.

Article 57 also calls for mandatory exclusion where, among other things, the procuring authority knows that the vendor has not paid its taxes or its social security obligations. Member states may override a mandatory exclusion on any of these grounds on an exceptional basis, for “reasons relating to the public interest such as public health or protection of the environment.” Member states also may derogate from a mandatory exclusion for failure to pay taxes or social security obligations, if “exclusion would be clearly disproportionate.” Article 57 further says that member states *may* exclude vendors on a number of grounds, including “where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract” -- and important step forward in allowing European procuring agencies to address past failures in contractor performance. *See* Hans-Joachim Priess, *supra*, at 120-21 (discussing exclusions and exceptions in detail); Hans-Joachim Priess, *Anti-Corruption Internationally: Challenges in Procurement Markets Abroad*, 2013 Gov. Con. Year Rev. Br. 5 (discussing draft directive in context of international anti-corruption efforts).

### **2. Corruption Risks the New European Directive Does Not Address**

From a U.S. perspective, none of this seems surprising. European Article 57’s grounds for exclusion accord with a U.S. contracting officer’s broad discretion to exclude “non-responsible” vendors, per FAR Subpart 9.1, and with U.S. suspension and debarment officials’ sweeping authority to exclude vendors, government-wide, for any “cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.” FAR 9.406-2(c). What *is* surprising to those familiar with the U.S. federal system, however, is what is missing from Article 57 of the new European directive:

- **No Debarment System:** The directive does not contemplate a regularized system of debarment. Instead, exclusion is to be

done on a contract-by-contract basis, by contracting officials who may (or may not) have expertise in the grounds for exclusion; a contracting official may not, for example, know how to judge whether a vendor truly owes social security taxes. In the United States, this problem -- contracting officials' lack of expertise in the grounds for exclusion -- is what helped undo the Clinton administration's efforts to use U.S. contracting officers to "blacklist" vendors for certain types of labor and environmental violations. *See, e.g., Bush Administration Suspends "Blacklisting" Rule*, OFCCP Federal Contract Compliance Manual, Letter No. 226, 2001 WL 36651498 (CCH May 30, 2001).

- **Exclusion as Calibrated Punishment:** Rather than using exclusion as a means of addressing the peculiar reputational and performance risks that wayward contractors may pose, as the U.S. system does, *see, e.g., Joseph D. West, Timothy J. Hatch, Christyne K. Brennan & Lawrence J.C. Van Dyke, Suspension & Debarment*, 06-9 Briefing Papers 1, 6-7 (Aug. 2006); Steven A. Shaw, Mike Wagner & Robert Nichols, *Contractor Responsibility: Toward An Integrated Approach To Legal Risk Management*, 13-4 Briefing Papers 1 (Mar. 2013), Article 57 seems to contemplate a graduated system of punishment, with mandatory exclusion reserved for the most serious offenses. This approach, much like the World Bank's graduated approach to sanctions, *see World Bank Sanctioning Guidelines*, available at <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf>, treats exclusion as a form of graduated punishment, rather than risk mitigation. *See, e.g., Christopher R. Yukins, Rethinking the World Bank's Sanctions System*, 55 GC. ¶ 355 (Nov. 2013). The U.S. approach is far more flexible, and leaves it to contracting officers (on individual procurements) and suspension and debarment officials (agency- and government-wide) to assess and address contractor-specific risk, both to prospective projects (performance risk) and to the government's legitimacy (reputation risk).
- **Directive Does Not Tackle Fraud:** Although, for example, a 2011 study commissioned by the European Commission specifically called for, at the EU level, "better monitoring, detection, analysis, and reporting technology to fight fraud and corruption," and to "make these available to Member States," *see PwC EU Services, Public Procurement: Costs We Pay for Corruption -- Identifying and Reducing Corruption in Public Procurement in the EU*, at 12 (2011), available at [http://ec.europa.eu/anti\\_fraud/documents/anti-fraud-policy/research-and-studies/pwc\\_olaf\\_study\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/anti-fraud-policy/research-and-studies/pwc_olaf_study_en.pdf), the new European directive does not offer an integrated solution to address fraud in contract performance.

### 3. New Directive -- On Contractor Compliance

What will perhaps be most surprising to U.S. observers is the very limited approach taken to contractor compliance, under the new direc-

tive. While U.S. procurement law, building on a robust framework of U.S. compliance rules, generally assumes that contractor compliance systems will always be used, *see, e.g.*, FAR 52.203-13, the new directive assumes that “self-cleaning” (compliance) measures will be put in place *only after a contractor engages in misconduct*. *See* Directive 2014/24/EU, Art. 57(6) (“Any [specifically affected] economic operator . . . 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.”).

The European directive’s limited approach, which treats compliance efforts as *remedial* measures rather than as ongoing *risk mitigation* measures, is especially surprising in light of the UK Ministry of Justice guidelines under the UK Bribery Act of 2010. The United Kingdom’s approach, which follows a worldwide trend, *see, e.g.*, Hans-Joachim Priess, *Anti-Corruption Internationally: Challenges in Procurement Markets Abroad*, *supra*, is to require that anti-corruption compliance measures be put in place by *all* firms -- not only those that have engaged in misconduct. *See* UK Ministry of Justice, *UK Bribery Act 2010 -- Guidance*, at 7 (Mar. 2011), *available at* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181762/bribery-act-2010-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf). The disconnect between emerging international best practices in compliance and the new directive suggests that, over time, the European compliance requirements for contractors may expand, to conform more closely to international norms.

#### **4. New Challenge: Labor Compliance**

For compliance officers on both sides of the Atlantic, perhaps the most notable new area of compliance concern is *labor compliance*. The new European directive makes labor violations a potential basis for exclusion, as does an executive order issued by President Barack Obama in July 2014.

The new European directive provides, in Recital 39, that:

It should . . . be possible to include clauses ensuring compliance with *collective agreements* in compliance with Union law in public contracts. *Non-compliance with the relevant obligations could be considered to be grave misconduct on the part of the economic operator concerned, liable to exclusion of that economic operator from the procedure for the award of a public contract*

(Emphasis added.) Article 57(4)(c) goes on to say that a contractor may be excluded “where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable.” Although Recital 39 (as noted) is not legally binding, the recital is likely to be read in conjunction with Article 18(2), which calls for member states to “take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions.” If a contractor is badly out of step with collective bargain-

ing agreements, or otherwise engages in serious violations of labor law, stakeholders -- including unions -- may argue that the contractor should be excluded under the new directive. *See, e.g.,* European Trade Union Confederation, *New EU Framework on Public Procurement: ETUC Key Points for the Transposition of Directive 2014/24/EU*, at 9 (trade union confederation discussing labor protections gained under new directive), available at [http://www.etuc.org/sites/www.etuc.org/files/publication/files/ces-brochure\\_transpo\\_edited\\_03.pdf](http://www.etuc.org/sites/www.etuc.org/files/publication/files/ces-brochure_transpo_edited_03.pdf).

The Obama administration took a similar approach in the President's "Fair Pay and Safe Workplaces" executive order, which was issued on July 31, 2014. Under that executive order, a contractor could be subject to exclusion if a contracting official, in consultation with a "labor compliance official," concluded that the contractor engaged in violations ("particularly serious, repeated, willful, or pervasive violations") of certain labor laws. E.O. 13673, available at <http://www.whitehouse.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces>. Although the executive order remains to be implemented in regulation, the order has stirred a storm of controversy because it could force a contracting officer to sit, in practical terms, as a judge of labor violations -- an area in which contracting officers are not necessarily experienced. *See, e.g., Executive Order Targets Contractor Compliance With Labor Laws*, 56 GC ¶ 266 (Aug. 13, 2014); *Fair Pay and Safe Workplaces Executive Order—New Rules Require Federal Contractors And Subcontractors To Track And Report Labor Violations*, 38 Constr. Contr. L. Rep. NL 14 (Sept. 12, 2014).

### III. TRADE AGREEMENT IMPLICATIONS: E-PROCUREMENT

As the discussion above reflects, the new European directive carries important practical ramifications for firms that hope to compete in the European public procurement markets. Here, we review how the new directive also may affect the United States' ongoing trade negotiations with the European Union.

The United States and the European Union are engaged in protracted negotiations regarding the proposed Transatlantic Trade & Investment Partnership (TTIP), which would liberalize trade and establish an ongoing system to harmonize regulatory schemes between the United States and Europe, so as to reduce non-tariff barriers to trade. *See, e.g.,* Allen B. Green & Marques O. Peterson, *Converging Procurement Systems -- Part II: International Trade and Public Procurement 2013 Update*, 2014 Gov't Cont. Year Rev. Br. 2 (Feb. 2014). Procurement remains an important point of discussion in those TTIP negotiations. *See, e.g.,* Christopher R. Yukins & Hans-Joachim Priess, *Feature Comment: Breaking The Impasse In The Transatlantic Trade And Investment Partnership (TTIP) Negotiations: Rethinking Priorities In Procurement*, 56 GC ¶ 235 (July 24, 2014).

Any TTIP agreement between the European Union and the United States may well address a recurring issue in opening procurement markets: transparency, importantly including transparency as to procurement opportunities. In addressing this and other elements of open procurement markets, the TTIP negotiations may be influenced by the Canada - Eu-

European Union Comprehensive and Economic Trade Agreement (CETA), which is currently being finalized. *See, e.g.,* Jean Heilman Grier, *Major Procurement Gains in Canada-EU Agreement* (Nov. 1, 2013), available at <http://trade.djaghe.com/?p=78>. Under CETA, Canada has assured the European Union that Canadian procurement opportunities at both the central and sub-central levels (*i.e.*, federal and provincial) will be accessible through a “single point of entry.” *See* CETA (provisional text), Chapter X, Art. VI (“All the notices of intended procurement shall be directly accessible [by electronic means free of charge through a single point of access . . .]”), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/21.aspx?lang=eng>.

Although the U.S. federal government already uses a “governmentwide point of entry,” [www.fedbizopps.gov](http://www.fedbizopps.gov), to publicize federal opportunities on a centralized website, *see, e.g.,* FAR 5.003, in the United States sub-central (*e.g.*, state) opportunities do *not* appear on that site. Many states’ procurement-related websites are available through the National Institute for Government Procurement (NIGP), [http://www.nigp.org/eweb/StartPage.aspx?Site=NIGP&webcode=gs\\_stateproclinks](http://www.nigp.org/eweb/StartPage.aspx?Site=NIGP&webcode=gs_stateproclinks), but opportunities on state websites are *not* channeled through a central site -- as Canada has promised to do for the European Union. Given Canada’s willingness to establish a consolidated site (over a five-year transitional period, *see* CETA, Ch. X, Art. VI(1) & Annex X-02), and the European Union’s stated goal, in the new directive, to transition completely to electronic procurement in the coming years, *see* Roger Bickerstaff, *E-Procurement Under the New EU Procurement Directives*, 2014 Pub. Proc. L. Rev. 134, the European Union may argue that the United States, too, should agree in TTIP to make its procurement opportunities (both “central” and “sub-central”) readily available on a single website.

#### **IV. CONCLUSION**

The new European procurement directives, which are currently being transposed into member states’ procurement laws, share many common features with U.S. procurement law. European policymakers are increasingly willing to allow flexible forms of negotiated procurement, similar to competitive negotiations in the United States, and the European anti-corruption measures under the new directive are similar in many ways to their U.S. counterparts. There remain, however, significant differences between the two systems -- such as differences in contractor compliance requirements, and in publicizing procurement opportunities -- which need to be addressed if harmonization is to help erase unnecessary barriers to trade between the U.S. and European procurement markets.