

Implementation of the EU-Vietnam Free Trade Agreement

# Trading Among Partners: The EU-Vietnam Free Trade Agreement – Benefits, Opportunities, Challenges

## Legal Framework and Practice of Public Procurement in Vietnam

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# Government Procurement in Vietnam

- ❖ Vietnam is one of the countries with the highest ratio of public investment to GDP in the world (i.e., 39 per cent annually from 1995) compared with the average 15-20 per cent in several countries in the world. As Vietnam only opened its market to private companies and officially acknowledged them in law nearly 30 years ago, procurement in Vietnam is broadly understood as government procurement. The first consolidated law on government procurement was only adopted in 2005.
- ❖ By 2005, most of the procurement activities were conducted by State entities, which caused a certain level of irregularities in the process. The number of private companies has increased significantly over the years, especially when the Government privatized State-owned companies, resulting in the total number of around 100 State companies in key sectors of Vietnam's economy only. Given the increasing concern of private companies in government procurement and the requirement of international agreements to which Vietnam is a party, Vietnam needs to ensure effectiveness, competitiveness, fairness and transparency in government procurement activities by completing its legal framework in this field.



# Government Procurement in Vietnam

In terms of contract awards, Chinese companies used to profit the most from Vietnam's procurement market and the lack of binding legal framework in Vietnam . 90 per cent of the power, mining, manufacturing, ferrous and chemical projects of State-owned companies in Vietnam were awarded to Chinese contractors in the last 2 decades. China State Construction Engineering Corp keeps winning important contracts although it has a poor track record and has even been blacklisted by the World Bank due to bribery charges.

This situation is going to end soon. Although Vietnam has not agreed to cover their government procurement under the Government Procurement Agreement of the WTO, Vietnam has now undertaken to do so in the EVFTA. With the EVFTA, that attractive market will be opened to European companies. For the first time in decades, European companies now have a level playing field to compete for public procurement projects in Vietnam, a country with the average GDP of around USD 320 billion annually.



# EVFTA

The EVFTA includes the requirement to treat EU tenderers or domestic tenderers with EU investment capital and Vietnamese tenderers equally when a government buys goods or requests for a service worth over the specified threshold. *(I cannot state all the various specific thresholds here. Please come back to me after the event for queries on this).* Vietnam undertakes to timely publish information on public tender, allow sufficient time for tenderers to prepare for and submit a tender, maintain the confidentiality of tender.

The EVFTA also requires its Parties to assess tender based on fair and objective principles, evaluate and award tender only based on criteria set out in notices and tender documentation, create an effective regime for complaints and settling disputes, etc.

These rules require all Parties, especially Vietnam, in the context of China's tenderers predominantly win the tender with cheap offer price but low-quality services, to reform their tendering procedures and protect their interests by disqualifying tenders with poor performance and low capacity.



# Does the EVFTA make public procurement more transparent?

- ❖ By law, the answer is yes. But in practice, there needs to be a lot of improvement.
- ❖ Recently, many cases related to Violation of regulations on bidding, causing serious consequences have been discovered. This is an act that not only causes loss of State property, but also does not do any good to the economy and welfare of the country.
- ❖ **Reality alert:** An official report issued by VCCI shows the following realities:
  - 1 out of 3 businesses is willing to pay extra costs to increase the probability of winning a contract.
  - Businesses also said they had to pay unofficial fees for preparation and submission of bids. If the enterprise refuses to pay these amounts, the progress of completing the dossiers will be delayed, and the bids will not be submitted, causing a loss greater than the above payment - this is in line with what I observed in my 20 years experience.



# Public Procurement in Healthcare sector

- The Covid-19 pandemic in the last two years has put the healthcare sector under the spotlight of strict management from the Government. Consequently, various issues have been detected.

## Public Procurement System

- The Ministry of Health tend to assign Departments of Health of the provinces/cities and units to proactively procure drugs and medical equipment. Departments of Health in many provinces/cities in turn assign this responsibilities to local health facilities (e.g. hospitals) as they cannot process the bidding in time.
- This is understandable as each Department of Health of the province/city currently has only about 20 people, who do not have in-depth expertise in healthcare, finance, understanding of the law on bidding, experience in organizing contractor selection.
- However, the lack of management from the Ministry and Departments of Health creates a loophole in bidding management, enabling local facilities to control bidding procedure from beginning to end for their own benefits.

## Public Procurement Practice ( stats from an official VCCI report):

- In the healthcare sector, 50% of medical equipment suppliers agree that there exists the issue of commission payment to win a bid.
- In the healthcare sector, 21.3% of commission payment was suggested by the bidding officer in charge, while in other sectors this issue was only 10%.
- Most entities consider commission payment as an “unwritten law”, while the remaining said they actively paid commission.
- A series of cases of irregularities in the bidding of medical facilities, which have led to many officials being prosecuted in recent times, is a serious warning about the need to overcome inadequacy in healthcare sector procurement activities that is reducing the healthy competitiveness of bidding activities as well as whole country's healthcare system.



# Does the EVFTA make public procurement more transparent?

- ❖ Health care may be just one of the bidding areas that have been negatively detected due to the special attention in the last 2 years. Many other fields such as investment, construction, education, natural resources - environment, regular procurement of state agencies, units of the armed forces, public non-business units, procurement of State-owned enterprises... also have many potential risks of violations if they are not closely monitored.

## *Examples:*

- Education sector: in May 2022, inspectors of Phu Yen province discovered that the Department of Education and Training of Phu Yen province made many mistakes when assigning investor of bidding packages for procurement of teaching equipment from the State budget for the period 2019-2020. One of the mistake is failure to assess the products value without considering market value, only based on the value provided by bidders.
- Construction sector: in 2 years between 2020 and 2022, a company in Nghe An province continuously participated and won a total of 31 bidding packages with a value of over VND 47 billion, of which the results of 13 packages still have been announced on any bidding system. In the majority of these tenders, though there were other competitive bidders, the bidding results always state that this company is the only bidder.
- Normally, when there are more than one bidders, the authority would have to assess all the proposed bids. However, if there is only one bidder participating in the bid, then the authority could only choose one. Falsely stating that there was only one bidder maybe a solution of the authority of Nghe An province to legalize their wrongdoings in this instance.



# Difficulties when bidding

There are many types of bidding arrangements such as:

- When a government official sets out technical requirements so that only one contractor can meet the required specification;
- When state officials provide inside information so that the "favored" bidder can enter the bidding round with the lowest price; and when the public official responsible for conducting the bidding gives only the “preferred” contractor access to the bidding documents before the official announcement of the bid so that the “preferred” contractor has time to prepare your tender documents.
- Bid coercion: when one or more bidders give up bidding or are forced by another bidder to give up. Or, as in some cases, public officials pressurized not to bid or withdraw previously submitted bids so that a designated contractor would win. The unit that does not participate in the bidding may receive a sub-contract from the winning unit or be "failed" for not participating in the bidding.
- Collaborative bidding for shared benefits: when bidders collude with each other to submit bids that are so high in value that most of these bidders do not meet the requirements of the tender, so that a “preferred” bidder can win the bid. Usually, these ‘failed’ collaborative bidder will be compensated by the winning bidder and they can get a small part from the contract “bonus” section.
- Rotational bidding: when bidders compromise to submit bids together, but agree to act as the low bidder in turn for a related series of contracts.





# Difficulties when bidding

- Dividing customers: when the parties agree to divide customers or areas so as not to compete with each other when bidding or when there is a notice of invitation to bid, they will only send bids after reaching an agreement with each other.
  - Bidding low and then rationalizing: the company appointed to offer the lowest bid has a tacit agreement with the government official in charge of awarding the contract which state that During the implementation of the contract, the bidder can increase the contract price so that the bidder can complete the work and also increase profits for contractors and state officials.
  - Data falsification: when state officials falsify public procurement procedures to embezzle State money simply by falsifying data in procurement contracts. The risk of corruption can manifest in the appropriation and misuse of public property.
- All these bidding arrangements are not in compliance with the EVFTA's principles.



# Green Public Procurement

In recent times, Green Procurement has become popular in international commercial transactions and in public procurement in many countries, especially in light of COP26. Chapter 9.9 of the EVFTA allows Parties to apply technical specifications to promote the conservation of natural resources or protect the environment.

Green procurement is the process of purchasing goods and services that take into account the factors of minimizing environmental impact in the environment throughout the life cycle of goods and service.

*Vietnam's achievements in this sphere to date:*

\_ Vietnam has issued and implemented regulations on the process and criteria for granting eco-labels. Eco-labels have been piloted for a number of products. The activities have been recognized as a positive premise moving towards sustainable production and consumption.

\_ The State has issued a number of preferential and supportive incentives for units producing and supplying green products. Although the support is limited to initial stages, it also recognizes the interest from the government to encourage and promote the production of green products.

*To develop Green Procurement properly, Vietnam needs to overcome:*

- (i) The awareness of state agencies and public sector officials about Green Public Procurement is still limited – solution: there should be more training for people who work with and for the Government.
- (ii) The policy system on Green Public Procurement is still inadequate, there are currently no specific policies and regulations on promoting Green Procurement, there is a lack of preferential policies as well as specific guidelines on green procurement to encourage businesses to produce green products and services and promote Green Procurement related programs.



# Government level -What can be done to improve public procurement reality?

## *Methods:*

- Legal investigation audit: This measure emphasizes the need to determine whether funds are being used properly. This can be incorporated into periodic audits
- Specialised judicial body: This measure emphasizes building a public procurement-focus system with sufficient authority to receive denunciations, conduct investigations, prosecute and prescribe mechanisms for trial and conviction, and provide remedial measures.
- Objective supervision: This measure relies on observers to monitor the procurement process from the outset. These observers may be public management professionals retained in private companies or appointed by government regulatory agencies to monitor significant audits.
- Information transparency policy: This legislative measure allows the public, supervisory organizations and the media to access the information to know which companies are winning bids and which contracts are signed, terms and value of such contracts, etc.



# Government level – Dispute Resolution

- ❖ Chapter 15 of the EVFTA contains Government-level dispute settlement mechanism, which can only be used by the Trade Committee of the two Parties and only used to resolve disputes arising from or based on commitments under the EVFTA.

## ***Step 1: Consultation***

Any dispute must first be resolved by consultation between the two Parties. The Complaining Party must send a written request for consultations to the other Party, and the two Parties shall consult together within 30 days. After 45 days, if the consultation has not been conducted, or has been conducted but failed to reach amicable results, Parties shall move to Step 2.

## ***Step 2: Arbitration***

- Establishment of the Arbitration Council:

The Complaining Party may submit a request for the establishment of an arbitral tribunal to resolve the dispute by arbitration. The request must be made in writing, sent to the other Party and the Trade Committee.

- Conduct arbitration proceedings:

Within 10 days from the date the Arbitral Tribunal is established, the two Parties will jointly decide with the Arbitral Tribunal on necessary issues such as time frame, remuneration, arbitration costs, etc., except for the issues already committed under the EVFTA. Unless otherwise agreed by the Parties, within 3 days from the date of establishment of the Arbitral Tribunal, the Arbitral Tribunal may receive written explanations from individuals who are citizens or organizations established in the territory of either Party.



# Government level – Dispute Resolution

- Report of the Arbitral Tribunal:

Within 90 days (which can be extended but not more than 120 days) from the date of establishment, the Arbitral Tribunal must issue a interim report with contents on the facts of the case, application of regulations, grounds for arbitration. related decisions and recommendations. In case of urgency, the interim report will be issued within 45 days (extendable up to 60 days) of the establishment of the Arbitral Tribunal.

The Arbitral Tribunal shall then consider the opinions, comments and requests of the Parties, revise the report and approve the Final Report within 120 days (or up to 150 days if extended) from the date of establishment of the Arbitral Tribunal (these time limits are 60 and 75 days respectively in case of emergency).

### *Step 3: Execute*

In principle, the Parties are obliged to take the necessary measures to enforce the conclusion of the case in the Final Report of the Arbitral Tribunal.

- Time required to execute:

In case the Defaulting Party needs time to implement, it must notify this to the other Party and the Trade Committee of the EVFTA (within 30 days from the date of receipt of the Final Report). In case the two Parties cannot agree on the necessary time for enforcement, the Arbitral Tribunal that handled the case will be re-convened (at the request of the Complaining Party) to make a decision on the required time period.



# Government level – Dispute resolution

- Review of enforcement measures:

At the end of the implementation period, the Defaulting Party must notify the other Party and the Trade Committee of the EVFTA of the measures it has taken to enforce the dispute settlement conclusion. In case the two Parties still have a dispute about these measures, they may reconvene the Arbitral Tribunal that handled the case for this Council to make a decision on this issue.

- Temporary remedy in case measures are not implemented:

In the event that, through the above steps, the necessary enforcement action has not been taken, the Defaulting Party may make a proposal for interim compensation if requested by the Complaining Party.

If the Complaining Party has not requested provisional remedies or has requested but failed to reach agreement on provisional compensation, it has the right to apply for suspension of the obligations under the EVFTA to the same extent as the breach/damage (provided that the other Party and the EVFTA Trade Committee are notified and clearly state the extent of the suspension of obligations).

- The Dispute Resolution provision under the EVFTA is not strong enough.
- Now we examine a much sharper tool – the ISDS



# Investor-State Dispute Settlement (ISDS)

\_ This mechanism is covered under the EU-Vietnam Investment Protection Agreement (EVIPA). The EVIPA is pending ratification by EU member states before it can come to force.

\_ In disputes regarding investment (for example, expropriation without compensation or discrimination of investment), an investor is allowed to bring the dispute to the Investment Tribunal for settlement. To ensure the fairness and independence of the dispute settlement, a permanent Tribunal will be comprised of nine members: three nationals each appointed from the EU and Vietnam, together with three nationals appointed from third countries.

\_ Cases will be heard by a three-member Tribunal selected by the Chairman of the Tribunal in a random manner. This is also to ensure consistent rulings in similar cases, thus making the dispute settlement more predictable. The EVIPA also allows a sole Tribunal member where the claimant is a small or medium-sized enterprise, or the compensation of damaged claims is relatively low. This is a flexible approach considering that Vietnam is still a developing country.



# Investor-State Dispute Settlement (ISDS)

- In case either of the disputing parties disagrees with the decision of the Tribunal, it can appeal to the Appeal Tribunal. While this is different from the common arbitration proceeding, it is quite similar to the two-level dispute settlement mechanism in the WTO (Panel and Appellate Body). This mechanism could save time and costs for the whole proceedings.
- In the first 05 years following entry into force of the EVIPA: The final settlement is enforceable by the domestic courts regarding its validity
- After 05 years: the final settlement is directly binding and enforceable in Vietnam or the EU country of the Investor/State in question.

*For example:*

A French company can bring its dispute with the State of Vietnam to the Investment Tribunal.

If win, the French company can enforce the final settlement in either France or Vietnam.

In the first 05 years: If it chooses to enforce in France, then the French company must bring this final settlement to a French court.

After 05 years: the final settlement is automatically binding in France without having to be enforced by a local French court.





# Q&A



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