

THE US-CHINA BUSINESS COUNCIL

美 中 贸 易 全 国 委 员 会

US-China Business Council Recommendations on Government Procurement and Sales to SOEs

September 2021

Since 1973, the US-China Business Council (USCBC) and its more than 260 member companies have contributed to China's economic and technological development. Our members include a range of international enterprises dedicated to the China market.

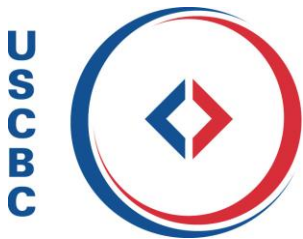
Many USCBC members are actively involved in both government procurement and sales to SOEs, have long-term partnerships with Chinese customers, and consistently offer high quality products and services. Member companies have noted improvements in China's procurement environment in recent years, including greater transparency in tenders, commitments to offer equal treatment to foreign-invested enterprises (FIEs), and efforts to align China's procurement laws with international standards.

USCBC has conducted 30 interviews with companies in the information and communications technology (ICT), healthcare, energy, and manufacturing sectors about government procurement challenges in China.

USCBC companies welcome draft revisions of the Tendering and Bidding Law and the Government Procurement Law, which would toughen procedural and transparency requirements around tender notices and align China's procurement framework more closely with the Government Procurement Agreement. Companies also appreciate the inclusion of an anti-discrimination provision in the Foreign Investment Law, which emphasizes that China will uphold fair competition for FIEs in government procurement activities and that FIE products manufactured in China will receive equal treatment.

However, companies remain concerned about inconsistent implementation of procurement laws, efforts to replace foreign products and components with domestic ones, the lack of a definition or domestic content threshold for domestic products, and broad security criteria that is used to evaluate bidders.

USCBC encourages China to continue aligning its procurement practices with existing commitments at the WTO and international standards. Fully implementing the Foreign Investment Law, fulfilling WTO commitments related to SOE procurement, and further improving upon its bid to join the Government Procurement Agreement would significantly improve China's procurement environment and create new opportunities for Chinese companies. As a GPA member, China would have greater access to government procurement



THE US-CHINA BUSINESS COUNCIL

美中贸易全国委员会

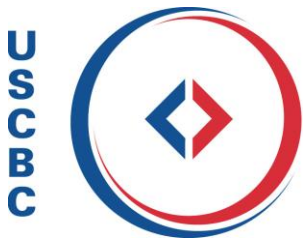
markets in other GPA countries and regions. The Council also hopes that China will encourage narrow interpretations of security criteria when evaluating bidders, and that China will provide a definition for domestic products that includes those manufactured in China by FIEs. This would allow for greater consistency and predictability in China's procurement environment. USCBC hopes that the detailed recommendations included in the attachment are able to provide some constructive ideas to help address US companies' challenges while at the same time benefiting Chinese companies and consumers. The Council aims to be a partner in China's efforts to procure the highest quality goods and services at the most competitive prices and hopes that the Chinese government will view our organization as a resource.

China's GPA bid and domestic legislation

Further improve China's bid to join the GPA: China's most recent bid to join the Government Procurement Agreement (GPA) significantly improved on previous bids by expanding coverage of entities at various levels of government and increasing the number of state-owned enterprises (SOEs) and services subject to GPA compliance. We encourage China to further build upon this offer by adding greater coverage of SOEs and limiting transitional measures that would delay full implementation of China's commitments after accession. Joining the GPA with a comprehensive offer would not only allow foreign-invested enterprises (FIEs) greater access to China's procurement market but would also allow Chinese companies greater access to procurement opportunities in other GPA member countries and regions.

Align domestic procurement laws with the Foreign Investment Law: Current drafts of the Tendering and Bidding Law and the Government Procurement Law have been well-received by US companies. However, further aligning language with the Foreign Investment Law would ensure consistency across domestic legislation and equal treatment of FIEs that conduct manufacturing in China.

- Article 16 of the Foreign Investment Law states: "China ensures that foreign-invested enterprises participate in government procurement activities through fair competition in accordance with law. Government procurement is to give equal treatment to products manufactured by, or services provided by, foreign-invested enterprises in mainland China."
- Article 15 of the Implementation Regulations for the Foreign Investment Law states: "The government and relevant departments must not obstruct or restrict foreign-invested enterprises' free entry into the government procurement market. Government procurers and procurement agents must not exhibit differential or discriminatory treatment of foreign-invested enterprises in areas such as the publication of government procurement information, the inspection of supplier requirements and



THE US-CHINA BUSINESS COUNCIL

美中贸易全国委员会

credentials, and bid evaluation criteria; must not restrict suppliers on the basis of unreasonable requirements such as ownership structure, organizational structure, stock structure, investor nationality, or service branding; and must not offer different treatment to goods produced in China and services provided by foreign-invested enterprises in China (compared to those goods produced and those services provided by domestic enterprises).”

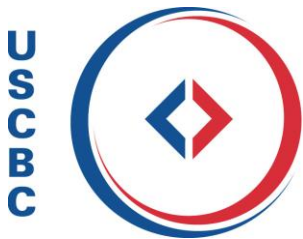
Define “domestic products”: China has not yet released a definition for “domestic products,” so its meaning remains open to interpretation. FIEs often find themselves excluded from procurement opportunities or subject to unequal treatment because of inconsistent interpretation across government entities, and because of FIEs’ association with a foreign brand. Companies recommend releasing a definition that includes products manufactured in China by FIEs.

Fulfill WTO commitments on SOE procurement: Domestic content requirements, instructions to favor domestic products, and other efforts to interfere with SOE procurement decisions that are otherwise made along commercial lines are incompatible with China’s WTO commitments and the core WTO principle of national treatment. During its WTO accession, China made the following commitments related to SOEs: 1) “All state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, e.g., price, quality, marketability, and availability, and the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions;” and 2) “The Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value, or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement.”

Sector specific recommendations in ICT and healthcare

Security assessments for ICT products

Narrowly interpret security criteria: Even though cybersecurity legislation does not explicitly cite national origin as a defining factor in products’ security profiles, US companies note that many procuring entities consider US companies to be de facto security risks. Linking a product’s security to its country of origin or the nationality of its manufacturer creates significant market access barriers for FIEs. We recommend that government entities and SOEs engaging in procurement publicly release security criteria, narrowly interpret these criteria when assessing products, and avoid judging a product’s security based on its country of origin or the nationality of its manufacturer.



THE US-CHINA BUSINESS COUNCIL

美 中 贸 易 全 国 委 员 会

Healthcare: pharmaceutical and consumable procurement

Continue improving the National Drug Reimbursement List: We encourage China to establish a comprehensive and sustainable policy framework for government pricing and reimbursement that would include predictable and timely reimbursement decisions for new drugs, systematic and transparent mechanisms for price negotiation linked to reimbursement, adoption of evidence-based methodologies for drug value assessment, and an enhanced role for commercial health insurance.

Elevate consideration of quality in procurement of high-value consumables: During volume-based procurement (VBP) for high-value consumables, there is limited distinction between more and less advanced products, despite significant variation in quality within product categories. Companies recommend taking quality into greater consideration and conducting separate rounds of procurement for products with different applications and levels of quality.

Improve implementation of VBP: While allowing multiple winning bidders is a positive development, by awarding all supply to those with the lowest price bids, the national VBP program may reduce the number of quality suppliers in the market, increase the risk of drug shortages, and hinder patient and physician choice in selecting the clinically most appropriate medicines. We encourage China to implement a transparent and appropriate government pricing policy that recognizes innovation and the value that our member companies' products bring to patients and China.