

Guidance 23 - Overview of the Agreement on Government Procurement

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Introduction

Procurement of products and services by government agencies for their own purposes represents an important share of total government expenditure and thus has a significant role in domestic economies. While ensuring best value for money will be secured through an open and non-discriminatory procurement regime, governments sometimes seek to achieve certain other domestic policy goals through their purchasing decisions, such as promotion of local industrial sectors or business groups. Measures to this effect may be either explicitly prescribed in national legislations, for example prohibitions against the purchase of foreign goods or services or from foreign suppliers, preference margins, set-asides and offsets, or in the form of less overt measures or practices which have the effect of denying foreign products, services and suppliers the opportunity to compete in domestic government procurement markets, including excessive use of single or selective tendering, non-open technical specification requirements and, in particular, lack of transparency in tendering procedures including contract awards. Such discriminatory government procurement procedures and practices can lead to distortions in international trade.

Government procurement has been effectively omitted from the scope of the multilateral trade rules under the WTO, in the areas of both goods and services. In the General Agreement on Tariffs and Trade, originally negotiated in 1947, government procurement was explicitly excluded from the key national treatment obligations. More recently, government procurement has been carved out of the main commitments of the General Agreement on Trade in Services. Since it is estimated that government procurement typically represents 10-15% of GDP, this represents a considerable gap in the multilateral trading system.

A growing awareness of the trade-restrictive effects of discriminatory procurement policies and of the desirability of fulfilling these gaps in the trading system resulted in a first effort to bring government procurement under internationally agreed trade rules in the Tokyo Round of Trade Negotiations. As a result, the first Agreement on Government Procurement was signed in 1979 and entered into force in 1981. It was amended in 1987, with this amended version entering into force in 1988. In parallel with the Uruguay Round, Parties to the Agreement held negotiations to extend the scope and coverage of the Agreement. The Agreement on Government Procurement (1994) (GPA) was signed in Marrakesh on 15 April 1994 – at the same time as the Agreement Establishing the WTO. The new Agreement entered into force on 1 January 1996. The GPA is one of the ‘plurilateral’ Agreements included in Annex 5 to the Agreement establishing the WTO, signifying that not all WTO Members are bound by it.

According to the statistics collected under the Tokyo Round Agreement, that Agreement applied annually to a total value of contracts of around US\$30 billion in 1990-94. Under the new Agreement, the value of procurement that is opened up to international competition is estimated to have increased by ten times, with the extension of rules to cover procurement of services as well as goods and to cover sub-central entities and public utilities as well.

Main Features

The GPA establishes an agreed framework of rights and obligations among its Parties with respect to their national laws, regulations, procedures and practices in the area of government procurement. The cornerstone of the rules in the Agreement is non-discrimination. In respect of the procurement covered by the Agreement, government Parties to the Agreement are required to give the products, services and suppliers of any other Party to the Agreement treatment ‘no less favourable’ than that they give to their domestic products, services and suppliers and not to discriminate among goods, services and suppliers of other Parties (Article III:1). Furthermore, each Party is required to ensure that its entities do not treat a locally established supplier less favourably than other locally established supplier on the basis of degree of foreign affiliation or ownership and do not discriminate against a locally established supplier on the basis of country of production of the good or service being supplied (Article III:2). In order to ensure that the basic principle of non-discrimination is followed and that access to procurement is available to foreign

products, services and suppliers, the Agreement lays heavy emphasis on procedures for providing transparency of laws, regulations, procedures and practices regarding government procurement.

Scope and Coverage

The Agreement does not apply to all government procurement of the Parties.

The obligations under the Agreement apply to procurement:

- by the procuring entities that each Party has listed in its schedule in Annexes 1 to 3 of Appendix 1, relating respectively to central government entities, sub-central government entities and other entities such as utilities;
- of goods; and
- all services and construction services that are specified in positive lists found, respectively, in Annexes 4 and 5 of Appendix 1;
- in respect of procurement contracts above certain threshold values. Each Party indicates the levels of minimum thresholds that apply to the procurement of goods and services under Annexes 1, 2 and 3 entities (Article I:4).

The Agreement authorises Parties to modify the mutually agreed coverage of Appendices I to IV, subject to the procedures for rectification and modification specified in Article XXIV:6. Since its signature in April 1994, the Agreement's scope has been expanded through the incorporation in it of the results of a series of bilateral agreements between individual Parties. A loose-leaf system for Appendices to the Agreement is designed to reflect the up-to-date status of the Appendices as such changes occur.

When reading the schedules in Appendix I to ascertain whether a particular procurement contract is covered by the Agreement, it is important to check not only whether the procuring entity is covered, the threshold level and, if the contract is for a service, whether that service is covered, but also the General Notes at the end of most Parties' schedules which provide for a number of exceptions. It should be noted that exceptions from the obligations of the Agreement are also allowed for developing countries in certain situations (Article V) and for non-economic reasons, for example to protect national security, interests, public morals, order or safety, human, animal or plant life or health or intellectual property, etc. (Article XXIII).

The Agreement (Article IX:11) requires that notices of invitation to participate in an intended procurement make it clear, either in the notice itself or in the publication in which it appears, whether the procurement in question is covered by the Agreement.

Tendering Procedures

The Agreement contains a number of detailed procedural obligations which procuring entities have to fulfil to ensure the effective application of its basic principles (Articles VII to XVI). The purpose of these procedural requirements is to guarantee that access to covered procurement is effectively open and that an equal opportunity is given to foreign suppliers and suppliers in competing for government contracts.

The Agreement allows the use of open, selective and limited tendering procedures, provided they are consistent with the provisions laid out in Articles VII to XVI:

- Under open procedures all interested suppliers may submit a tender (Article VII:3(a)).
- Under selective tendering procedures only those suppliers invited to do so by the entity may submit a tender (Articles VII:3(b) and X). To ensure optimum effective international competition, purchasing entities are required to invite tenders from the maximum number of foreign suppliers. Safeguards to ensure that the procedures and conditions for qualification of suppliers do not discriminate against suppliers of other Parties are set out in Article VIII. For example, any conditions for participation in tendering procedures by suppliers shall be limited to those that are essential to ensure the firm's capability to fulfil the contract and shall not have a discriminatory effect. Once a year the entities using the selective tendering method are required to publish, in a publication indicated in Appendix III to the Agreement, their lists of qualified suppliers, and to specify the period of validity of those lists and the conditions that need to be met for inclusion of interested suppliers in the lists (Article IX: 9).

- Under limited tendering procedures the entity contacts the potential suppliers individually (Article VII:3(c)). The Agreement closely circumscribes the situations in which this method can be used, for example in the absence of tenders in response to an open tender or selective tender or in cases of collusion, when the product or service can be supplied only by a particular supplier, or for reasons of extreme urgency brought about by events unforeseeable by the entity (Article XV).

Entities may hold negotiations with suppliers making tenders, provided this is indicated in the initial tender notice or it appears from the tender evaluation that no one tender is the most advantageous and subject to safeguards to ensure that such negotiations do not discriminate between suppliers (Article XIV).

The Agreement prescribes certain minimum deadlines that must be allowed for the preparation, submission and receipt of tenders to enable responsive tendering (Article XI:2). These must be set long enough to allow all suppliers, domestic and foreign, to prepare and submit tenders before the closing of the tendering procedures. In general the minimum shall be 40 days from the date of publication of an Invitation to Tender. The minimum time-limits for receipt of tenders may be reduced to 25 or even 10 days in certain well-defined circumstances.

In the tender documentation the purchasing entity is required to give all necessary information related to the procurement in question to enable potential suppliers to submit responsive tenders, including information required to be published in tender notices and other important information, for example economic and technical requirements, financial guarantees and the criteria for awarding the contract and procedural information such as the closing date and time for receipt of tenders (Article XII).

The objective of the procedural rules for submission, receipt and opening of tenders is to ensure fairness, equity and transparency in the procurement process (Article XIII:1-3). All tenders solicited under open and selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings.

Only tenders that conform to the essential requirements of the tender notice or documentation and are from a supplier which complies with the conditions for participation can be considered for award. Entities have the obligation to award contracts to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender is either the lowest tender or the tender which is determined to be the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation. An entity that has received a tender abnormally lower than other tenders may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract (Article XIII:4).

The modes of transmission of data foreseen under the relevant provisions of the Agreement are telex, telegram and facsimile. The Agreement recognises the fact that its provisions do not take into account the rapidly emerging use of information technology in government procurement. In order to ensure that it does not constitute an obstacle to technical progress in this area, the Agreement calls for regular consultations in the Committee regarding developments in information technology and, if necessary, negotiation of modifications to the Agreement itself (Article XXIV:8).

Other Provisions for Open Procurement

The use of offsets – measures to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements – are explicitly prohibited in the Agreement. Notwithstanding this, developing countries may negotiate, at the time of their accession, conditions for the use of offsets provided these are used only for the qualification to participate in the procurement process and not as criteria for awarding contracts (Article XVI).

The Agreement contains obligations on technical specifications in order to prevent entities from discriminating against and among foreign goods and suppliers through the technical characteristics of products and services that they specify (Article VI). Technical specifications shall be in terms of performance rather than design, and be based on international standards, where they exist, or otherwise on national technical regulations, recognised national standards, or building codes.

Prior Information

Prior to the actual process, Parties are required to publish an Invitation to Participate in the form of a tender notice in a publicly accessible publication indicated in Appendix II to the Agreement. The purpose is to inform all interested suppliers about the procurement opportunity and the relevant aspects of the procurement in question. Entities at central government level in Annex 1 are required to use a notice of proposed procurement, whereas other entities in Annexes 2 and 3 may use a notice of planned procurement (Article IX).

Post-Award Information and Publication

Information must also be provided, after the award of the contract, on the award decision in the form of a notice, giving information on such matters as the nature and quantity of the products and services in the contract award, the name and address of the winning tenderer and the value of the winning award or the highest and the lowest offer taken into account in the award of the contract (Article XVIII:1).

Moreover, in response to a request from a supplier from a Party to the Agreement, the procuring entity must provide prompt and pertinent information on: its procurement practices; an explanation of the reasons why a supplier's application to qualify was rejected; why its existing qualification to tender was brought to an end and on the characteristics and relevant advantages of the tender selected (Article XVIII:2). However, entities are entitled to withhold certain information on grounds of confidentiality (Article XVIII:4). The Agreement provides for the protection of confidential information (Article XIX:4). In addition, the government of an unsuccessful tenderer, Party to the Agreement, may seek such additional information on the contract award as is necessary to ensure that the procurement was made fairly and impartially (Article XIX:2).

There is a general requirement to publish laws, regulations, judicial decisions, administrative rulings of general application and any procedures regarding government procurement covered by the Agreement. The relevant publications are listed in Appendix IV (Article XIX:1). As a further element of transparency under the Agreement, each government must collect and provide to the other Parties, through the Committee, statistics on its procurement covered by the Agreement (Article XIX:5).

Special Rules for Developing Countries

The Agreement recognises the development, financial and trade needs of developing countries, in particular least-developed countries, and allows special and differential treatment in order to meet their specific development objectives (Article V:1). Development objectives of developing countries should be taken into account in the negotiation of coverage of procurement by entities in developed and developing

countries (Article V:3-7). Article V also contains provisions on: technical assistance (Article V:8-11); establishment of information centres giving information on procurement practices and procedures in developed countries (Article V:11); special treatment for least-developed countries (Article V:12 and 13); and review of the application of Article V (Article V:14 and 15).

Enforcement

Disputes between Parties under the Agreement are subject to the procedures of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (Article XXII:1). Because of the plurilateral nature of the Agreement, Article XXII contains a number of special rules or procedures (Article XXII:3, 5 and 6). Of particular interest is the provision disallowing so-called

‘cross-retaliation’ – the suspension of concessions or other obligations under the GPA as a result of disputes arising under the other WTO Agreements as well as suspension of concessions or other obligations under any other WTO Agreement because of any dispute arising under the GPA (Article XXII:7). Moreover, under the Agreement the DSB has the authority to authorise consultations among parties to the dispute regarding remedies when withdrawal of violating measures is not possible (Article XXII:3).

As a new and unique feature of the enforcement procedures in the WTO system, Article XX of the GPA sets out mandatory requirements for the establishment of a domestic bid challenge system, giving suppliers believing that a procurement has been handled inconsistently with the requirements of the GPA a right of recourse to an independent domestic tribunal. Parties may confer the authority to hear challenges by suppliers on national courts or on an impartial and independent review body. In the event that a bid challenge is heard by a review body which does not have the status of a court of law, either its decisions must be subject to judicial review or it must follow the procedures/criteria laid down in detail in the Agreement (Article XX: 6(a)-(g)). The challenge body must have the authority to order the correction of a breach of the

Agreement or compensation for the loss or damages suffered by a supplier, but this may be limited to costs for tender preparation or protest. Pending the outcome of the challenge, it must be able to order rapid interim measures, including the suspension of the procurement process, to correct breaches of the Agreement and to preserve commercial opportunities (Article XX:7 (a)-(c)).

Committee on Government Procurement

The committee handling the plurilateral agreement, and its observers.

Parties to the Agreement (Committee Members)

Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, United States.

Negotiating Accession

Bulgaria, Estonia, Jordan, Kyrgyz Republic, Latvia, Panama, Chinese Taipei.

Observer Governments

Argentina, Australia, Bulgaria, Cameroon, Czech Republic, Chile, Colombia, Croatia, Estonia, Georgia, Jordan, Kyrgyz Republic, Latvia, Lithuania, Malta, Moldova, Mongolia, Oman, Panama, Poland, Slovak Republic, Slovenia, Turkey.

Observers – Intergovernmental Organisations

International Monetary Fund.

Organisation for Economic Cooperation and Development.

International Trade Centre.

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