

Public Procurement in the International context

Government Procurement Agreement at the WTO and Regional Trade Agreements

Seminar-cum-workshop

on

Public Procurement Legislation in India: National and International Perspectives

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Professor

Centre for WTO Studies

Why does Public Procurement have an international context

Public procurement in most economies known to range between 10 to 25% of GDP

Conventionally public procurement used to develop domestic capacities

Globally integrated economies can specialise and hence make most of trade

Foreign markets of interest to domestic exporters of goods and services

Reciprocally — Domestic market of interest to foreign suppliers

Foreign participation in public procurement to be facilitated under free trade

Why does Public Procurement have an international context

Foreign participation necessary at times too

Deficient capacity

Monopolistic situations

Access to state-of-art technology

Tied Aid

Efficient funding

Time constraints

GPA

A plurilateral non-mandatory Agreement

Current Members

Armenia
 Canada
 EU — 27
 Hong Kong,
 China
 Iceland
 Israel
 Japan

Korea
 Liechtenstein
 Aruba
 Norway
 Singapore
 Switzerland
 Chinese Taipei
 United States

Negotiating Access

Albania
 China
 Georgia
 Jordan
 Kyrgyz
 Moldova
 Oman
 Panama
 Ukraine

Observer Status

Argentina
 Australia
 Bahrain
 Cameroon
 Chile
 Colombia
 Croatia

India
 Mongolia
 New Zealand
 Saudi Arabia
 Sri Lanka
 Turkey

GPA

Observer status of India since February 2010 means

Ability to closely follow discussions in the GPA Council

Cannot directly affect the negotiations and discussions

Can indirectly influence process through talks with other members

Can learn about the negotiating strategies of acceding members such as China

GPA

Two main considerations

Market Access

Transparency

GPA

Market Access

National Treatment

Opportunities and threats

GPA

Transparency

Set procedures with high degree of predictability

Developing contractor confidence in the process

Lend teeth to competition

Main elements of GPA

Non-discrimination

National treatment

Coverage

Defined through schedules specifying entities, thresholds, covered services and specific exclusions

Coverage*

In Appendix 1

Entity Coverage

Annex 1 — Central Government Entities

Annex 2 — Sub-Central Government Entities

Annex 3 — Other entities

Coverage of Goods and Services

Annex 4 — Services

Annex 5 — Construction Services

No separate annex for goods since in principle all goods covered

*Subject to thresholds, specified derogations

Coverage

Thresholds — general levels (in SDRs)

Entities	Goods	Services	Construction services
Annex 1	1,30,000	1,30,000	50,00,000
Annex 2	2,00,000	2,00,000	50,00,000
Annex 3	4,00,000	4,00,000	50,00,000

Coverage

Entity Coverage

Annex 1 — Central Government Entities

Positive list

Annex 2 — Sub-Central Government Entities

Positive list

Generic description — regional or local authorities

Annex 3 — Other entities

Positive list

Generic description — utilities

Coverage

Goods and Services

All Goods covered

Annex 4 — Services

Computer services

Financial services

R&M services

Transport services

Management consulting services

Exclusions to services

R&D services, arbitration and conciliation, etc.

Coverage

Goods and Services

Annex 5 — Construction Services

Article 1 Definitions

For purposes of this Agreement

...

(b) "A construction services contract is a contract which has its objective the realization by whatever means of civil or building work, in the sense of Division 51 of the [UN Provisional] Central Product Classification."

Coverage

Derogations

Clarification

Definition of procurement — may not apply to land transactions

General or National Security exceptions

Therefore not covered

Specific derogation

Relating to an entity, product or services sector

General derogation

Relating to domestic policy — MSME sourcing, offsets

Offsets

Article XVI

Does not generally allow offsets

Offsets defined as

"Offsets in government procurement are measures used 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.

Offsets

Article XVI

However, for developing countries, it is stated'

"... a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory.

Coverage

Derogations

Bilateral

Reciprocal market opening

Country-specific

Identified countries not to be covered either positively or negatively

Linkage to GATS specific commitments

Services and construction services form part of the General Agreement on trade in services where a country makes separate commitments but does not include services procured in exercise of governmental authority

Main elements of GPA

To address transparency detailed provisions on

Tendering procedures

Qualification of suppliers

Invitations to participate

Selection procedures

Time limits, documentation, opening of tenders and award procedures

Transparency

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Qualification of suppliers

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Transparency

Ex ante information

Publication of applicable rules on procurement regime

Publish laws, regulations, established jurisprudence, administrative rulings

Provide explanations on request from other parties

Publish or notify amendment to above

Transparency

Ex ante Information

Information on individual procurements

Publish information on procurement opportunities

Provide qualification and tender documents on request

Provide opportunities for debriefing of suppliers

Publish information on contract awards

New text — allows for electronic access of notices as well as e-auction where applicable

Transparency

Procedural Rules

Specified procurement methods

3 main methods — open, selective and limited tendering

Limited tendering to be an exception

New text — allows flexibility for commercial goods and services

Procedural Rules

Other rules

Notices- 5 main types in 2 broad categories

Pre-award

Notice of intended procurement

Summary notice

Notice inviting suppliers to apply for qualification

Notice of planned procurement

Post award

Procedural Rules

Other rules

Qualification and selection of suppliers

To be based on fair and equitable procedures

Opportunities for suppliers to apply for inclusion on pre-qualification list

Non-discriminatory selection of suppliers

Information regarding qualification decisions to suppliers

New text — relevant prior experience allowed as condition and grounds for exclusion of suppliers detailed

Procedural Rules

Other rules

Technical specifications

To be open and trade non-restrictive

Preferably performance-based and to international standards

To allow for submission of 'equivalent' offers where a descriptive or similar approach unavoidable

New text — allows for consideration of environmental factors

Procedural Rules

Other rules

Evaluation Criteria

To be objective, pre-disclosed, sole basis for award decision

To be included in full in tender documentation

Tender documentation

To contain all necessary information

Procedural Rules

Other rules

Time limits — minimum periods specified

Qualification — 25 days

Tendering — open and selective: 40 days

Reduction only in special conditions

New text — *enhanced flexibilities for urgency, recurring procurements, etc.*

Treatment of tenders/ contract awards

Procedures to ensure transparency, regularity, impartiality

Procedural Rules

Other rules

Awards — to be made

On basis of pre-disclosed criteria or essential requirements

To fully capable and compliant tenderer

On the basis of either lowest tender or most advantageous offer

Negotiation allowed

If pre-specified and pre-disclosed or no obvious winner

Transparency

Ex post and other aspects

Award

*Notice, supplier information, debriefing
information to parties, statistics, record-keeping, etc.*

Main elements of GPA

Enforcement

Domestic review procedures such 'bid challenge' and 'remedy systems'

Dispute settlement Understanding of the WTO

Main elements of GPA

Why are Domestic review procedures needed

Provides self-policing and enforcing

Provides forum to air complaints and obtain relief

Provides 'due process' rights

Provides opportunity to seek procurement file

Provides right to a hearing

Enhance accountability

Improve reputation of system — ∴ greater participation and competition

Main elements of GPA

Two aspects of Domestic review procedures need to be balanced

*Provide opportunity to redress complaints and possibly correct
incorrect decisions*

Limit disruption caused by protest

Main elements of GPA

Jurisdiction of Review Mechanism

Universal Jurisdiction

Impractical

Transparent and impart Uniformity

Main elements of GPA

Who can complain

Disappointed bidder?

Anyone who believes improper process followed?

Main elements of GPA

What should be the time limit

Too tight — escapes proper scrutiny

Too relaxed — delays procurement

Main elements of GPA

Evidence

Who compels collection of evidence?

How to ensure evidence remains after protest?

Oral testimonies?

From — Employer? Disappointed Bidder? Any other competitor?

Main elements of GPA

Relief

Interim relief

No relief — Risks of resolution being too late

Automatic — Risks delaying the procurement process

Case by case — Risk of subjectivity

Main elements of GPA

Relief

Final relief

Binding orders or recommendations?

How to recover cost of litigation?

Publication of decisions to establish precedence and increase confidence or maintain confidentiality?

Main elements of GPA

Appeal

Administrative entity

Judicial system

Main elements of GPA

Crucial to locate forum of protest correctly

Within contracting agency

Efficiency vs. lack of independence and objectivity

Independent Administrative Agency

Perceived expertise, efficiency and respect vs. increased cost, time and enforcement capacity constraints

Court

Independence and enforcement capacity vs. slow, expensive and less expertise

Main elements of GPA

Dispute settlement Understanding of the WTO

Much bigger forum

∴ much more expensive

Meant for WTO parties not for individuals

Systemic issues only

Main elements of GPA

Use of domestic bid challenge mechanisms far outweighs use of GPA dispute mechanism

Effective bid challenge mechanisms support successful procurement systems

Transparency

Integrity

Competition

Uniformity

Best Value

Efficiency

Main elements of GPA

New Text

Simplification of procedures

Address widespread use of e-commerce

*Greater flexibility for Employers on time periods and related
procedures*

Main elements of GPA

New Text

More explicit recognition of implications for governance such as
conflict of interest and corrupt practices

Sustainable procurement — resource conservation and environmental
protection

GPA

Indian Market

A very basic estimate of the Government Procurement in India shows:

Central Government	Rs. 2,51,501 crore	USD 44.91 billion
State Government	Rs 1,34,280 crore	USD 23.98 billion
All Government	Rs. 3,85,781 crore	USD 68.89 billion
Central PSUs	Rs. 2,68,100 crore	USD 47.88 billion
State PSUs	Rs. 1,46,374 crore	USD 26.14 billion
All PSUs	Rs. 4,14,474 crore	USD 74.01 billion
All Government and Public Sector	Rs. 8,00,255 crore	USD 142.90 billion

Regional Trade Agreements

Are a smaller set of trade agreements which are essentially either with one other country or with a group of countries

Are normally considered bilateral in nature

Regional Trade Agreements

Some RTAs have provisions on Public Procurement

India — Japan FTA

Limited ambition

Focusing on sharing of information and knowledge

Yet — specific clause on non-discrimination

If any other country is given added benefits same will accrue to Japan

Regional Trade Agreements

Canada — Latin America

Replicates the GPA

Most Latin American countries not members

Yet forced to accept GPA standards and open up their Public Procurement Markets

Similar situations in other RTAs

Possibly unequal deals

Issues before the Indian Industry

Are there reasonable size markets available Indian suppliers to Governments in large countries such as the United States and the European Union?

Are foreign suppliers to Government and PSUs likely to swamp Indian suppliers if equal access is provided by law?

Issues before the Indian Government

Are we going to give away greater market access than we will get?

Are the conditions too stringent and too expensive to adopt?

What if procedures are not rolled out in time and too many challenges, too many disputes sap the system of its energy and ability to address equity and efficiency?

Thank you

Madhukar Limba