

International Regulatory Framework for Government Procurement
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On the international side the EU has concluded several bilateral agreements (with Switzerland, Chile, Israel and Mexico) and is currently negotiating others (Mercosur, Canada, GCC). My Colleague will come back on these agreements.

However the main regulatory framework, on which all other agreements are based is provided by the Government Procurement Agreement (GPA) of the WTO.

The GPA is a plurilateral agreement (because it is signed only by some WTO members and it is administered by a plurilateral committee). The present agreement and commitments were negotiated in the Uruguay Round and took effect on 1 January 1996.

The GPA is composed of two elements — general rules and obligations, and schedules of national entities in each member country whose procurement is subject to the agreement.

One essential element is that because of its exclusive external competence, the EC, including its Member States is one Party to the GPA (no separate membership of the Member States). This means that when an acceding Country becomes an EU Member State, it will be included in the Agreement as part of the EC (no separate accession to the GPA).

The procedural part of the GPA: General rules and obligations

I. The principle of non discrimination and national treatment are the fundamental principles of the Agreement.

In respect of the procurement covered by the Agreement, governments 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 another 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).

II. The rules on tendering procedures

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 emphasis on procedures for providing transparency of laws, regulations, procedures and practices regarding government procurement. (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 supplies and suppliers in competing for government contracts.

As far as the EC is concerned all these procedural rules are contained in the EC Directives which are even more complete and stricter than the rules in the GPA.

III. 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 prohibiting 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 authorize 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 procurement has been handled inconsistently with the requirements of the GPA a right of recourse to an independent domestic tribunal. These rules are based on the EC directives on remedies.

(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)).

In conclusion, it is important to understand that the obligation and rules just mentioned are included in the EC Directives on public procurement. Thus, no reference to the GPA is necessary in national legislation. The GPA itself has been included in the EC legal order by a decision of the Council to conclude and ratify the different agreements following the Uruguay round (in 1994).