

# GPA accession as an opportunity for policy innovation and reform: operationalizing and internalizing the obligations of the Agreement

Professor Sue Arrowsmith; Professor Emerita,  
University of Nottingham

[www.nottingham.ac.uk/law/pprg](http://www.nottingham.ac.uk/law/pprg)

# Background

- Brazil has existing public procurement law (Laws, Decrees etc)



# Background

- How to approach the GPA against this background



# Outline

1. Coverage: which procuring entities and which contracts are covered?
2. Contract award procedures
3. Supplier remedies (“domestic review procedures”)
4. General issues

# Coverage

- GPA covers ONLY contracts considered of interest to trade
  - Tendering is also appropriate for non-covered contracts
- GPA does not cover ALL contracts of interest to trade: is based on negotiation

# Coverage

- Thus the GPA will not cover ALL contracts covered by the relevant national/regional/local government's Public Procurement Law(s)
  - Often quite limited coverage of sub-central procurement

# Coverage

- Lesson from experience :

Keep a uniform approach for all contracts as far as possible

– i.e. apply all new “GPA-based” procedures and remedies even to contracts not covered by the GPA - and even if those markets are closed to foreign suppliers



# Coverage

- Why?
  - Less complex and confusing for stakeholders
  - Avoids legal disputes over which rules apply
  - Applying GPA rules may *improve* the system – and there will be no reason *not* to apply GPA rules

# Coverage

- Can apply same rules to e.g.:
  - Contracts below GPA thresholds which are subject to tendering rules
  - Contracts for goods or services not covered by the GPA
  - Contracts for procuring entities not covered by the GPA

# Coverage

- Ideally should also apply to defence contracts (including to excluded hard defence supplies)
  - Can use suitable exemptions for security etc
  - UNCITRAL Model Law on Public Procurement 2011 promotes this approach



# Award procedures

## Issue 1

How do the GPA procurement methods fit with national methods of procurement?

# Award procedures

## GPA PROCUREMENT PROCEDURES ("METHODS")

Open tendering

Selective tendering

Limited tendering (limited circumstances only)

# Award procedures

Q. Do we need to have just these three procurement methods – and call them open tendering, selective tendering and limited tendering?

A. No: each Party can design/keep its own methods, provided they “fit” within one of these GPA methods

# Award procedures

## SELECTIVE TENDERING

Notice advertising the procurement

- individual; notice of several procurements; notice of list

Invitation to participate to suppliers who are interested

One or more tendering rounds

*Can* include dialogue before or after each round

Selection winner and award contract, based on most advantageous tender or lowest price; can have negotiations

Contract award notice

# Award procedures

## GPA

Open tendering

Selective tendering

Limited tendering

## EU directives/UK regulations

Open procedure

Restricted procedure

Competitive dialogue (limited use)

Competitive procedure with negotiation (limited use)

Negotiated procedure with prior call for competition (free use EU Annex 3 entities only)

Innovation partnership (limited use)

Negotiated procedure without prior call for competition



# Award procedures

- Countries can use different methods for:
  - Different types of entities
    - As in EU Directives
  - Different types (e.g. works, supplies, services) or value of contracts
    - e.g. Require use of open procedure for works contracts, but not services
  - Different levels of government/regions
- *provided* they fit with the GPA methods

# Award procedures

- Countries can make use of these methods – or variations of them - subject to conditions e.g.
  - Allow selective tendering only for complex contracts
  - Allow selective tendering *involving negotiations* only for complex contracts (EU approach)

# Award procedures

- Electronic auctions
  - Expressly recognised: GPA Art.XIV
  - Not a separate method of procurement in the GPA – but can be operated within the three GPA methods
  - *Can* be a separate method in national law, if desired

# Award procedures

- Limited tendering
  - GPA method does not *require* either public notice or competition
  - But notice and/or competition are *permitted* within this GPA method
    - E.g. inviting quotes from three known suppliers for urgent procurement
      - UNCITRAL competitive negotiations method
  - Countries can limit use to just some (or none) of the circumstances allowed in the GPA

# Award procedures

## Issue 2

How do the GPA rules on specific issues - such as advertising, minimum time periods for responses, conditions for participation and award criteria - fit with national rules?

# Award procedures

- GPA rules are *minimum standards*
- So countries can have stricter/additional requirements  
e.g.
  - Longer time limits for tendering than GPA minimum
  - More information in notices than the GPA requires
  - Requirements to advertise by additional means
    - e.g. in national trade journals

# Award procedures

- Countries can choose to *limit* use of GPA tools/flexibilities e.g.
  - Limit use of award criteria that are *permitted* by the GPA e.g.
    - Require use of lowest price only for some types of procurement
    - Prohibit procurement based on price only for some types
    - Require use of “environmental” criteria for some procurements

# Award procedures

- GPA rules are not exhaustive – so countries can have additional rules, adding extra rules to GPA methods or covering things the GPA does not deal with at all e.g.
  - Rules on scoring systems for evaluating tenders
  - Rules on how to appoint evaluation panels
  - Detailed rules limiting modifications to contracts
  - Rules on how to conduct electronic auctions
- Must comply with GPA general principles, though



# Award procedures

- Rules can again be different for different entities or types of contracts





# Award procedures

- However..... take the opportunity of GPA accession to look more broadly at award procedures
  - Can they be improved?
  - Can they be made more uniform between contracts?
    - UK reform

# Supplier remedies (“domestic review procedures”)

- Main lesson: courts do not provide an effective or balanced remedy so consider a specialist body

# Supplier remedies (“domestic review procedures”)

- 2017: 15 EU Member States had specialist review bodies:
  - [https://ec.europa.eu/growth/content/new-eu-network-review-bodies-make-public-procurement-remedies-more-efficient-0\\_en](https://ec.europa.eu/growth/content/new-eu-network-review-bodies-make-public-procurement-remedies-more-efficient-0_en)
- Experience shows preferable for an effective system
  - E.g. significantly faster (often strict time limits for completion)
  - European Commission has been encouraging such bodies

# Supplier remedies (“domestic review procedures”)

- Why a specialist body?
  - Expertise
    - Can facilitate GPA-compliant interpretation
  - Designed for procurement
  - Designed effectively
  - Clear rules
  - Better resourced?

Without “baggage”



# General issues

- Post-implementation, how can we ensure that the GPA is considered by:
  - Legislature?
  - Lawyers and courts, in interpretation/application of the law?
  - Academics?



# General issues

- Use of GPA accession to drive wider reform of public procurement law
  - Political opportunity
    - As in UK, after Brexit
  - Need for integrated approach

# General issues

- Importance of practical initiatives – 2017 European Commission Communication e.g. professionalisation:  
<http://ec.europa.eu/docsroom/documents/25614>

