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

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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")**

<table>
<thead>
<tr>
<th>Procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open tendering</td>
</tr>
<tr>
<td>Selective tendering</td>
</tr>
<tr>
<td>Limited tendering (limited circumstances only)</td>
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</tbody>
</table>
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

<table>
<thead>
<tr>
<th>Notice advertising the procurement</th>
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<tbody>
<tr>
<td>- individual; notice of several procurements; notice of list</td>
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<table>
<thead>
<tr>
<th>Invitation to participate to suppliers who are interested</th>
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<table>
<thead>
<tr>
<th>One or more tendering rounds</th>
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<tbody>
<tr>
<td><em>Can</em> include dialogue before or after each round</td>
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</table>

<table>
<thead>
<tr>
<th>Selection winner and award contract, based on most advantageous tender or lowest price; can have negotiations</th>
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<table>
<thead>
<tr>
<th>Contract award notice</th>
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</table>
# Award procedures

**GPA**

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**EU directives/UK regulations**

<table>
<thead>
<tr>
<th>Open procedure</th>
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<table>
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<tr>
<th>Restricted procedure</th>
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<table>
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<tr>
<th>Competitive dialogue (limited use)</th>
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<table>
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<tr>
<th>Competitive procedure with negotiation (limited use)</th>
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<table>
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<tr>
<th>Negotiated procedure with prior call for competition (free use EU Annex 3 entities only)</th>
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<tr>
<th>Innovation partnership (limited use)</th>
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<table>
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<tr>
<th>Negotiated procedure without prior call for competition</th>
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</table>
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:

- 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