4.2 General exceptions and flexibilities of the GPA

Antonella Salgueiro
Lawyer, LL.M. International Trade Consultant

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Twitter: @anto_salgueiro
General exceptions and flexibilities of the WTO GPA

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I. Flexibilities of the GPA...

- Flexibilities for sub-central and ‘other’ entities
  - Art. XI

- Shorter time periods – electronic tools
  - Art. XI

- Security and general exceptions
  - Art. III

- Flexibilities for crisis-related procurement
II. Flexibilities for sub-central and ‘other’ entities

- Higher GPA thresholds
- Notices of intended procurement
- Multi-use lists
- Collection and reporting of statistics
Additional flexibilities for developing and least-developed economies: *transitional measures*

**Article V of the GPA**

...the Parties shall give special consideration to the development, financial and trade needs and circumstances of developing countries and least developed countries...

Subject to negotiations, based on development needs

Transparent and non-discriminatory application
III. Shorter time periods for procurement conducted through electronic means – Art. XI:

Additional flexibilities for parties’ procurement authorities to **reduce the time-period for tendering by 5 days** for each of the following:

- The notice of intended procurement is published by electronic means;
- All the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and
- The entity accepts tenders by electronic means.
IV. Security Exception – Art. III.1

Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests...

- Procurement of arms
- Ammunition
- War materials
- Procurement indispensable for national security or for national defence purposes
V. General Exceptions – Art. III.2

...nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:

- Public morals, order, safety
- Protect IP
- Goods or services of special groups
- Protect human, animal, or plant life and health
VI. Flexibilities available to GPA Parties in time of (health) crisis

Entities that carry out health or crisis-related procurements are covered extensively by the GPA Parties at the central and sub-central levels of government and as other entities.

A significant range of the goods and services that are being or may be procured by governments in response to the COVID-19 crisis are covered by the rules and requirements of the GPA.
Flexibilities in time of crisis!

The GPA offers choices that can help policy makers in deciding to what extent and which normally applicable procedural and transparency rules can and should be suspended during a crisis...

General Exception in Article III:2 for measures necessary for the protection of human life and health

The availability of shorter time periods for tendering processes in particular circumstances;

The use of limited tendering in response to public health emergencies

...these flexibilities ensure that the Agreement does not serve as an obstacle to swift, efficient responses by governments in a time of crisis.
Availability of shorter time periods for tendering processes in particular circumstances:

The GPA provides flexibility in regard to time periods for the procurement of goods, services and construction services where expedited procurement is needed in times of crisis:

Article XI:4 allows to reduce applicable time periods from the baseline minimum of 40 days to not less than 10 days where:

“a state of urgency duly substantiated by the procuring entity renders the time-period for tendering established in accordance with paragraph 3 impracticable.”

All other transparency and procedural requirements remain in place, under this approach!
The use of limited tendering in response to public health emergencies

Article XIII:1(d) - insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering”
Procuring entities are exempted from the mandatory application of:

- Articles VII to IX — on publication requirements and conditions for the participation and qualification of suppliers;
- Article X (7-11) — requiring the publication of documentation setting out technical specifications and evaluation criteria;
- Article XI — setting out minimum time periods to be respected;
- Article XII — applicable to negotiations;
- Article XIV on electronic auctions, and XV on the awarding of contracts.

But... remain applicable:

- Art. X 1-6 on Technical Specifications
- The use of international standards to the extent possible;
- Post-award transparency requirements contained in Article XV.

Permitting at least appropriate ex-post evaluation and monitoring of procurement through basic post-award transparency.
Additional and very relevant analysis on ensuring flexibility for governments in time of economic and public health crisis: can be found at:

Keeping Markets Open While ensuring Due Flexibility for Governments in a Time of Economic and Public Health Crisis: The Role of the WTO Agreement on Government Procurement (GPA)

Robert D. Anderson and Anna Caroline Müller (2020) 29 P.P.L.R., Issue 4

Concluding remarks:

The Agreement was modernized in 2012, adding greater flexibility for its Parties!

These include flexibilities for central and sub-central entities and for procurement through the use of electronic means.

Article III:2 ensures that GPA Parties retain powers to take exceptional measures in the context of (health) crises.

Further flexibilities ensure that the Agreement permits swift, efficient responses by governments in a time of crisis!

GPA is not intended to impose undue restrictions on the freedom of action of Parties! Great care has been taken to ensure due flexibility in a wide set of circumstances!