

Government Procurement in the WTO

By

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Preface

Government procurement accounts for 10% or more of GDP in most states, and practices in this area can operate as important barriers to trade. Thus it is not surprising that it has been a concern of multilateral regulators since at least the end of the Second World War, and that it is a subject of great interest for the World Trade Organization (WTO).

For both political and practical reasons, most government procurement was excluded from the main obligations of GATT 1947 and, later, from the multilateral agreements negotiated during the Uruguay Round. However, procurement is now becoming an increasingly important subject in the WTO, with direct implications for a growing number of policy-makers and administrators in member (and applicant) states, and broader implications for all those interested in the WTO system.

First, this area is regulated by an important plurilateral agreement, the Agreement on Government Procurement (GPA). Although the GPA currently applies only to 29 Member States, this includes the major trading entities of the US, EU, Japan and Canada and, under pressure from the existing GPA Parties, many new WTO members and applicants have recently become GPA observers and/or applied for membership. (In particular, since the text of this book was finalised, China has been granted observer status). Second, despite the wide “government procurement” exclusions, the existing multilateral agreements still have a role in this area, particularly in relation to the commercial activities of government – an area of special importance for some new WTO members (including China). Finally, there are also on-going multilateral initiatives on procurement. In particular, it is envisaged in the Doha Declaration that negotiations will begin after the Fifth WTO Ministerial in 2003 for creating an entirely new multilateral agreement dealing with transparency in government procurement.

Despite the growing importance of the subject, however, and the proliferation of writing on most WTO issues, the literature on government procurement in the WTO, particularly from a legal perspective, is very limited. Against this background, this book seeks to provide a comprehensive analysis and critique of the legal aspects of the subject, dealing both with the existing WTO provisions and with the current initiatives for broadening regulation. After outlining the relevant economic issues and the general role and history of the WTO in this area (Chapters 1 and 2), the subsequent chapters deal in detail with the impact of the current multilateral rules (Chapter 3); the GPA (Chapters 4–15); and the issue of expanding participation, including through the new multilateral initiatives (Chapter 16).

Some of the issues covered, including issues surrounding the negotiation of concessions (see Chapters 5 and 16), the impact of WTO rules on national social and environmental policies (see Chapter 13) and enforcement (see Chapter 14), have been dealt with to some degree in the existing literature. However, neither the academic literature nor GATT/WTO publications have given much attention to the subject of contract award procedures – required by the GPA and under consideration in the transparency initiative – and, in particular, to their implications for the complex commercial problems faced by procuring entities.

Thus virtually nothing has been written on the implications of GPA requirements for complex procurement procedures, such as requests for proposals or competitive negotiations; for framework (or umbrella) arrangements; for qualification systems; or for electronic procurement. However, applying the rules to these situations raises many important questions, and even in the context of traditional single stage tendering the apparent simplicity of the rules conceals numerous problems. Lack of clarity in the award procedures, combined with errors and anomalies in the current GPA text, creates considerable difficulties for the increasing number of states that must implement and apply the Agreement.

These problems are not merely matters of technical detail, but have important general implications. Uncertainties can hinder the objectives of transparency and non-discrimination (for example, by increasing non-compliance) and the procedures could have significant adverse implications for the commercial and other interests of procuring entities if interpreted in an unduly restrictive way. Such problems create a deterrent to GPA membership, and a fear that they may be replicated in a multilateral transparency agreement is one reason (although far from the only one) that some WTO members are hostile to such an agreement. Thus this book devotes significant space to considering the detail of these procedures.

The subject of government procurement provides an interesting case study of the problems of a regulatory system that has a significant impact behind national borders. Throughout the analysis the book seeks to address the important question of how, in developing and interpreting WTO rules, an appropriate balance can be maintained between, on the one hand, GPA objectives of non-discrimination and transparency and, on the other, the freedom of national governments to pursue legitimate domestic objectives. Most obviously international regulation of award procedures affects states' freedom to devise their own procedures for obtaining value for money in procurement. To the extent that the existing literature deals at all with the award procedures, the focus has been on identifying the limitations of the GPA in achieving transparency. Whilst there are limited respects in which more stringent transparency rules might be useful, however, it is argued that it is not the limitations in the Agreement that should be the main cause for concern. Rather, the main danger lies in an approach that does not give sufficient weight to national interests in value for money and an efficient procurement process. In relation to the impact of WTO rules on secondary (or collateral) procurement measures (for example, to promote social, environmental and human rights policies), the thrust of the argument is again for allowing a broad discretion to member states. However, whilst the GPA needs amending so that the substantive policy areas for state action are not constrained, additional controls also need to be built in to the current system.

By treating both broad themes and detailed aspects of the rules, the aim is to produce a book that is relevant both for procurement specialists (particularly those who develop and apply the rules) and for those interested more generally in the WTO. With this in mind I have sought to provide brief explanations both of basic concepts in international trade and of relevant procurement terms. Wherever possible I explained GPA procedures using the methods and standards of the UNCITRAL Model Law on procurement, both for simplicity and to make the book more useful for procurement specialists.

Whilst writing this book I have received help from numerous individuals and I would like to express my sincere thanks to all of them. I am particularly indebted to Peter Bennett of the UK Office of Government Commerce, who read large parts of the manuscript and discussed with me many of the issues raised in the book. I would also like to thank Federico Trionfetti for his help on the economic aspects of public procurement; John Colling, Jonathon Denison Cross and John Addison of the Office of Government Commerce; Glenn Fletcher and Colin Maund from the Achilles Group; Auke Haagsma from the Commission

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Finally I am, as always, deeply grateful for the constant love and support of my family, Peter, Emma and Joe, and dedicate this book to them.

So far as possible, this work is up to date as at December 2001.

Professor Sue Arrowsmith

About the Author

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