

WTO Government Procurement Agreement: History and Future

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Abstract:

This research paper is a part of the research project F2/70/2018 “Přeshraniční veřejné zakázky – analýza mezinárodního prostředí a překážky v zapojení českých firem” supported by the Internal Grant Agency (IGA) of the University of Economics, Prague.

National governments worldwide reduced the use of tariff barriers to trade as a result of international trade agreements, many governments, nevertheless, have raised non-tariff barriers in their place. One increasingly prominent non-tariff barrier is discrimination in public procurement, especially so-called home bias. These discriminatory public procurement practices retarded the growth of world trade and its liberalization and started the discussion on international public procurement market rules in the World Trade Organization. Governmental Procurement Code has been signed in late 70ties as a result of the Tokyo Round trade negotiations, and in 1995, it became a part of the WTO system as the Government Procurement Agreement. Further negotiations of the GPA agreement followed under its built-in agenda and the revised GPA came into force in 2014. Despite 40 years of negotiations, cross-border procurement remains, according to available data, limited at the international level. The goal of this paper is to identify possible shortcomings of the Revised GPA and challenges for the future development. In our analysis, the historical background of the Government Procurement Agreement will be taken into consideration.

Key Words: Cross-border public procurement, Government Procurement Agreement, Revised GPA, World Trade Organization

JEL Classification Codes: H57, F13, F23

INTRODUCTION

The multilateral trading system is aimed at trade liberalization in the main trade areas, namely in goods and services trade. The GATT and GATS agreements, however, do not cover some specific parts of the trade that nevertheless represent a large and profitable market. Both mentioned agreements do not deal with government procurement and thus open a very high level of flexibility for the WTO members to discriminate foreign suppliers or not to open this market at all.

Liberalization of the government procurement market is a very difficult task, as it requires the governments to apply most favoured nation clause and national treatment – it means the same rules and principles to all the foreign suppliers and domestic companies alike. Government procurement however means to spend means of domestic tax payers and thus all governments tend to support by those means domestic subjects as their economic development ensures future taxes (and voices in elections). On the other hand, each government would like to open the third markets for its subjects and government procurement markets are very promising in this regard.

The international community deals with the issue of government procurement liberalization since 70ties of the last century within the framework of the WTO, through several amendment and revisions and the last came into force quite recently. The scope of countries participating in negotiations is quite limited, and does not go behind developed markets - the markets of emerging developing countries are still excluded as their governments do not find possible to give up all the advantages that the non-liberalized government procurement market offers.

Even if the country is a member of the Government Procurement Agreement, the companies claim difficulties in entering the government purchases market in third countries. The authors of this paper work in their research with several hypothesis in order to find reasons for the mentioned situation. The hypothesis relevant to this paper is “there are shortcomings in the international agreement on government procurement that do not allow economic subjects to benefit from the liberalised market access to third countries”. The goal of this paper is thus to identify possible shortcomings of the Revised GPA and challenges for the future development.

1. HISTORY: GOVERNMENT PROCUREMENT AGREEMENT 1994 AND ITS ORIGIN

The Agreement on Government Procurement (GPA) fulfils the gap that the GATT and GATS agreement left behind them, as they do not apply to purchases of goods and services by governments for their own use.

The GPA was not, however, the first attempt of the international community to deal with the discriminatory trade effects of public procurement practices. Government procurement has been addressed first during the Tokyo Round of the multilateral trade negotiations that led to the Governmental Procurement Code (GPC) signed in 1979 by the European Communities (EC), the US, Canada, Switzerland, Austria, Portugal, Sweden, Norway, Japan, Hong Kong, Singapore and Israel. The Code referred to trade with goods only, and excluded specifically energy, telecommunications and transportation sectors. It ruled transparency and non-discrimination and signatory parties agreed to extend its scope within further negotiations that had been opened in 1983 and the amended Code was implemented in 1988. In parallel with the Uruguay Round, the next negotiations were led, however, those negotiations did not become part of the multilateral negotiations because of concerns of countries that were not members of the GPC and did not find feasible to accept commitments in the governmental purchase area.

The negotiation of the GPA were impacted by the positions of the EC and the USA and their domestic policies as for the governmental procurements. With the implementation of the Single Market, the EC opened its market also in sectors that were not covered by multilateral rules and thus insisted on reciprocity provided by other markets, namely on abolishment of the discriminatory preferences of “Buy American” provisions in the US legislation. Buy American restrictions were applied to products and construction materials in many sectors and imposed from 6 to 50 percent price preference in favour of US products or products with a minimum 50 percent of domestic content, procured by federal agencies and federal funds, and agencies at state and local level as well. In order to achieve the goal of reciprocity, the EC introduced the Buy European clause for water, transport, energy and telecommunications sectors as a part of the new procurement legislation in 1990. It should have served as an offensive negotiation tool (Meunier, 2007).

The EC proposal in the beginning of GPA negotiations was an ambitious one, and proposed high transparency of procedures, publication of calls for bids, prohibition of discriminatory clauses and recourse for companies excluded from competing for a contracts (European Commission, n.d.). The main goal was to expand the coverage to the subcentral level, to municipalities and other lower level of governments. It was namely targeted to the US states

and the Buy American legislation. The EC interests were lying in US utilities markets, as transport, airports and water supply.

The US agreed to discuss the coverage of central procurement that were excluded from the GPC, but claimed that the state level can be open on a voluntary basis only. They pursued the objective to eliminate the reciprocity clause of the EC and preserve the existing preferences for US suppliers at the EC market. The negotiations, however, did not develop well and the US retaliated the EC unless it removed the Buy European clause for telecommunications and electrical utilities.

A war of sanctions and countervailing action between the US and the EC ended with a partial opening of the US market for the EC companies. Thirty-nine US states and seven cities agreed to open their public procurement to European suppliers. The EC agreed to open its public supply market at all governmental levels. Nevertheless, the EC telecommunications sector was excluded from the EC commitments, and the Buy American provisions on public transport remained not being included in the agreement.

The GPA was finally signed by 23 countries¹ alongside to the Marakesh agreement that established the World Trade Organization in 1994. The GPA became in force in 1996. In general, it covered the procurement of goods, services and construction, number of utilities sectors and included the central and local government level and stated the minimum level of thresholds for its application. In value terms, the GPA 1994 was more than ten times larger than its predecessor, creating market opportunities of around 350 billion EUR a year (European Commission, n.d.).

The architecture of the GPA was based on the most favored nation clause as for purchase of goods at the central level, and on the reciprocity as for the procurement of goods, services and construction at the central and local government level and in utilities sectors. The agreement imposed the national treatment obligation and promoted the principle of transparency that referred to tendering procedures, qualification of suppliers, invitation to tender, selection procedures, time limits, documentation requirements, procedures for the award of contracts and negotiations with tenderers. The technical specification should not have represented an unnecessary obstacle to international trade. (WTO GPA, 1994). Every signatory of the GPA provided specific national commitments and listed its procuring entities, and the procurement can be performed by any contractual means (Wouters, De Meester, 2007). The GPA provides

¹ twelve EU members, five EFTA members, US, Japan, Canada, South Korea, Hong Kong, Israel.

for special and differential treatment for developing countries; the signatories were obliged to take into consideration the needs of developing countries and facilitate with regards to government procurement, increased imports from those countries.

1. PRESENT: REVISED GOVERNMENT PROCUREMENT AGREEMENT

The renegotiation of the Government Procurement Agreement that was discussed in the previous chapter started in 1997 within the WTO Committee on Government Procurement and was concluded in December 2011. The outcome of the negotiations was formally adopted in March 2012. The revised GPA entered into force on 6 April 2014 and builds upon two previous versions of the Agreement, the initial one forged in the course of the Tokyo Round and the second negotiated in parallel to the Uruguay Round. (Anderson & Müller, 2017). It is worth mentioning that similarly to the fact that the negotiations resulting in the GPA 1994 were not formally part of the Uruguay Round, the revision of the GPA was not a part of the Doha Round of negotiations.

The renegotiation involved both the modernization of the Agreement's text and a significant extension of the market access commitments. The revised GPA extends the scope of the previous agreement and promotes good governance by requiring parties to conduct their procurement activities in a way that avoid conflicts of interest and prevents corrupt practices. Growing membership of the GPA is evidence of the benefits of the Agreement in enhancing international competitiveness and supporting economic growth. (WTO, 2017) There are currently 46 members (see Box 1) of the revised GPA including the European Union and its member countries; the only country that is a member of the GPA 1994, however, is not a member of the revised GPA is Switzerland. This chapter reviews the process negotiations and adoption of the revised GPA and analyses improvements to the revised GPA and expansion of market access.

Box 1: Members of the revised GPA (in alphabetical order)

Members of the revised GPA	
Armenia	Republic of Moldova
Canada	Montenegro
European Union	Netherlands

(with regard to its 28 member states)	(with respect to Aruba)
Hong Kong	New Zealand
Iceland	Norway
Israel	Singapore
Japan	Chinese Taipei
Republic of Korea	Ukraine
Liechtenstein	United States

Source: authors (according to the World Trade Organization)

2.1 Renegotiation of the Government Procurement Agreement

The road to the revised GPA has its origin in the GPA 1994 as the latter embodies (in Article XXIV) calling upon its parties to undertake negotiations with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all parties. (WTO GPA, 1994) Preliminary discussions started in 1994, in the first year of the entry into force of the GPA 1994; and in 1996, the Committee agreed to undertake an early review starting in 1997. The elements of the review were to include expansion of the coverage; elimination of discriminatory measures and practices which distort open procurement; and simplification and improvement of the Agreement, including adaptation to advances in the area of information technology. (Anderson & Müller, 2017) In 1999 and 2000, informal sessions focusing on the text of the Agreement took place. In February 2002, the negotiators agreed on a work programme and timetable of future procedures.

Agreement on most elements of the revised GPA text was reached in December 2006. However, the agreement of negotiators was provisional in that it was subject to a legal check; and a mutually satisfactory outcome of the other aspect of the negotiations on a new Government Procurement Agreement, namely those on an expansion of coverage (such as a list of entities whose procurement is opened up). (WTO, 2018)

The final details of the GPA market access commitments were agreed in December 2011, which meant that agreement on all elements of the renegotiation was reached. The plurilateral nature of the Agreement and the flexibility provided by individually determined market access commitments based on reciprocity helped to achieve this success. However, certain concerns regarding imbalances in coverage offered emerged as well. The European Union, in particular, desiring to open up procurement markets to an important degree, saw itself forced to introduce

different levels of market access offered to different trading partners, depending on the extent of their own liberalization efforts. (Anderson & Müller, 2017)

Nevertheless, on 15 December 2011, a political decision on the outcomes of all aspects of the negotiations was taken at Ministerial level in Geneva and was confirmed, on 30 March 2012, by the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement. Two-thirds of the parties to the GPA were required to accept the Protocol of Amendment before the revised GPA could enter into force. This condition was met when Israel approved the Protocol on 7 March 2014. (WTO, 2014)

2.2 Text of the revised Government Procurement Agreement

The main goal of the Government Procurement Agreement is to ensure creating open and transparent procurement markets, including guarantees of national treatment and non-discrimination. Therefore, the GPA incorporates detailed requirements in the following areas: notices, conditions for participation, qualification of suppliers, technical specifications and tender documentation, time periods for tendering and delivery, the use of negotiation and limited tendering, electronic auctions, treatment of tenders, and awarding of contracts. (GPA, 2018) These principles remain the same in the new GPA; however, all provisions were revised, with a view to making them more streamlined, easier to understand and user-friendly.

One of the most significant changes involved in the revised GPA is taking into account developments in current government procurement practices, notably the use of electronic tools. The GPA requires, for each covered procurement, a procuring entity to publish a notice of intended procurement in the appropriate paper or electronic medium. Nonetheless, there is a different approach for central entities, and subcentral, and other entities. For central entities, the notices shall be accessible by electronic means free of charge through a single point of access. For sub-central, and other entities, the notices shall be (where accessible by electronic means) provided, at least, through links in a gateway electronic site that is accessible free of charge. However, also sub-central and other entities are encouraged to publish their notices by electronic means free of charge through a single point of access. Thus, the use of electronic is only an option, not an obligation. (Neumannová & Štěrbová, 2018)

Improvements to the revised GPA include also additional flexibilities for procurement authorities (e.g. shorter notice periods when electronic tools are used); a new requirement for participating governments to avoid conflicts of interest and prevent corrupt practices in their

procurement activities; more explicit recognition of the right of procuring entities to promote environmental values and sustainability; and revised and improved transitional measures for developing countries that accede to the Agreement. (WTO, 2017)

2.3 Expansion of market access commitments

The second main area that was changed by the revised Government Procurement Agreement was the extent of market access commitments of the GPA parties; the GPA does not provide universal coverage commitments. For each GPA party, Appendix I of the Agreement is divided into Annexes which present covered entities (central, sub-central, others), covered goods, services, and construction services plus general notes (see Table 1). These Annexes also specify threshold values above which individual procurements are subject to the GPA disciplines. This, in other words, means that government procurement falls within the GPA rules if the procuring entity is covered, if the procured goods/services/construction services are covered and if the value of the procurement is above the threshold levels indicated in commitments schedules.

Table 1: Coverage schedules under the revised GPA and the GPA 1994

Revised GPA	GPA 1994
Annex 1: central government entities	Annex 1: central government entities
Annex 2: sub-central government entities	Annex 2: sub-central government entities
Annex 3: other entities	Annex 3: other entities
Annex 4: goods	General rule that all goods are covered unless specifically exempted.
Annex 5: services	Annex 4: services
Annex 6: construction services	Annex 5: construction services
Annex 7: general notes	Included as “General Notes” under the GPA 1994.

Source: authors (according to the World Trade Organization)

The revised GPA extends the list of covered entities by more than 600 additional central, local and other government agencies (the most significant contribution was the one of Canada which added the entities of its provinces and territories). The extension of market access also includes

improvements in the coverage of goods; coverage of new service sectors by almost all of the GPA parties, especially in the area of telecommunication services; full coverage of construction services by all parties; and coverage of so-called BOT contracts (build-operate-transfer), public work concessions or other forms of PPPs by three of the GPA parties. The additions to market access comprise also downward adjustments in the threshold values by Israel, Japan, Korea and the Netherlands with respect to Aruba. All these changes contributed to the fact that the value of covered government procurement increased by \$80-100 billion annually. (WTO, 2011)

2. FUTURE: NEW CHALLENGES

Despite the development of government procurement within the World Trade Organization that has been lasting for decades, the work is still in progress and new topics, areas, and possible improvements are being discussed; and the share of cross-border government procurement remain low for various reasons. One of these reasons is persisting shortcomings in the WTO regulation; these shortcomings can (as follows from the previous chapter) consist in the text of the GPA or in the commitments schedules of GPA parties. However, a lack of statistical data has to be taken into consideration when assessing the potential obstacles and shortcomings; and the authors admit that further research will be needed.

The (revised) GPA aims at creating open and transparent procurement markets; therefore, the provisions included in its text should not be perceived as shortcomings, but rather imperfections that, if improved, could lead to higher share of cross-border public procurement. The authors found these in insufficient regulation of international e-procurement (which remains only an option), including not establishing single point of access for procurement notices; insufficient standardization of procurement notices; and insufficient support of small and medium-size enterprises.

The shortcomings connected with market access commitments consist in a (hypothetically) insufficient scope of covered goods/services/construction services; in a (hypothetically) insufficient scope of covered governmental entities; and in too high thresholds for covered procurement. All these shortcomings were, nevertheless, partially eliminated by the revision of the GPA.

What is more, the decisions made in the context of the new GPA address not only the text and coverage of the revised Agreement, but also set out future work programmes of the Committee on Government Procurement (for an overview, see Box 2). These work programmes cover, to a relatively high extent, all above mentioned shortcomings. In addition to these below-noted

programmes, a further attachment to the Protocol of Amendment calls for the initiation of additional work programmes on the following subjects: a review of the use, transparency and the legal frameworks for PPPs, and their relationship to covered procurement; the advantages and disadvantages of developing common nomenclature for goods and services; and the advantages and disadvantages of developing standardised notices. (Anderson & Müller, 2017)

Box 2: Future Work Programmes of the Committee on Government Procurement under the World Trade Organization

Future Work Programmes
<ul style="list-style-type: none"> • a Work Programme for SMEs • a Work Programme on the Collection and Reporting of Statistical Data • a Work Programme on Sustainable Procurement • a Work Programme on Exclusions and Restrictions in Parties' Annexes • a Work Programme on Safety Standards in International Procurement

Source: authors according to the World Trade Organization

Another chance how to open up international government procurement markets even more is the continuing growth of the GPA membership. As discussed above, the GPA is a plurilateral agreement, which enabled higher flexibility when negotiating and faster achieving of results (e.g. in comparison with the Doha Development Agenda, DDA), but means that not all members of the WTO are parties to the GPA. However, the number of parties has grown significantly over the past two decades. The Tokyo Round Government Procurement Code covered 19 members; the GPA 1994 (when it came to force) covered 21 members; and currently, the revised GPA binds 46 countries (Switzerland remains a party to the GPA 1994). There are two formal requirements in any accession to the GPA. First, the acceding WTO member must reach agreement with the existing parties on the range of its procurements to be governed by the Agreement; second, each party must ensure the conformity of its laws, regulations and administrative procedures, in addition to the rules, procedures and practices applied by its procuring entities, with provisions of the GPA. (GPA, 2018) All signs indicate that the GPA gains importance as an element of the legal framework for global trade.

To complete this text, the authors create SWOT analysis of the Government Procurement Agreement to summarize findings mentioned above based on their desk research – see Table 2.

As usual, the SWOT analysis comprises strengths, weaknesses, opportunities, and threats. There are several points that can be included in more than one category; please, note that these are marked with “?”.

Table 2: SWOT analysis of the Government Procurement Agreement

Strengths	Weaknesses
<ul style="list-style-type: none"> • Plurilateral agreement – flexibility in comparison with the WTO Rounds • Interconnection with the General Agreement on Tariffs and Trade (GATT) and with the General Agreement on Trade in Services (GATS) – synergies • Anchoring the possibility of e-commerce (however, a permissive approach) • <i>Flexibility in coverage commitments – no universal coverage commitments (?)</i> 	<ul style="list-style-type: none"> • Not ensuring interoperability of procurement system of its parties • Insufficient commitments schemes of the parties to the GPA – covered goods/services/construction services, covered entities, and primarily high thresholds • Insufficient support of e-procurement, primarily establishing single points of access • <i>No universal coverage commitments (?)</i>
Opportunities	Threats
<ul style="list-style-type: none"> • Growing membership (from 19 members at the beginning to current 46, respectively 47, parties) • Anchoring further negotiations and improvements of the GPA (similar to the revision of the GPA) • Support of the global struggle against corruption • Establishing various work programmes • Covering also public work concessions and other PPPs • <i>Synergies with regional trade agreements (?)</i> 	<ul style="list-style-type: none"> • Low share of above threshold government procurement • Persisting home-bias in public procurement that is, however, hard to measure • Cost of accession to the GPA • Concerns regarding imbalances in coverage and reciprocity • Complicated assessment of new rules due to insufficient statistical data • <i>Rivalry of regional trade agreements (?)</i>

Source: authors

CONCLUSION

The government procurement market attracts an interest of companies as it represents benefits laying in quite large scope of business and also in a certainty that the government will pay the supplies. On the other hand, it is a very sensitive area, as governments spend money that are under strict public control. Principles and rules of governmental procurement liberalization became a goal of the international agreement in this area. Since the last century, namely developed countries negotiate international regulation and through amended and revised versions of the GPA make the governmental purchases market more and more accessible. Nevertheless, even in the newly revised GPA 2018, there are some shortcomings assessed by the SWOT analysis that do not allow companies to fully enjoy from the profitability of the government procurement market and thus create barriers for their trade or investment activities abroad.

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