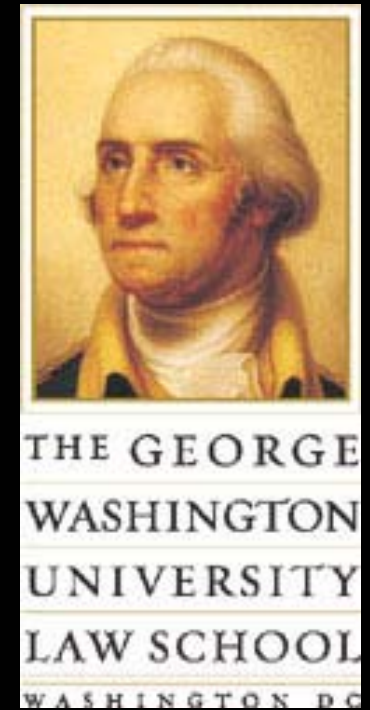


Implementing GPA- Compliant Domestic Review Procedures: Insights from International Experience

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Domestic Review Mechanisms:

permit *(both domestic and foreign)* potential offerors *(bidders)* and disappointed offerors *(unsuccessful competitors)* the opportunity to seek correction of anomalies or inequities in the contractor selection process.

Reasons for a Challenge Regime

- Increase private-sector's trust in procurement system – increase competition
- **Increase public trust in procurement system & government overall**
- Improve state's image in international community; meet minimum standards for GPA
- **Partial delegation of the oversight regime, by the government to contractor community (private sector)**

Aspirations

- Provide a **forum** to hear complaints by, and **grant relief** to, interested parties
- Enhance **accountability** of procurement officials and government agencies
- Promote **transparency** into how the procurement system works
- Protect **integrity** of procurement system
- Avoid unnecessary **cost** and **delay & disruption** of procurements during process

Consider: People, Culture, Norms

- **Perception of Rule of Law**
 - **Commitment to due process**
- **Respect for Courts, Judges, Administrative Tribunals**
- **Willingness to Litigate**
 - **avoid “bite the hand...” instinct**
 - **difficult hurdle (public confidence)**

Capacity: Expertise and Independence

- The decision-makers must be knowledgeable, credible, respected, and, (most importantly) independent
 - This is true regardless of whether adjudicators are judges, attorneys, experts, or laymen
- **Government representatives must be cooperative, knowledgeable, and credible**
 - **Government must respect the challenger (protestor) and the challenger's rights**

Challenge Forum Decisions

- Where (within the government) to locate the forum?
- **Breadth of the forum's jurisdiction?**
- Who may bring a challenge?
- **Strict or flexible time limits to commence a challenge?**
- Type & source of evidence available to forum?
- **Whether to stay (hold) procurements during challenges?**
- How difficult is it for a disappointed offeror to win?
- **Breadth (and enforcement) of meaningful relief?**

What do protests challenge?

- **Pre-award**
 - Lack of notice of solicitation
 - Overly restrictive solicitation
 - Ambiguous specifications
 - Exclusion from competition (interim)
- **Post-award**
 - Did not receive contract
 - Improper application of evaluation criteria
 - Anything learned during debriefing(***)

- award stay or suspension (*standstill, freeze*)
- re-solicit, re-compete
- issue new solicitation
- terminate awarded contract (T/C)
- direct award
- bid and proposal (B&P) costs
- attorney's fees
- re-open negotiations; re-evaluate offers
- refrain from exercising option
- **lost profits?**

REMEDIES?

Lessons from the US model?

- **Imperfect regime, but informative:**
 - Large, developed, complicated procurement regime
 - Broad industrial base
 - Generally open to foreign contractors
 - Fully evolved
 - Bureaucracy
 - Judicial regime
 - (Relatively) litigious culture

U.S. Model?

- **no exhaustion requirement**
- **no entry fee (or nominal fee)**
- **Election/Choice of Forum**
 - **Three (3) options**
 - **too many?**
 - **inefficient use of resources?**

Agency (Ministry) Protests

- **Long, unimpressive history**
 - Constant efforts to reform
 - Generally ineffective
- **Most “efficient” (inexpensive) forum**
- **Obvious problem = objectivity**

Judicial Option

- **U.S. Court of Federal Claims**
 - Expensive
 - Difficult to stop procurement
 - High burden for temporary restraining order (TRO) or preliminary injunction (PI) versus automatic stay
 - Litigant must prove “likelihood of success on merits”
 - **Low volume - Not a forum of choice**

Administrative Protests - Government Accountability Office (GAO)

- Unique forum, legislative instrumentality
 - quasi judicial
- **Resolution mandate:**
 - *independent, expeditious, inexpensive*
- Decisions establish a uniform body of law
 - relied on by
 - Legislature
 - *Courts*
 - *contracting agencies*
 - public
- **Familiar (public) rules**

GAO traits, features

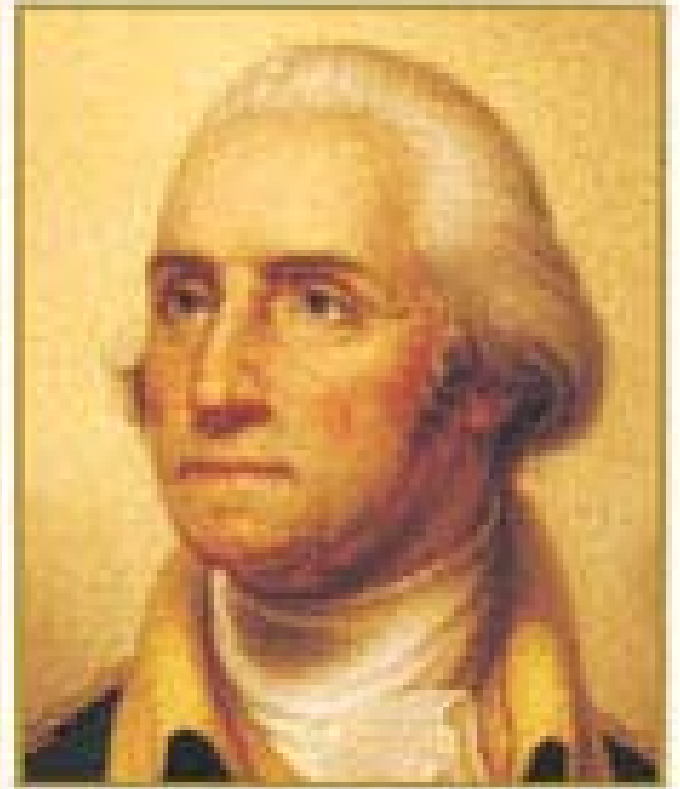
- **Automatic Stay – (cost = letter, plus price of a stamp)**
- **Expertise**
 - **talented, respected career legal staff**
- **Agency Report**
- **Sufficient, but limited, process**
 - **discovery**
 - **hearings (live witnesses)**
 - **counsel = optional (but typical)**

Robust Domestic Review Mechanisms Support Successful Public Procurement Regimes

- **Transparency**
- **Integrity**
- **Competition**
- **Uniformity**
- **Best Value**
- **Efficiency**

Conclusion

- Questions?
- Comments?
- Suggestions?
- Ideas?



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