

SPP, best value for money and international trade obligations: the GPA as a model agreement

Judge Marc Steiner,
Swiss Federal Administrative Court

Geneva, 22nd February 2017

Purpose and topics of the presentation

- The revision of the GPA: Green Public Procurement endorsed, “constructive ambiguity” concerning social aspects
- Relevance of the EU public procurement reform 2014
- Regulatory density (“Regulierungsdichte”) of the GPA as a key argument regarding its interpretation
- GPA is not about regulating private consumer choice, but about the public consumer choice itself -> more policy space

The revised GPA is more than a market access tool

“While benefits of the GPA are often seen in terms of providing market access rights for national suppliers in the other GPA parties’ markets, the Agreement can also be seen as a powerful tool for improving governance and promoting development.”

(Nicholas C. Niggli, former Chairman of the WTO Committee on Government Procurement)

Revised GPA and Sustainability Issues I

Art. XXII (8) revised GPA + Annex E:

The work programme on sustainable procurement shall examine [...]


the ways in which sustainable procurement can be practiced in a manner consistent with Parties' international trade obligations.

[This is especially true concerning social aspects.]

Revised GPA: WTO Symposium 2015

SESSION 3: Ensuring the continuing relevance of the GPA: the New Work Programmes of the GPA Committee and related policy considerations

Chair: Mr Antony Taubman, Director, Intellectual Property Division, WTO Secretariat

 Thursday, 17 September, 14.30-16.30

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14.30

Chairman's introductory remarks

Strategic use of public procurement as purpose of the EU directive 2014/24/EU

Public procurement plays a key role in the Europe 2020 strategy [...] for smart, sustainable and inclusive growth' ('Europe 2020'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds (Recital 2 of the Directive 2014/24/EU).

SPP as a possible purpose of a modern public procurement regulation?

Reform of the Swiss public procurement law:
Art. 2 of the draft of a (entirely new) Federal Act
on Public Procurement (FAPP; 15 February 2017):

The purpose of this law is [inter alia] to ensure that public resources are sustainably used from an economic, an environmental and a social perspective.

What is SPP? Total cost of ownership? Green public procurement? Including social aspects?

**Total cost of ownership
is more than the price
paid by a procuring
entity.
Best price-quality ratio
<> lowest price.**

**Coffee which has
been unfairly
marketed leaves a
sour taste (CJEU).**

**GPP:
Not each award criterion
... used to identify the
most advantageous
tender must necessarily
be of a purely economic
nature (CJEU).**

PPMs: There is more policy space within the GPA compared to “normal” WTO-law

Technical specifications – this was true already concerning Art. VI of the GPA 1994 – may include the characteristics of the products ... such as ... the processes and methods for their production ...

PPMs: More policy space within the GPA compared to “normal” WTO-law

Compared to classical WTO law this formula allows for more policy space; it's a *lex specialis* compared with the ordinary PPMs debate. Why? GPA doesn't deal with measures such as an import ban or a trade sanction in the general WTO context. The GPA is **not about regulating** private consumer choice but about public **consumer choice** itself.

Revised GPA and Sustainability Issues II

Art. X (6) revised GPA

on **technical specifications**:

For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.

Revised GPA and Sustainability Issues III

Art. X (9) revised GPA

on the tender documentation:

The **evaluation criteria** set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery.

Interplay GPA and EU Directives

The contracting authorities ... which apply [this Directive] ... should therefore be in conformity with the [Government Procurement] Agreement (Recital 7 Directive 2004/18/EC). -> **Framing and applying EU law is interpreting the GPA!**

European Parliament Resolution “Modernisation of Public Procurement” (25 October 2011)

Takes the view that [...] the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender [...] taking into account the entire life-cycle costs of the relevant goods, services or works;

EP Resolution “Modernisation of Public Procurement” (25 October 2011)

[...] stresses that this would not exclude the lowest price as a decisive criterion in the case of highly standardised goods or services; [...]; stresses that supporting the criterion of ‘maximum economic benefit’ would foster innovation and efforts to achieve the best quality and value, i.e. to comply with the requirements of the Europe 2020 strategy

Directive 2014/24/EU – Philosophy I

Recitals 47 and 95:

Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges.

Directive 2014/24/EU – Philosophy II

Recital 95: In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement.

Communication COM(2008) 400 final

Such a shift (to a greener economy) could also boost the competitiveness of European industry by stimulating innovation in eco-technologies – which have been recognised as a high-growth sector where Europe is already a world leader (p. 2).

ILO Core Labour Standards / Exclusion

Art. 7, para. 2, of the Swiss Ordinance on Public Procurement (OPP; limited to the federal level; version applicable since 1st January 2010):

If the subject of the contract is a task to be performed abroad, the bidder has to assure at least the respect of the ILO Core Labour Standards set out at Annex 2a [of the OPP].

Directive 2014/24/EU – Award Criteria

Art. 67 / Recitals 89-92: “most economically advantageous tender” / “best price-quality ratio” / “social, environmental and innovative characteristics” / including factors involved “in the specific process of production” (cf. also judgment C-368/10 CJEU “Max Havelaar”)

Bern becomes a “fair trade town”

14 February 2017: Bern, the capital of Switzerland, gets the label “fair trade town”. Accordingly a Bernese politician would argue that social award criteria should be endorsed during the ongoing reform of the Swiss public procurement law. Classical WTO-lawyers hate social aspects because of their potential to be abused as disguised protectionism. But these are local social aspects; influencing social conditions abroad (as a consumer) is different.

Switzerland becomes a “fair trade country”

In the dispatch of the Swiss Federal Council of 15 February 2017 concerning the Federal Act on Public Procurement (award criteria) it is explicitly stated, that it will in the future be possible to procure fair trade products (p. 96). This was not foreseen in the draft version of April 2015.

Directive 2014/24/EU – Award Criteria

Art. 67 / Recital 92: When assessing the best price-quality ratio contracting authorities should determine the economic and qualitative criteria **linked to the subject-matter of the contract** that they will use for that purpose.

Directive 2014/24/EU – Award Criteria

In a ruling on the purchase of electricity, an award criterion relating to the amount of electricity produced from renewable sources **in excess** of the expected consumption of the contracting authority was ruled inadmissible, as it was **not linked to the subject matter of the contract** (C-448/01 EVN/Wienstrom).

Directive 2014/24/EU – Life-cycle costing

Art. 68:

Life-cycle costing shall .. cover parts or all of the following costs:

(b) costs imputed to **environmental externalities** linked to the product ... during its life cycle, provided their monetary value can be determined and verified; ... costs such as emissions of greenhouse gases ...

GPA and secondary policies / Does a “purity principle” apply?

According to the purity principle one purpose of public procurement regulation would be to establish a system that reduces as far as possible the insertion of non-economic criteria into the procurement process (definition by Sue Arrow-smith / Christopher McCrudden discussing the GPA).

Revised GPA – Rules on Award Criteria

Art. XV: [..] the entity shall make the award to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notices, has submitted

a) the most advantageous tender; **or**

b) where price is the sole criterion, the lowest price.

GPA 1994 – Basic Rule on Award Criteria (unchanged in revGPA 2012)

Given the objective of the GPA of laying down minimum standards to be applied, it has opted for flexibility and, in addition to allowing awards on price, also allows other criteria to be taken into account, provided they have been set out in the tender documentation (Peter Trepte).

GPA 1994 – Abnormally Low Tenders

One can realistically not expect from an international framework like the GPA a substantial contribution to the solution of the problem when discussing abnormally low tenders (Gerhard Kunnert), because the GPA is about minimum standards.

Conclusion on the interpretation of the GPA: The GPA is not meant as a comprehensive procurement codification

The GPA as setting minimum standards is meant to be **compatible with different views on economic policy**; a strict "purity principle" (cf. slide 25) would rather be a possible characteristic of a full fledged / comprehensive regulation.

A minimum of consistency?

WTO, ILO, UNCTAD, UNEP etc. are sub-systems of the same overarching system. This presupposes the idea of an at least to some extent coherent legal framework / world order. The GPA is not only about trade, but also on governance and to a certain extent on sustainability, without disregarding the core principles of the GPA (balance of interests).

Contact

Swiss Federal Administrative Court

Mr. Marc Steiner

CH-9023 St. Gallen

Switzerland

phone: +41 58 465 25 74

E-mail: marc.steiner@bvger.admin.ch