

Future trends and evolution of the GPA in light of international developments

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Outline

- Concessions and other public-private partnerships (PPPs)
- Framework agreements

Concessions and other PPPs

- PPPs: long-term arrangements with close private sector involvement in provision of services and infrastructure
- Great – and increasing - interest to trade
- GPA Committee Decision of 30 March 2012 added to work programmes: “a review of the use, transparency and the legal frameworks of public-private partnerships, and their relationship to covered procurement”

Concessions and other PPPs

- Ordinary contractual arrangements (payment by public bodies for services or infrastructure) covered by GPA
 - Depends on scope of coverage for each Party (type of services, thresholds etc)

Concessions and other PPPs

- Concessions - where contractor is remunerated by exploiting the work or services (payments from users)
 - E.g. toll motorway; construction and operation of tramway ; electronic telephone directory
 - Often treated as outside rules on public contracts/procurement under domestic procurement laws
 - UNCITRAL has separate provisions (Legislative Guide; and Model Legislative Provisions)
 - EU has a special Concessions Directive 2014/23 and only recently fully regulated such arrangements

Concessions and other PPPs

- Joint venture companies between public and private bodies (which may not be covered by GPA), with work contracted out to the private sector partner (“Institutional PPPs”)
- “Development agreements” e.g. regeneration project where contractor builds public infrastructure (as well as commercial properties) on part of land provided by public sector

Concessions and other PPPs

- Are these arrangements covered by GPA?
 - GPA applies to “any measure regarding covered procurement”: Art II.1
 - Art. II.2 further defines, but does not deal with these issues

Concessions and other PPPs

- Are these arrangements covered by the GPA?
 - Is the concept of “procurement” defined by a Party’s national system - or uniform for all Parties?
 - Latter approach used in e.g. 1984 Report on VAT and Threshold
 - Complicated by fact that some Parties explicitly cover some of these arrangements in Annexes:
 - EU and Montenegro cover works concessions for some countries and Korea some “BOT” transactions – defined to cover arrangements involving exploitation of what is provided; also Japan.

Concessions and other PPPs

- If not procurement are they then outside the “government procurement” exemptions of the GATT/GATS?

Concessions and other PPPs

- General coverage of these arrangements should be *explicitly* resolved
- Challenges:
 - Differences in inclination to cover
 - Differences in national systems
 - Are GPA procedures suitable?
 - Defining the covered transactions
 - Joint ventures and development agreements very difficult to deal with – concessions less so?

Concessions and other PPPs

- Concessions
 - Character as a concession (remuneration by exploiting the work or service) should not preclude something from being procurement under GPA; this should be stated expressly in the definition
 - Note that procurement does not cover simple authorisations – only where there is an obligation to provide the service/infrastructure
 - Usual rules of the GPA should apply: these are suitable
 - Avoids the need for a definitions/distinctions
 - Parties can take concessions out if they wish

Framework agreements

- = Arrangement used to procure over time where quantities, nature or timing of purchases not known (UNCITRAL terminology)
 - e.g. office supplies, road repair services, consultancy work
- Single-supplier and multi-supplier arrangements
- Account for a significant proportion of government procurement expenditure

Framework agreements

- On-going arrangements rather than new purchases each time can:
 - reduce transaction costs;
 - deal with urgent situations;
 - provide security of supply
- However, can present dangers to competition and transparency and hence to procurement objectives (including opening contracts to foreign industry)
 - E.g. ordering process can be difficult to monitor; dangers of use when not appropriate e.g. “piggy backing” on existing frameworks

Framework agreements

- Expressly regulated (including multi-supplier agreements) in EU directives
 - Always authorised for utilities but rules not clear
 - Authorised and regulated in detail for public sector since 2004
- Now dealt with by UNCITRAL, again including multi-supplier agreements

Framework agreements

- UNCITRAL
 1. Closed framework agreement (with one more more suppliers), where all terms and conditions set in the framework agreement
 2. Closed framework agreement with more than one supplier, where hold mini-competition when order placed
 - e.g. consultancy
 3. Open (on-line) framework agreement – anyone can join even after concluded and is new competition for each order

Framework agreements

- Position under the GPA
 - Most types (including those with a mini-competition) can be operated using open and selective tendering
 - But many uncertainties and problems e.g.
 - Is the value of a multi-supplier framework for threshold purposes the value of each order or of the whole framework?
 - Can rotation/equitable division of work be used to place orders?
 - Identification of users in the notice
 - Do current practices of Parties comply?