Domestic Review Procedures

Under the 1994 Agreement (**GPA**) and the Provisionally Agreed Revised Text (**RT**)

What is Domestic Review?

- Mechanism to file a **bid challenge** with respect to a specific tender
- Seeking remedy for **irregularities in the tendering process** relating to acts of the procuring entity
- Review by **domestic authorities**

➢ **Enforcement of procurement rules**

Public and Private Interests

Public

- Reap benefits of open and transparent procurement
- Public purpose of the particular procurement

Private

- Interest in a fair chance to win the tender, effective remedies
- Interest in timely process, competitors' interest to proceed with tendering

General approach of the GPA

(Article XX GPA, XVIII RT)

- (Existing) domestic challenge procedures are opened to suppliers from other Parties on a **non-discriminatory** basis.
- **Minimum standards** concerning the nature of the review body, the challenge procedure and remedies available
- Each Party can determine its **own approach** in accordance with its own legal, constitutional and administrative traditions.

Who can challenge what?

- **Suppliers** may challenge
  - a breach of the Agreement
  - a failure to comply with a Party's measures implementing the Agreement

NEW

- arising in the context of a covered procurement
- in which the supplier has/has had, an interest

➢ **Case-specific** review

➢ Initiated by **private** entity

First step: Consultations

- (Soft) obligation to **encourage** the entity and the supplier to seek resolution of the complaint through **consultations**
- **Avoidance** of overly formal procedure for minor complaints
- **Impartial** and **timely** consideration, **not prejudicial** to supplier

Optional: Initial review

- Parties are free to establish a review mechanism **not subject** to requirements of impartiality, independence etc.
  - **Opportunity for self-review**
  - **Cost-effective**
  - **Informal**
- Flexibility, implementation according to **domestic** legal system

Next step: Impartial review (Appeal)

- **Impartial** authority, **independent** of procuring entities
- Flexibility: **court** or **other authority**, **administrative** or **judicial**
- If other authority:
  - subject to **judicial review** **or**
  - minimum **due process** standards

➢ **Courts** are presumed to ensure fair trial

General principles (Art. XVIII:1 RT, XX:2 GPA)

- **Timely**
  - Also Art. XVIII:3 and 6(f) RT, XX:5 and 8 GPA
- **Effective**
  - Also Art. XVIII:7 RT, XX:7 GPA
- **Transparent**
  - Also Art. XVIII:6(a)-(f) RT, XX:3, 6(a)-(g) GPA
- **Non-discriminatory**

When?

- At any stage of the tendering process:
  - **Pre-award**: Protests include allegations that a solicitation is defective, improper qualification procedure
  - **Post-award**: Protests include allegations that a contract award is improper (for example, that selection was unreasonable or inconsistent with the solicitation award criteria)
- **Sufficient** time, at least 10 days

(Art. XVIII:3 RT, XX:5 GPA)

What?

- Rapid **interim measures**
  - to preserve **opportunity to participate**
  - **may** result in suspension of procurement process
  - weighing of **public/private interest** at play
  - just cause for not acting **in writing**
- **Corrective action**
- **Compensation** for loss or damages
  - **may** be limited to costs for tender preparation, or the challenge, or both.

Transparency

- Article **IX:13, 14 RT; VIII (f), XVIII:2(b) GPA**: information on **qualification** of suppliers
- Article **XVI:1 RT, XVIII:2(c), 3 GPA**: supplier can request explanation of the **reasons** why its tender was not selected.
- Article **XVI:3 RT, XX:4 GPA** requires that procuring entities maintain documentation for at least **three years**.

Non-discrimination/Impartiality

- Opening up of domestic challenge procedures: Articles **XVIII:1** and **V:1, 2 RT; XX:2** and **III:1, 2 GPA**
- But also **avoidance of negative consequences** from bid challenge for suppliers:
  - Articles **XVIII:2** and **V:4 RT; XX:1** and **VII:1 GPA**
  - Article **VIII:1** and **XV:5 RT; VIII chapeau, (b)** and **XIII:4(b) GPA**

Summary/Benefits

- **Domestic review & substantive provisions are mutually supportive**
- Increase **transparency** and **integrity** of procurement system
- Increase private-sector's **trust** in procurement system, thereby possibly **increasing competition**
- Avoid **corruption**
- **Reliance on supplier's initiative helps reaching public goals in a (cost-) efficient manner**

Thank you

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