

Sustainability and Public Procurement – Legal Background

Judge Marc Steiner,
Swiss Federal Administrative Court

Preliminary remark I: GPA in Switzerland

Contrary to EU member states for Switzerland the WTO Government Procurement Agreement constitutes the most important non-national legal framework.

Preliminary Remark II: GPA in the EU context

The contracting authorities ... which apply [this Directive] ... should therefore be in conformity with the [Government Procurement] Agreement (Recital 7 Directive 2004/18/EC).

GPA 1994 as a plurilateral agreement

Other agreements, as revised in the Uruguay Round, became part of the WTO ... applicable to all WTO members. ... The result of the GPA negotiations, by contrast, was a plurilateral agreement.

GPA 1994: Basic principles (I)

Two non-discrimination pillars:

- national treatment
- most favoured nation obligation

Article III:2(b): "... entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good ..."

GPA 1994: Basic principles (II)

These prohibitions affect, most notably, secondary policies directed at supporting non-competitive domestic industries (Arrowsmith, Government Procurement in the WTO, p. 328)

GPA 1994: Basic principles (III)

Sustainable Public Procurement is not by definition directed at supporting non-competitive domestic industries, but there is a potential for abuse.

Balance of interests and Sustainability

Marrakesh Agreement Establishing the WTO:
... While allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking ... to protect and preserve the environment ...

Balance of interests: Trade and Labour

WTO approach:

We renew our commitment to the observance of .. ILO core labour standards. ... We reject the use of labour standards for protectionist purposes

(Singapore Ministerial Declaration 1996)

Balance of interests: Trade and Labour

ILO approach:

Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the ILO, to respect ... the [ILO core labour standards] (1998 ILO Declaration on Fundamental Principles and Rights at Work).

Balance of interests: Trade and Labour

ILO and public contracts:

The ILO-Convention (94) on Labour Clauses in Public Contracts is not exactly a success (International Labour Office, General Survey concerning the Labour Clauses Convention and Recommendation, Geneva 2008).

Trade and Labour in the general WTO context

The problem of the admissibility of trade sanctions to enforce core labour rights divided the member states and still does (Werner Meng, in: Benvenisti/Nolte 2004, p. 381).

http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm

Trade and Labour in the general WTO context

These conflicts need to be resolved if international law is to provide a reliable and credible system of norms (Christine Kaufmann, Globalisation and Labour Rights, 2007, p. 272).

Trade and Labour in the GPA context

Asking the respect of ILO core labour standards in the context of public purchasing is not the same as a import ban or a trade sanction in the general WTO context.

Trade and Labour in the EU context

Secondary policies / Legal basis

Art. 26 Directive 2004/18/EC:

Conditions for performance of contracts

Trade and Labour in the EU context

Contracting authorities may lay down special conditions relating to the performance of a contract. ... The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

Trade and Labour in the EU context

For instance, mention may be made, ... of the requirements ... to comply in substance with the provisions of the basic ILO Conventions, assuming that such provisions have not been implemented in national law (Recital 33 Directive 2004/18/EC).

Legal coherence: Limitations on secondary policy criteria

Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents (Recital 33 Directive 2004/18/EC).

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). -> **Applying EU law is interpreting the GPA!**

Secondary policies / purity principle

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).

GPA: Setting of minimum standards or comprehensive procurement codification?

Review of the GPA:

The objective of simplification and improvement was thought to be a key element in attracting wider membership and thus improve the multilateral aspect of the Agreement (Trepte, p. 1161).

Art. VIII GPA – Qualification of Suppliers

Art. VIII(b): Any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capacity to fulfil the contract in question.

Art. VIII GPA – Qualification of Suppliers

Art. VIII(h): Nothing in subparagraphs (a) through (g) shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

Secondary Conditions

However, it is arguable that the rules on qualification criteria do not allow suppliers to be excluded because they cannot comply with requirements unconnected with contract performance (Arrowsmith, Government Procurement in the WTO, p. 336 s.).

Art. XXIII GPA: Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of ... unjustifiable discrimination ..., nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures ... relating to the products or services of handicapped persons ...

Art. XXIII GPA: Exceptions

Can Art. XXIII.2 not be used to justify policies directed at labour or environmental conditions in other countries – for example, requirements relating to working conditions where the workers concerned are based in other GPA states?

Swiss finish (federal level; since 2010)

If the task being the object of the contract is performed abroad, the bidder has to assure at least the respect of the ILO Core Labour Standards (Swiss Federal Ordinance on Public Procurement [VöB])

Swiss finish (federal level; since 2010)

The procuring entity requires that subcontractors and suppliers also comply with the ILO Core Labour Standards. This is assured by a contractual transfer of this obligation from the bidder to important suppliers and subcontractors (Recommendations on Sustainable Procurement).

Swiss finish (federal level; since 2010)

Recommendations (publication details):

<http://www.bbl.admin.ch/bkb/02617/02632/index.html?lang=de>

Swiss Federal Procurement Commission,
Sustainable procurement –
Recommendations for the federal
procurement offices, 2010

Charter of Fundamental Rights

Article 35

“[...] A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities.”

Is this a fundamental guarantee or rather an objective like those enshrined in Art. 3 TEU?

Treaty on the Functioning of the EU

Article 7

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

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