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The WTO's Revised Government Procurement Agreement - An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets

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FEATURE COMMENT: The WTO's Revised Government Procurement Agreement—An Important Milestone Toward Greater Market Access And Transparency In Global Public Procurement Markets

On Dec. 15, 2011, in Geneva, Switzerland, the Parties to the World Trade Organization Government Procurement Agreement (GPA or Agreement) concluded an effort spanning more than 10 years by adopting significant revisions to the Agreement. WTO News, "Historic Deal Reached on Government Procurement," www.wto.org/english/news_e/news11_e/gpro_15dec11_e.htm. The revised text was provisionally adopted in 2006, but could not come into force until a conclusion was also reached in the related negotiations on market access. Among other things, the GPA Parties' recent Agreement comprises (a) a much-needed modernization of the text of the Agreement, (b) an expansion of related market-access commitments by the Parties, and (c) a set of Future Work Programs intended to enhance transparency among the Parties and improve the administration of the Agreement. See "Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, GPA/112 of 16 December 2011," available at www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.

In addition to market-access commitments, which are based on principles of reciprocity, the GPA—which has been in force in its current form since 1995—embodies detailed provisions on aspects of the procurement process to ensure transparent and open competition for both domestic and foreign firms. Both the original and the revised GPA

derive from three core principles: transparency in public purchasing, nondiscrimination amongst signatories and procedural fairness. Like its predecessor, the revised Agreement binds only that subset of the WTO's member governments that opts into it.

The Parties to the Agreement include the U.S., the EU (with its 27 member states), most other developed countries of the world, and a number of other economies. Although China is not yet a Party to the Agreement, as discussed below, the revisions are expected to facilitate its eventual accession and, in the future, those of other major emerging economies.

The Parties to the Agreement (the participating WTO member governments) will implement the updated and improved GPA over time, likely within the next six months to a year. (The revised Agreement is to be formally signed by the Parties toward the end of March, following completion of a legal and technical verification process which is a standard WTO procedure.)

Although most U.S. federal procurement practitioners will find themselves unaffected by the changes, the revised and updated GPA text "significantly clarifies GPA requirements, increases transparency of procurement practices through electronic methods, [and] provides more flexibility for procuring entities, especially when buying commercial (off-the-shelf) goods and services." U.S. Trade Representative, "Fact Sheet: Benefits for the United States from the Revised WTO Government Procurement Agreement" (Dec. 15, 2011), www.ustr.gov/about-us/press-office/fact-sheets/2011/december/benefits-united-states-revised-wto-government-procur. The revised Agreement also endeavors to accommodate developing economies as partners to the Agreement, inter alia, through more specific and concrete transitional measures.

A Small but Expanding Slice of a Huge Market—The WTO Secretariat has estimated that, once in place, the revised Agreement will expand GPA Parties' access to procurement markets by as much as \$80–100 billion annually

worldwide. Although that may sound impressive, the potential for far greater growth lies ahead. The global public procurement market is enormous, and it continues to expand with near-insatiable demand for infrastructure investment and a broad array of public services, particularly in the developing world. But much of this market remains closed to foreign firms. Although the Organisation for Economic Cooperation and Development has estimated that public procurement represents 15–20 percent of gross domestic product (GDP) in most countries, the U.S. Trade Representative (USTR) found that, prior to the expansion just concluded, the GPA covered markets of only around \$1.6 trillion, or approximately 2.5 percent of the global GDP (still a sizeable slice of world economic activity).

Two factors account for the limited coverage of the GPA as compared to the total size of global public procurement markets. First, even the WTO members that participate in the Agreement typically agree to cover only a portion of their government purchases of goods and services, whether at the central (in the U.S., federal) or sub-central (in the U.S., state and local) government levels. Moreover, many governments, including the U.S., continue to provide preferential treatment for domestic firms, at least in some market segments. Second, the membership of the Agreement, although it includes the overwhelming majority of developed economies, still excludes most emerging and developing nations.

The gaps in the existing Parties' coverage have been partially addressed in the recently concluded negotiation and will no doubt be further ameliorated, over time, in succeeding rounds of negotiations. In the future, however, the largest gains in the coverage of the Agreement are almost certain to come from the accession to the Agreement by new Parties, notably the emerging market economies. See Anderson, Pelletier, Osei-Lah and Müller, "Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and An Evaluative Framework for Individual WTO Members Considering Accession" (WTO Staff Working Paper ERSD-2011-15, October 6, 2011), available at www.wto.org/english/res_e/reser_e/ersd201115_e.htm. Current signs point to a significant expansion of the GPA's membership to include a number of such economies.

At present, 22 WTO members are observers to the GPA, nine of which are in the process of nego-

tiating their accession to the Agreement. These are Albania, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman, Panama and the Ukraine. China, of course, is by far the largest of these (and is discussed at greater length below), though the Ukraine and others also bring to the table very substantial public procurement markets. Jordan is in an advanced stage of negotiations to join the Agreement, and Russia—which was accepted for WTO membership only on Dec. 16, 2011—the day after the conclusion of the GPA renegotiation—has also signaled its intent to join the Agreement in the coming years. Saudi Arabia has a commitment eventually to join the Agreement. India has no prior commitment to join, but became an observer to the GPA in 2010, and is known to be assessing its potential interests in relation to the Agreement.

One of the most unique features of the GPA is that each member's coverage is negotiated and ultimately defined through detailed schedules (annexes) in Appendix 1 of the Agreement. WTO Government Procurement website, at www.wto.org/english/tratop_e/gproc_e/gproc_e.htm; individual Appendices are accessible at www.wto.org/english/tratop_e/gproc_e/appendices_e.htm. These annexes specify, among other things,

- which entities' (i.e., government instrumentalities', agencies', ministries', departments', etc.) contracting actions are subject to the Agreement, at both the central and (where applicable) sub-central government levels;
- monetary thresholds (below which the Agreement does not apply to individual procurements);
- categories or types of services covered by the Agreement; and
- specified exclusions (of all types).

Together, these details determine the extent of access to each Party's procurement market that is provided by the Agreement.

For example, in light of the thresholds that are specified in each Party's schedules, the GPA does not apply to a high volume of smaller (less-expensive) procurements by the participating governments. The U.S., like most Parties, adheres to the GPA's general thresholds of 130,000 Special Drawing Rights (SDRs)—currently equivalent to \$202,000—for goods and services procurements at the central government level, and 5 million SDRs—equivalent to \$7.78 million—for construction procurements. See 76 Fed. Reg.

76808, 76809 (Dec. 8, 2011). Below this threshold, the legal obligations of the Agreement, including those with respect to nondiscrimination, do not apply. In negotiating their accession to the GPA, Parties can negotiate specific threshold levels for the GPA's application, for example, agreeing to initially higher thresholds with a multiyear phase-in period down to the general levels.

As a direct result of the renegotiation that has just been concluded, the Agreement is expected to cover (at a minimum) more than 200 additional government entities and sub-entities. The revised Agreement also expands coverage to certain goods and services not previously covered by the Agreement, and—for the first time—includes full coverage of construction services. Several GPA Parties have also undertaken to provide new coverage of Build-Operate-Transfer arrangements. Of course, these additions to the sum of market-access commitments under the Agreement pale by comparison to those that will eventually flow from the accession of China and (hopefully) other major emerging economies to the Agreement.

Not Just New, but Better—Although the revised GPA is based on the same general principles as the 1994 Agreement, the amended text updates the original Agreement in several significant respects. First, it moves away from rigidly defined rules and allows for more flexibility in the pursuit of increasingly harmonized best practices in procurement. (Anyone familiar with the U.S. procurement scene will recognize many of the basic requirements that apply, ranging from the public posting of solicitations, to provide transparency and increase competition, through to the establishment of domestic review mechanisms (bid protest systems), to remedy errors and ensure accountability.) Arguably—and certainly, in our view—one of the primary benefits of the GPA as a tool of international economic policy is its ability to encourage best practices in public procurement while providing individual members with the flexibility necessary to adapt to specific contexts and scenarios.

Second, the amended text embraces advances in information technology and evolving procurement methods. The use of electronic procurement methods, from e-catalogs to electronic reverse auctions, has gained traction among developed and developing economies alike. Proponents assert that e-procurement encourages transparency, efficiency

and uniformity in awarding contracts. The original Agreement, however, failed to address the nascent (or not-yet-envisioned) explosion in electronic procurement methods. Embracing this trend, the revised text explicitly applies to procurement methods “whether or not ... conducted exclusively or partially by electronic means.” GPA Art. II(1). The revised GPA also provides general principles on the use of e-procurement and encourages members to “maintain mechanisms that ensure the integrity of requests for participation and tenders.” GPA Art. IV(3). (Outside of the U.S., most states use the term “tender” as opposed to “offer” (or the more familiar—to U.S. citizens—“bid” or “proposal”).)

In light of the foregoing elements, the GPA clearly constitutes an important instrument for promoting good governance internationally, in addition to serving as a market-access tool. Indeed, the revised GPA text carries forward this aspect of the Agreement in a significant way: It incorporates a specific new requirement for participating governments and their relevant procuring entities to avoid conflicts of interest and prevent corrupt practices. These provisions are unique in the context of WTO treaty obligations. See Arrowsmith, “The Revised Agreement on Government Procurement: Changes to the procedural rules and other transparency provisions,” in Arrowsmith and Anderson, eds., *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge University Press and the WTO: 2011, chapter 10, pp. 285–336.

Finally, the revised text better accommodates the concerns of—and the flexibilities desired by—developing economies. The revised GPA explicitly acknowledges the need, when negotiating non-Party accessions to the Agreement, to “give special consideration to the development, financial and trade needs and circumstances of developing countries and least developed countries.” GPA Art. V(1). Specifically, the transitional measures that are potentially available to developing countries that accede to the GPA, based on the particular needs of the individual accession candidates and subject to the existing Parties' Agreement, include (1) price preferences to protect domestic industries, (2) the flexibility to deploy offsets, (3) phasing in the coverage of specific government entities, and (4) initial coverage thresholds above the standard levels. Such measures are intended to be phased out over time and may be accompanied by reciprocal derogations from the existing Parties' coverage to

maintain an appropriate balance of opportunities under the Agreement. “There is a clear hope, on the part of the Parties, that the availability of these measures and possibilities will both encourage developing countries to consider joining the Agreement and facilitate their respective accession processes.” Anderson, “The WTO Agreement on Government Procurement (GPA): An Emerging Tool of Global Integration and Good Governance,” *Law in Transition Online*, Autumn 2010, at 5, available at www.ebrd.com/downloads/research/news/lit102.pdf; see also Müller, “Special and differential treatment and other special measures for developing countries under the Agreement on Government Procurement: the current text and new provisions,” in Arrowsmith and Anderson, *supra*, chapter 11, pp. 339–376.

And Better Still, in the Future?—The third element of the package adopted in December in Geneva is a set of work programs to be taken up by the GPA Parties to address matters of mutual interest. These include (a) best practices with respect to measures and policies that the Parties use to support the participation of small and medium-size enterprises in government procurement; (b) the promotion of environmentally sustainable procurement practices, consistent with the Agreement; and (c) improvement of the statistical data that is available relating to the Agreement. It will be interesting to follow the Parties’ progress on these issues.

The U.S. Perspective—Following conclusion of the GPA negotiation in December, Ron Kirk, the USTR, noted that “suppliers in the United States will have the opportunity to support more American jobs with broader, deeper access to government procurement work in many of our partner economies.” U.S. suppliers will enjoy “access to more than 150 additional central government entities in European Union Member States” and other GPA parties. U.S. suppliers will also benefit from additional access to sub-central government entities in Japan, Korea and Israel, as well as access to the Canadian provinces for the first time. GPA Parties have also agreed to expand coverage to additional government enterprises, including Israel’s Environmental Services Company and development companies, “as well as new entities from Japan, Korea, Liechtenstein and Chinese Taipei.” Nonetheless, “the United States maintains all of its current exclusions and exceptions, including its exclusion of set-asides for small and minority firms.” USTR, Press Release, “United

States Welcomes Opportunities for U.S. Suppliers Under Newly Revised WTO Government Procurement Agreement” (Dec. 15, 2011), www.ustr.gov/about-us/press-office/press-releases/2011/december/united-states-welcomes-opportunities-us-suppliers; USTR, Fact Sheet, “Benefits for the United States from the Revised WTO Government Procurement Agreement” (Dec. 15, 2011), www.ustr.gov/about-us/press-office/fact-sheets/2011/december/benefits-united-states-revised-wto-government-procur.

In addition to their participation in the formal conclusion of the GPA renegotiation, the U.S. and EU have agreed to establish a Bilateral Procurement Forum to further their bilateral procurement relationship. This Forum is expected to “take up procurement regulatory issues and international procurement issues, such as China’s accession to the GPA—a key priority for both [the U.S. and the EU].” *Id.* This seems a most useful development, and we are fascinated to learn more about this initiative.

As a further outcome of the negotiation concluded in Geneva, Israel committed itself to phase out its system of offsets (domestic content requirements) which has been in place since 1981. “Over 15 years, Israel will progressively reduce its application of these offsets to zero from the current 20 percent, reduce the number of entities that apply offsets, and set a threshold below which offsets will not be applied.” *Id.*

Significance of Conclusion of the GPA Renegotiation in an Era of Economic Crisis—In these unstable economic times, the importance of the GPA—and of the strengthening of the Agreement that will occur as a result of the revisions adopted in December—cannot be overstated. The Agreement performs a vital function in maintaining open international markets and avoiding potential retaliatory trade-limiting measures by the participating governments in the procurement sector. See, e.g., Schooner and Yukins, Feature Comment, “Tempering ‘Buy American’ In The Recovery Act—Steering Clear Of A Trade War,” 51 GC ¶ 78 (addressing these issues in the context of the Buy American provisions in the American Recovery and Reinvestment Act of 2009, emphasizing the significant risk that expanding domestic preferences could pose to the global economy, and encouraging efforts to avoid entering into a debilitating spiral of protectionism).

The GPA is, indeed, the main insurance policy available to exporting economies to preserve exist-

ing market-access rights in this crucial sector. Once a nation accedes to the GPA, the Agreement legally prevents individual country leaders from instituting politically popular but short-sighted policies such as limiting the market access of firms from other GPA Parties during downturns in the economic cycle. Because reciprocity—and the deterrence of retaliation—plays such an important role in trade, this long-standing Agreement lends an important element of stability to the global public procurement market.

In addition, the subject matter of the GPA—public procurement and contracting practices—bears directly on fiscal probity and the allocation of scarce economic resources, considerations that take on increased significance in the present economic environment. In this sense, the successful conclusion of the GPA renegotiation in Geneva in December can be said to have contributed not only to maintaining open international trade in the face of the present economic crisis, but also to good governance and the effective management of public resources in participating WTO member governments.

China's Accession to the Agreement; Mainstream Media Misperceptions—In the context of the December proceedings in Geneva, major news outlets lamented China's decision not to join the revised Agreement at this time. This perspective misses the mark and demonstrates a lack of understanding about the processes involved in GPA accession. Quite simply, the Chinese negotiations are ongoing; they are separate and distinct from the renegotiation of the Agreement that has just been concluded by the existing Parties; and there was not, in fact, any general expectation among informed persons that China's GPA accession would be concluded in the 2011 calendar year.

China's accession to the GPA is a complex, challenging and multifaceted exercise that remains on track, notwithstanding the reality that significant issues remain to be resolved. Although China undertook to join the GPA as early as 2001, when it joined the WTO, it formally applied for GPA accession only at the end of 2007. The USTR, in particular, has acknowledged that "China began its negotiations to join the GPA four years ago ... [and] has submitted three offers, each an improvement from the last." USTR, Press Release, "United States Welcomes Opportunities for U.S. Suppliers Under Newly Revised WTO Government Procurement Agreement" (Dec.

15, 2011), www.ustr.gov/about-us/press-office/press-releases/2011/december/united-states-welcomes-opportunities-us-suppliers. The offer submitted by China toward the end of 2011 has not met all of the expectations of the U.S. and other existing Parties, but responds to other Parties' requests by offering significant proposed coverage of procuring entities at the sub-central (provincial/municipal), in addition to the central, government level.

Two of us were in China in mid-2011, where we discussed the accession negotiation process with a large contingent of relevant Chinese officials. In part because of China's unique status in the world economy, all signs point to this negotiation being a protracted, complicated process. The USTR, in particular, has stated that "China still has some distance to go. ... For example, [the U.S. is] urging China to cover state-owned enterprises, add more sub-central entities and services, reduce its thresholds for the size of covered contracts, and remove other broad exclusions." *Id.* Important issues also remain to be addressed concerning China's procurement practices and legislation. (All accessions to the GPA require adaptation of relevant legislation and practices to comply with GPA norms, in addition to agreement with the existing Parties on coverage levels.)

But none of this should distract from the more important storyline, namely that China continues to invest massive resources in upgrading its public procurement regime as it negotiates with the GPA Parties to open its government purchasing markets to systematic international competition. This process will, when it reaches a conclusion, represent an historic broadening in the application of good procurement practices internationally and a major contribution to the rebalancing of trade relations with key emerging economies (which has been called for by, among others, President Obama).

Conclusion: A Significant Milestone and a Harbinger—The adoption of the revised GPA in Geneva in December 2011 by itself represents a significant milestone in the promotion of market access and transparency in public procurement markets internationally. It constitutes a necessary update of the global economy's most important, enforceable international treaty on public procurement, and (when the revisions come into force) will expand the market access provided by the Agreement to the tune of \$80–100 billion annually. In the current economic climate, these developments are an important step

in maintaining open international trade markets, encouraging good governance and reducing protectionist incentives in the public procurement sector.

Even more important, however, may be the effect of last month's conclusion of the GPA renegotiation in setting the stage for future expansion of the membership of the Agreement to encompass the world's major emerging economies such as China, Russia, the Ukraine and (perhaps) India. The conclusion has facilitated this in at least two ways: first, by enhancing the flexibility of the Agreement and thereby making it easier to implement for all GPA Parties (including new ones); and second, by creating new transitional measures that will ease and facilitate the accessions of at least some of these WTO Members. In addition, conclusion of this major WTO negotiation makes it possible for the existing GPA Parties to refocus their attention on the pending and possible future accessions, as the U.S. and the EU have already

undertaken to do. Stay tuned as the global public procurement market continues to evolve.



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