

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

Judge Marc Steiner,
Swiss Federal Administrative Court

Geneva, 14th September 2018

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

Testimonial on legal history from a Swiss perspective I (3 archaeological layers)



Testimonial on legal history from a Swiss perspective II (3 archaeological layers)

- Layer 1: Swiss internal market not really stimulated, market opening not the main focus, political environment favouring protectionism and collusion of bidders
- Layer 2: Swiss Internal Market Law, Cartel Act, GPA 1994, Public Procurement Regulation 1994; open markets, competition (based rather on price?); bidders can challenge award decisions
- Layer 3: GPA 2012 / EU directives 2014: Governance/preventing corruption, competition based on quality, sustainability and innovation (completing the goals according to layer 2)

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

[▼ More](#)

14.30 Chairman's introductory remarks

Sustainable (Public) Procurement: WTO Symposium 2017



GOVERNMENT PROCUREMENT: SYMPOSIUM – GENEVA 22 FEBRUARY 2017

Symposium on sustainable procurement

Work programme on sustainable procurement of the committee on government procurement⁽¹⁾

Centre William Rappard (WTO Headquarters), Room W

Geneva, 22 February 2017

Sustainable (Public) Procurement: WTO Symposium 2017



WORLD TRADE
ORGANIZATION

GPA/W/341

30 May 2017

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Committee on Government Procurement

KEY TAKE-AWAYS FROM THE COMMITTEE'S SYMPOSIUM ON SUSTAINABLE PROCUREMENT

HELD IN THE CENTRE WILLIAM RAPPARD (WTO HEADQUARTERS), GENEVA, ROOM W,
22 FEBRUARY 2017

Report by the Secretariat

Geneva, 14th September 2018

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 (endorsed by the lower chamber of the Swiss Parliament) 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 – Award Criteria

Art. 67 (2): Award criteria may comprise organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract, ..

Directive 2014/24/EU – Award Criteria

Art. 67 (2): Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

Competition based on quality vs. competition based on price

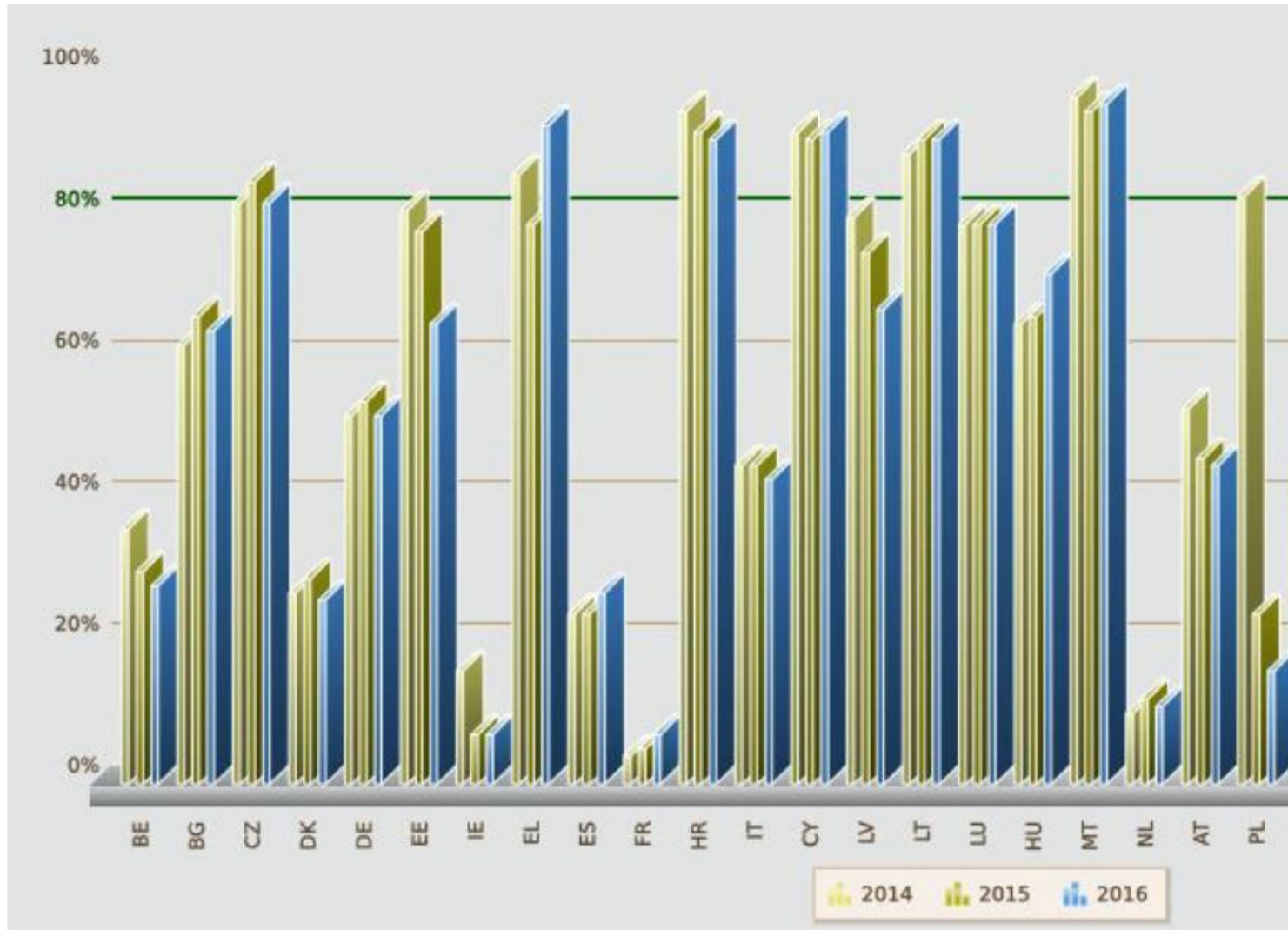
The EU directive 2014/24/EU aims allowing for choices but at the same time to foster competition based on quality.

(Innovation and sustainability are difficult to reconcile with a concept of public procurement building on the competition based on price only.)

Competition based on quality vs. competition based on price

The lower chamber of the Swiss Parliament wants to change the “formula” on how to award contracts: Decisive should be the “most advantageous tender” (“das vorteilhafteste Angebot”; cf. art. 41 of the draft for a new FAPP; i.e. the wording of the GPA) instead of the “most economically advantageous tender” (“das wirtschaftlich günstigste Angebot”; cf. art. 21 of the current FAPP).

EU Commission study 2017 on the performance of Member States in public procurement III



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; cf. art. 12 of the draft version of a new FAPP].

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 (Bundesblatt [= Federal Gazette] 2017 1851 ss., p. 1943). Art. 29 of the draft on award criteria has meanwhile been endorsed by the lower chamber of the Swiss Parliament.

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 (decision of the Swiss Federal Administrative Court B-3797/2015 [April 2016]).

GPA 1994 – Abnormally Low Tenders

Following more or less the example of the EU regulation (art. 68 directive 2014/24/EU) Swiss procuring entities will probably be obliged to ask questions to a supplier presenting an abnormally low bid (Art. 38 of the draft version endorsed by the lower chamber of the Swiss Parliament).

According to the current Swiss law procuring entities **may** ask questions if they want to (discretion).

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 31) 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).

Can we reconcile the sustainability goals with the aim of preventing corruption?

When discussing sustainability issues in Berlin some years ago, a Transparency International representative was of the opinion, that the discretion needed in order to foster sustainability and innovation is bad in terms of the purpose of preventing corruption. Is he right? Answer: It depends on the governance level of the country (“Reifegradmodell”).

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