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WTO Agreement on Government Procurement (GPA)

During the past 50 years, the United States has played a prominent role in developing international trade rules on government procurement. Most U.S. free trade agreements include government procurement obligations. The most notable international procurement agreement to which the United States is a party is the World Trade Organization (WTO)'s Agreement on Government Procurement (GPA). The GPA has opened procurement opportunities around the world to foreign competition, worth trillions of U.S. dollars annually. It also requires parties to establish transparent and nondiscriminatory rules for covered procurement. In particular, the agreement enables U.S. businesses to bid for certain government contracts in the markets of other GPA parties. Likewise, it allows foreign businesses to bid for contracts tendered by U.S. procuring entities in areas where federal and state governments have agreed to open up their procurement markets. The WTO estimates the size of the procurement market covered by the GPA at $1.7 trillion; data limitations make it difficult to quantify accurately the extent to which governments acquire goods and services from suppliers of other GPA parties.

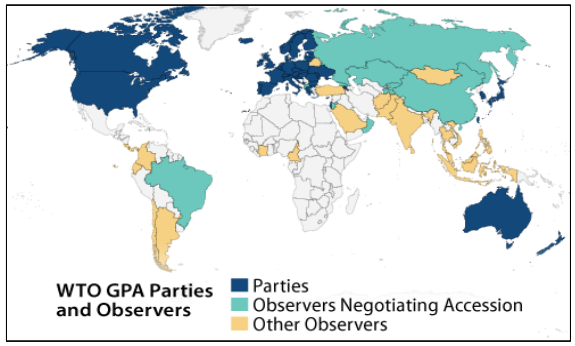
The Coronavirus Disease 2019 (COVID-19) pandemic increased Congress' interest in better understanding the role of international trade in U.S. government procurement. In particular, some Members and the Trump and Biden Administrations have sought ways to incentivize U.S.-based production by prioritizing the procurement of domestic goods and services by the federal government and limiting waivers to statutory domestic preference provisions such as the Buy American Act (BAA). Within this context, some Members have raised questions about the GPA, including how U.S. commitments under the agreement affect federal agency acquisitions of goods and services.

Background

In recognition of the economic and political benefits of open, transparent, and nondiscriminatory trade, the United States and other major trading partners established the General Agreement on Tariffs and Trade (GATT) in the aftermath of World War II. The first six rounds of GATT trade negotiations dealt primarily with tariff measures. The seventh round—the Tokyo Round (1973-1979)—took a significant step in addressing nontariff barriers, such as government procurement policies. Negotiators addressed many of these barriers in a series of codes, including the Government Procurement Code, which went into effect in 1981. The Code imposed a set of rules that signatories had to apply in their procurement procedures and practices.

Later, as part of the GATT's Uruguay Round—which resulted in the creation of the WTO in 1995—Code signatories negotiated a new agreement, the WTO GPA. It entered into force in 1996. The GPA extended the scope of the 1981 Code to include additional entities and thresholds, as well as applicability to procurements of services and construction services. Signatories agreed to enter into negotiations to expand the GPA's membership and coverage three years after the agreement entered into force.

Figure 1. Parties and Observers to the WTO GPA



Source: CRS with information from the WTO.

In 2012, after more than a decade of negotiations, GPA parties adopted a revision to the 1996 agreement, which entered into force in 2014. It reflected new procurement practices, clarified obligations, and expanded the scope of procurement activity covered by the 1996 GPA.

General Obligations under the GPA

The GPA governs procurement by any contractual means and applies to laws, regulations, and practices regarding any covered procurement. It may thus cover procurement by central and sub-central government entities, as well as utilities and other government enterprises that a party designates. The GPA does not cover every country or sector. The parties bound by the GPA negotiate market access commitments on a reciprocal basis. In its schedule of commitments (i.e., Appendix), each party specifies government entities, as well as categories of goods and services—subject to limitations and monetary thresholds—that are open to procurement bids by companies from other GPA parties. For example, the U.S. Appendix covers 85 federal entities and voluntary commitments by 37 states.

Consistent with the overall framework of the WTO, the agreement requires nondiscrimination and transparency in contracting—the GPA's two cornerstone principles. In addition, the GPA contains obligations regarding tendering, selection, and awarding requirements, qualification of suppliers, offsets, and challenge procedures. It also contains general exceptions from GPA obligations. For example, countries typically exclude certain defense and national security-related purchases, and in the case of the United States, set-asides for small and minority-owned businesses.

In negotiating reciprocal GPA procurement commitments, the United States has not required that other parties open all of their markets to foreign competition in the same nominal amounts, or offered to open all U.S. markets to foreign suppliers. Rather, its general aim has been to gain access to comparable opportunities in other parties' markets.

WTO GPA Cornerstone Principles

Nondiscrimination. The GPA requires parties to accord to the goods, services and suppliers of other GPA parties treatment "no less favorable" than that given to their domestic goods, services and suppliers throughout the procurement process for covered entities. In other words, parties cannot favor domestic goods, services, or suppliers, nor can they treat the goods, services or suppliers of one GPA party more favorably those of another GPA party.

Transparency. Each party is required to publish information on its procurement system, including applicable laws, regulations, and judicial decisions, in an officially designated medium that is widely disseminated and accessible to the public. Parties are also required to collect and report statistics on the contracts covered by the agreement. On request of any other party, a party must provide any information necessary to determine whether a procurement was conducted fairly and in accordance with the agreement.

Procurement Practices. A procuring entity must conduct procurement in a transparent manner consistent with the GPA, avoid conflict of interest, and prevent corrupt practices. Additionally, parties are to ensure that their procedures do not preclude competition or create unnecessary obstacles to international trade. The GPA also establishes general rules regarding the systems through which suppliers engage in competitive bidding for contracts (i.e., open, selective, and limited tendering procedures).

Offsets. Government entities may not impose, seek, or consider offsets either in qualifying and selecting suppliers, goods, or services, or in evaluating tenders and awarding contracts. An offset is defined as any condition "that encourages local development or improves a party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade, and similar action or requirement."

Dispute Settlement (DS). The WTO Dispute Settlement Understanding applies—with certain exceptions—to consultations and disputes involving the GPA. For example, only GPA parties may participate in decisions or actions by the DS Body in GPA disputes. In the event of lack of compliance in a dispute, cross-retaliation is not allowed with respect to the GPA. As such, parties may not suspend GPA benefits as a countermeasure in disputes brought under a different WTO agreement.

Modifications. A GPA party generally cannot modify the procurement that it covers without the consent of—or absence of objections from—the other parties. To make changes, a party must notify the WTO Committee on Government Procurement and explain the likely consequences for the mutually agreed coverage of the agreement. If parties are unable to reach an agreement over the proposed changes, they may pursue DS procedures.

Accession Negotiations. Any WTO member may accede to the GPA on terms agreed between that member and all GPA parties. Since the GPA entered into force in 1996, its membership has grown from 23 to 48 parties (counting EU members separately). The GPA accession process is based on negotiations with the acceding member on the procurement that it will cover and a determination by the GPA parties that its procurement system complies with the GPA. Many members that have joined the WTO since 1995 committed to seek GPA membership as part of their terms for accession, including China and Russia—both of which continue to be engaged in GPA accession negotiations. In May 2020, Brazil became the latest country to submit an application to join the GPA.

Security and General Exceptions. The GPA contains a national security exception, broadly in line with GATT 1994's Article XXI. The exception states that a party is allowed to take "any action or not [disclose] any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes." In addition, the GPA also contains general exceptions modeled after GATT's Article XX. These include—but are not limited to—safety, human, animal, or plant life or health, and philanthropic institutions.

Issues for Congress

As Congress oversees the implementation of recent legislation and the Biden Administration updates processes and regulations on U.S. government procurement, Members may consider the implications of such measures for the U.S. economy and their consistency with U.S. commitments under the GPA. For example, Members may engage with the Administration to assess the extent to which domestic producers are able to meet U.S. government demand and satisfy various essential national needs with inputs and products exclusively sourced from the United States.

The Trump Administration reviewed the benefits of the GPA, and according to one news report, considered withdrawal from the agreement. While some Members reportedly contend that the GPA is "imbalanced" and support U.S. withdrawal from it, others have called for modifying U.S. commitments under the agreement and modernizing rules regarding government procurement. Others argue that participation in the GPA not only maintains U.S. companies' ability to compete for foreign government contracts, but it also gives the United States leverage to negotiate greater market access and better terms with WTO members in accession negotiations (e.g., China).

U.S. government contractors often rely on global supply chains to support their U.S. government contracts, including networks of suppliers and manufacturing facilities in the territories of other GPA parties. Even when manufactured in the United States, many of the products that U.S. suppliers deliver to federal and state entities may have inputs from other GPA parties. Therefore, U.S. withdrawal from the GPA, or modifications to U.S. commitments under it, could potentially require U.S. businesses to restructure their supply chains—including, for example, by changing suppliers or relocating facilities—to comply with domestic sourcing laws. Moreover, as countries compete to set global standards (e.g., 5G technology), U.S. firms unable to bid for government contracts in GPA parties' markets may find themselves at a disadvantage, ceding opportunities to competitors from other countries.

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