

Government Procurement Law and Policy

Brazil • Canada • China • European Union • India
Japan • Russian Federation

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COMPARATIVE SUMMARY
GOVERNMENT PROCUREMENT LAW & POLICY

Executive Summary

Government procurement in the surveyed jurisdictions is regulated by laws that make their application mandatory at all levels of government.

Two members to the World Trade Organization Plurilateral Agreement on Government Procurement (WTO-GPA), Canada and the European Union, limit the scope of application of the Agreement through specific regulations, while Japan does not impose any limitation. In the BRIC bloc, government procurement may be required to come from domestic sources, with a few exceptions permitted, or be limited to issues involving the military, national security, pricing, or transparency.

In general, most governments are bound by their procurement rules, which also establish the scenarios in which a few industries are not subordinate to them. The rules also regulate the access of other nations' goods to their markets.

I. Purpose of the Report

This report summarizes and compares government procurement rules of selected jurisdictions, including the implementation of the WTO-GPA by the State members to the agreement as well as the domestic laws of the countries that are not members to the agreement.

II. WTO – Plurilateral Agreement on Government Procurement

Brazil, India and Russia are not parties to the WTO-GPA. Canada, the European Union, and Japan joined GPA in January 1996, and China was accepted as an observer in February 2002. In December 2007, China started its accession process by signing a written application to join the WTO-GPA.

III. Implementation of Government Procurement Rules

The provisions of the WTO-GPA were implemented in the domestic legislation of Canada, European Union and Japan. Japan issued general rules. Directives were prepared by the European Union, and Canada incorporated the provisions of the WTO-GPA at the federal level only, limiting the participation of suppliers on state and local tenders.

In the absence of an international agreement, government procurement in the BRIC countries (Brazil, Russia, India, and China) is governed by federal laws. Brazil and India issued federal laws based on constitutional principles, which was not the case for Russia and China. However, all countries make it mandatory that government procurement follow the rules enacted in this regard.

IV. Domestic Sourcing

Canada and the European Union have their domestic sourcing boundaries defined in the form of limitations and exclusions listed in legal instruments, while Japan does not make use of any restrictive protocols.

Canada used the General Notes submitted to the WTO-GPA to summarize limitations and exclusions, and to state that the services Canada has included extend only to parties that grant reciprocal access and that, for the European Union, the WTO-GPA does not apply to certain activities, which consequently defined the requirements for domestic sourcing.

The Directives issued by the European Union to regulate government procurement also list public contracts, works, and services that are excluded. In addition, within the European Union market, there is no requirement for preference of domestic sourcing. However, with regard to the WTO-GPA, EU Members are required to apply the “no less favorable” treatment to products, services, and suppliers of any other party to the Agreement than they give to their domestic products, services, and suppliers.

On the other hand, Japan does not have any requirement regarding domestic sourcing or industry exemption.

Brazil and China require that government procurement come from domestic sources, while Russia limits its domestic sourcing requirement to military and national security issues, and India prefers to focus on price competitiveness and transparency.

In Brazil, domestic sourcing is justified under constitutional principles that determine that government procurement must be done through public tenders that are regulated by federal law, and that no government entity is exempt from a public tender process. Small companies enjoy preferential treatment and the proposal that is more beneficial to the government is awarded the contract. However, if a tie occurs, Brazilian goods and services are given preference.

Russia does not restrict procurement based on the contractor’s citizenship. The criteria used to establish prohibitions and restrictions for acquisitions of goods, works, and services produced outside Russia is limited to military contracts and national security issues.

India’s requirement for government procurement is to procure materials and/or services of the specified quality, at the most competitive prices in a fair and transparent manner.

In China, government procurement must come from domestic sources, except when: (1) the required goods, projects, or services are not available in China, or are not available upon

reasonable commercial conditions; (2) the objects of procurement are for use outside China; or (3) it is specified otherwise in other laws or administrative regulations.

V. Exempted Industries

In Canada, federal government entities that are bound by the WTO-GPA are listed on the Annexes submitted to the WTO-GPA, making most governmental departments, agencies, and enterprises generally bound by the WTO-GPA. Nevertheless, the Department of Defence and the Royal Canadian Mounted Police are extensively exempt from procurement rules. In addition, the General Notes submitted by Canada list several types of activities, including public works, services, equipment, programs, and government assistance that are not covered by the WTO-GPA.

Like Canada, the European Union also lists on its Directives the public contracts, works, and service concessions that are excluded from the scope of the WTO-GPA and Japan does not have any exempted industry.

In Brazil, no industry is exempt from a public tender process, but the law lists the situations that are exempt from public tender and identifies the situations in which a public tender is not required because competitive bidding is not viable.

As in Brazil, in India no industry is exempt from the procedures of government procurement, outlined in India's General Financial Rules, as a means to provide equal opportunity, fairness, and transparency to all domestic and foreign companies who compete for procurement contracts.

In contrast, Russian law does not provide exemptions other than for state secrecy reasons, which appears also to be the case in China, as the requirements of the Chinese Procurement Law do not apply to military procurement, emergency procurement due to serious natural disaster or other matters of *force majeure*, or procurement involving national security or state secrets. Legislation currently being drafted in China will also exclude procurement with international loan funds, and procurement of mechanical and electrical products.

VI. Compliance with WTO Guidelines

The WTO-GPA is based on the principles of openness, transparency, and nondiscrimination, which apply to the parties' procurements that are covered by the Agreement, to the benefit of parties and their suppliers, goods, and services.¹ In this regard, Canada, the European Union, and Japan have consistently issued regulations designed to implement the Agreement into their domestic markets.

VII. Market Access for Other Nation's Goods

¹ World Trade Organization, The Plurilateral Agreement on Government Procurement, *available at* http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited Feb. 4, 2010).

The three members to the WTO-GPA covered in this report, Canada, the European Union, and Japan, issued regulations granting access to other nations' goods to their domestic markets.

Canada established rules for the procurement of certain supplies and services by national governments, which were prepared to give foreign parties market access on a reciprocal basis.

Access to the EU market for the goods of other nations who participate in the WTO-GPA is foreseen in the Directives issued by the European Union, which dictate that EU Members are required to apply the "no less favorable" treatment to products, services, and suppliers of any party to the Agreement than they give to their domestic products, services, and suppliers. In addition, the European Union legal regime on public procurement also applies to signatories to the WTO-GPA.

Japan has voluntarily improved foreign suppliers' access to government procurement by exceeding the requirements of the WTO-GPA. The government also expanded the scope of applicability of the GATT Agreement on government procurement by lowering the threshold estimated value assigned in the GATT Agreement.

Although the BRIC countries are not participating members to the WTO-GPA, other nations' goods can still reach their markets. Brazil and China require that government procurement come from domestic sources, but there are exceptions. In Brazil, a foreign company may participate in public tender processes for government contracts as long as they are established or represented in the country. In China, if certain circumstances occur, goods, projects, or services may be procured abroad.

Russia only establishes restrictions or prohibitions for the acquisition of goods, works, and services originating outside of Russia in the case of military contracts or when issues of national security are at stake.

In India, the only requirement is that foreign companies must be centrally registered with the Director General of Supplies and Disposal (DGS&D) in order to submit tenders agreeing to supply goods of the requested specifications.

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BRAZIL

GOVERNMENT PROCUREMENT LAW & POLICY

Executive Summary

Section XXI of Article 37 of the Brazilian Constitution of 1988 states that, except for cases specified by law, public works, services, purchases, and transfers of ownership must be contracted through a process of public tender that assures equal conditions for all bidders, with clauses that establish payment obligations and requirements for technical and economic qualifications indispensable to guarantee the fulfillment of these obligations.

Article 37 is regulated by Law No. 8,666 of June 21, 1993, which establishes the general rules for the procurement of goods, works, and services by the government, with the exception of those cases listed in the Law.

All government organs and agencies, including special funds, public companies (autarchies), public foundations, public companies, mixed-capital companies, and other entities that are directly or indirectly controlled by the Union, states, Federal District, and municipalities {CAPS} are subject to Law No. 8,666. To participate in the bidding process, foreign companies must be legally established or represented in the country.

In the area of international agreements, Brazil is not a party to the World Trade Organization Plurilateral Agreement on Government Procurement.

I. Introduction

This report discusses the Brazilian laws that apply to government contracts, more specifically the law that regulates government procurement. The report provides the constitutional principles and statutory requirements that must be followed by people and companies who want to participate in government bidding processes, constitutional principles supporting domestic sourcing, and additional procurement regulations applicable to different industries.

II. World Trade Organization

Brazil is not a party to the World Trade Organization Plurilateral Agreement on Government Procurement. The purpose of the agreement was to open government purchases to

international competition¹ and was designed to make the instruments that regulate government procurement more transparent, so that foreign competitors can be assured fair treatment and equal access to international markets.²

III. Constitutional Principles

A. Power to Legislate

Article 22(XXVII) of the Brazilian Constitution of 1988 determines that the Union has exclusive power to legislate with respect to the general rules for all types of public tenders and contracts, in all of their forms, for the direct public administration, public companies, and foundations of the Union, states, Federal District, and municipalities, provided that the requirements of Article 37(XXI) of the Constitution are observed, and for public companies and mixed-capital companies, as provided for in Article 173(§1)(III) of the Constitution.³

B. Public Bidding

Section XXI of Article 37 states that, except for cases specified by law, public works, services, purchases, and transfers of ownership must be contracted through a process of public tender that assures equal conditions for all bidders, with clauses that establish payment obligations. The effective conditions of the bid must be maintained, as provided by law, which may only allow requirements for technical and economic qualifications essential to secure performance of the obligations.⁴

Pursuant to Article 173, with the exception of the cases provided for in the Constitution, direct exploration of an economic activity by the State must only be permitted when necessary for the imperatives of national security or a relevant collective interest, as defined by law.⁵

In addition, the law must establish the legal regime of public companies, mixed-capital companies, and their subsidiaries that engage in economic activities of production or marketing of goods or services, dealing, inter alia, with⁶ bidding and contracting of public works, services, purchases, and transfers of ownership, which must observe the principles of public administration.⁷

¹ World Trade Organization, *Government Procurement: Opening Up for Competition*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#govt (last visited Jan. 12, 2010).

² *Id.*

³ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL DE 1988 [C.F.] art. 22(XXVII), available at the website of the Brazilian Presidency, http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm (last visited Jan. 12, 2010).

⁴ *Id.* art. 37(XXI).

⁵ *Id.* art. 173.

⁶ *Id.* §1.

⁷ *Id.* (III).

C. Concessions and Permits

Article 175 of the Constitution specifies that the government is responsible for providing public utility services, either directly or under a regime of concession or permission, which must always be done through public tender.⁸

D. Domestic Sourcing

Article 170(IX) of the Constitution, determines that the economic order is founded on the appreciation of the value of human labor and free enterprise and is intended to assure to everyone a dignified existence, according to the principles of social justice, which must observe, inter alia, preferential treatment for small companies organized under Brazilian law that have their headquarters and management in the country.⁹

Furthermore, according to Article 219 of the Constitution, the domestic market is part of the national patrimony and must be encouraged to enable the cultural, social and economic development, the well-being of the population and the technological autonomy of the country, as provided by federal law.¹⁰

IV. Regulation

Article 37 of the Constitution is regulated by Law No. 8,666 of June 21, 1993.¹¹ Law No. 8,666 does not apply to the purchase of computers and automation either in the form of goods or services, computer software, specific digital electronic equipment or telecommunications equipment, which are regulated by Law No. 8,248 of October 23, 1991,¹² as amended by Law No. 10,176 of January 11, 2001.¹³

Concessions and permissions are regulated by Law No. 8,987 of February 13, 1995.¹⁴ The petroleum industry is regulated by Law No. 9,478 of August 6 1997,¹⁵ which determines that the contracts for the acquisition of goods and services of the government-controlled petroleum company, PETROBRÁS, must be preceded by a simplified tender process, which is regulated by Decree No. 2,745 of August 24, 1998.¹⁶

⁸ *Id.* art. 175.

⁹ *Id.* art. 170(IX).

¹⁰ *Id.* art. 219.

¹¹ Lei No. 8.666, de 21 de Junho de 1993, https://www.planalto.gov.br/ccivil_03/leis/l8666_cons.htm.

¹² Lei No. 8.248, de 23 de Outubro de 1991, arts. 3, 16A, 16A(§2), http://www.planalto.gov.br/ccivil_03/Leis/L8248.htm.

¹³ Lei No. 10.176, de 11 de Janeiro de 2001, http://www.planalto.gov.br/ccivil_03/Leis/LEIS_2001/L10176.htm.

¹⁴ Lei No. 8.987, de 13 de Fevereiro de 1995, https://www.planalto.gov.br/ccivil_03/leis/l8987_cons.htm.

¹⁵ Lei No. 9.478 de 6 de Agosto de 1997, http://www.planalto.gov.br/ccivil_03/Leis/L9478.htm.

¹⁶ Decreto No. 2.745 de 24 de Agosto de 1998, http://www.planalto.gov.br/ccivil_03/decreto/D2745.htm.

A. Law No. 8,666 of June 21, 1993

Law No. 8,666 is the main law regulating government procurement in Brazil. The Law establishes the general rules for public tenders and administrative contracts regarding public works, services including publicity, transfers of ownership, and leasing within the ambit of the Union, states, Federal District, and municipalities.¹⁷

B. Applicability

Law No. 8,666 is applicable to all organs of the direct administration, special funds, public foundations, public companies, mixed-capital companies, and other entities that are directly or indirectly controlled by the Union, states, Federal District, and municipalities.¹⁸

C. Bidding Principle

Public tender was designed to ensure compliance with the constitutional principle of equality and to select the proposal most advantageous to the public administration and must be processed and judged in strict conformity with the basic principles of legality, anonymity, morality, equality, publicity, administrative probity, adherence to the tender announcement, and to its objective judgment.¹⁹

D. Restrictions Imposed on Public Agents

Public agents are not allowed to²⁰ accept, anticipate, include, or tolerate in the tender announcements clauses or conditions that compromise, restrict, or frustrate its competitive character; set preferences or distinctions by reason of place of birth, place of headquarters, or domicile of the bidders or any other circumstance irrelevant to the specific object of the contract;²¹ or establish differential treatment of commercial, legal, labor, social security, or of any other nature, between Brazilian and foreign companies, including currency, mode, and place of payment, even when financing of international agencies is involved, except as provided in Article 3(§2) of Law No. 8,666 and Article 3 of Law No. 8,248 of October 23, 1991.²²

E. Preference

In case of a tie between bidders in identical conditions during the public tender process, preference will be given, successively, to goods and services that are²³ produced or rendered by

¹⁷ Lei No. 8.666, de 21 de Junho de 1993, art. 1.

¹⁸ *Id.* sole para.

¹⁹ *Id.* art. 3.

²⁰ *Id.* §1.

²¹ *Id.* (I).

²² *Id.* (II).

²³ *Id.* §2.

Brazilian companies of national capital;²⁴ produced in the country;²⁵ produced or rendered by Brazilian companies;²⁶ and produced or provided by companies that invest in research and technology development in Brazil.²⁷

F. Definitions

Law No. 8,666 provides detailed definitions of several situations, steps, and procedures encompassed by the public tender process, including what is considered to be public works, services, purchases, and transfers of ownership;²⁸ prohibitions of direct or indirect participation in bidding processes;²⁹ modes of execution of public works and services;³⁰ technical and specialized professional services;³¹ acquisitions³² and transfer of ownership.³³

G. Publication

Article 21 of Law No. 8,666 mandates that all notices with a summary of the public tenders must be published in the Official Gazettes (*Diário Oficial da União, Diário Oficial do Estado ou do Distrito Federal*) and in newspapers with a large circulation.³⁴ In addition, the bidding announcement must indicate the place where the interested bidders may obtain a full copy of the bidding announcement³⁵ and the minimum period of time for the receipt of proposals in the many different modes of bidding.³⁶

H. Bidding Modes

Bidding modes include bidding (*concorrência*);³⁷ pricing (*tomada de preços*);³⁸ invitation;³⁹ contest;⁴⁰ and auction.⁴¹ Paragraphs 1 to 6 of Article 22 define each bidding mode.

²⁴ *Id.* at I. Constitutional Amendment No. 6 of August 15, 1995, revoked Article 171 of the Constitution, which defined “Brazilian company” and “Brazilian company of national capital.” In practice, the Amendment terminated with the discrimination between companies formed under Brazilian law. However, the Amendment introduced Section IX to Article 170, establishing a preferential treatment for small companies organized under Brazilian law that have their headquarters and management in the country.

²⁵ *Id.* (II).

²⁶ *Id.* (III).

²⁷ *Id.* (IV).

²⁸ *Id.* art. 6 *et seq.*

²⁹ *Id.* art. 9.

³⁰ *Id.* arts. 10, 11, 12.

³¹ *Id.* art. 13.

³² *Id.* arts. 14, 15.

³³ *Id.* arts. 17, 18, 19.

³⁴ *Id.* art. 21(I), (II), (III).

³⁵ *Id.* art. 21(§1).

³⁶ *Id.* art. 21 (§2).

³⁷ *Id.* art. 22(I).

Bidding, pricing, and invitations are determined according to the estimated value of the future contract.⁴²

I. Exemptions

Article 24 of Law No. 8,666 lists the situations that are exempt from public tender and Article 25 identifies the situations in which a public tender is not required because competitive bidding is not viable.

J. Requirements

Bidders must be legally established or represented in the country in order to qualify for participation in public tender processes for government contracts. In order to participate in a public tender process, the interested parties must only present documentation regarding⁴³ legal authorization;⁴⁴ technical qualification;⁴⁵ economic and financial qualification;⁴⁶ tax compliance;⁴⁷ and compliance with the provisions of Article 7(XXXIII) of the Federal Constitution.⁴⁸

Article 28 of Law No. 8,666 specifies the documentation required to prove legal authorization. Documentation regarding tax compliance is listed in Article 29, and Article 30 and 31 deal respectively with documentation regarding technical and financial qualifications.

K. Documentation

The documentation required for qualification may be submitted in the original, by any means of copy notarized by a competent registrar office or civil servant, or by publication in the official press.⁴⁹

When participating in international bidding, foreign companies that do not operate in the country must comply, as much as possible, with the provisions of Article 32 of Law No. 8,666

³⁸ *Id.* (II).

³⁹ *Id.* (III).

⁴⁰ *Id.* (IV).

⁴¹ *Id.* (V).

⁴² *Id.* art. 23.

⁴³ *Id.* art. 27.

⁴⁴ *Id.* (I).

⁴⁵ *Id.* (II).

⁴⁶ *Id.* (III).

⁴⁷ *Id.* (IV).

⁴⁸ *Id.* (V).

⁴⁹ *Id.* art. 32.

through similar documents, authenticated by the respective consulates and translated by an official translator, and must have legal representation in Brazil expressly authorized to receive service and to respond administratively or judicially.⁵⁰

L. Joint Ventures

When the public tender allows the participation of companies in consortia (joint ventures), the following rules must be observed:⁵¹

- Proof of a public or private compromise to form a joint venture, which must be signed by the participating companies;⁵²
- Indication of the company that will be responsible for the joint venture in Brazil, which must meet the conditions of leadership as established in the public tender notice,⁵³
- In the joint venture of Brazilian companies and foreign companies, the leadership must necessarily be exercised by the Brazilian company, subject to the provisions of Article 33(II) of Law No. 8,666;⁵⁴ and
- The winning bidder is obliged to promote, before the formation of the contract with the government, the formation and registration of the joint venture, in accordance with the compromise referred to in Article 33(I) of Law No. 8,666.⁵⁵

V. Concluding Remarks

Domestic sourcing is justified under the Constitutional principles that determine that government procurement must be done through public tenders that are regulated by federal law; that all Brazilian companies enjoy preferential treatment; and that the domestic market is considered to be part of the national patrimony. A few industries are regulated by specific norms, but no government entity is exempt from a public tender process.

Federal regulation defines the public tender process and its various modes and formats, its applicability, and its restrictions, exceptions, and exemptions. The proposal that is more beneficial to the government is awarded the contract. However, if a tie occurs, Brazilian goods and services are given preference.

⁵⁰ *Id.* art. 32(§4).

⁵¹ *Id.* art. 33.

⁵² *Id.* (I).

⁵³ *Id.* (II).

⁵⁴ *Id.* art. 33(§1).

⁵⁵ *Id.* art. 33(§2).

Aligned with constitutional principles, Brazil did not sign the World Trade Organization Plurilateral Agreement on Government Procurement. Nonetheless, foreign companies may participate in the bidding process for government contracts as long as they are legally established or represented in the country.

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CANADA

GOVERNMENT PROCUREMENT LAW & POLICY

Executive Summary

Canada has implemented the provisions of NAFTA and the WTO agreement on government procurement at the federal, but not the provincial or municipal level. Therefore, Canadian suppliers can be excluded from bidding on state and local contracts that are subject to the “Buy American” provisions of the American Recovery and Reinvestment Act. The federal government of Canada has been seeking a public interest waiver from the President and an agreement was reportedly reached, but details on the extent to which Canada will agree to change its subcentral government procurement practices in return for the waiver have not yet been released.

Most government contracts that are open for bidding by U.S. suppliers are listed by Public Works and Government Services Canada on the Government Electronic Tendering Service through MERX. This governmental department buys goods and services through contracts, standing offers, and supply arrangements.

I. International Agreements

A. Introduction

Canada is a party to a number of bilateral and multilateral international agreements that establish rules for the procurement of certain supplies and services by national governments that are designed to give foreign parties expanded, but still restricted access to each other's markets. The two most important of these agreements for Canada, the provisions of which are included in implementing Canadian legislation enacted by Parliament, are the plurilateral WTO Agreement on Government Procurement (AGP)¹ and the trilateral North American Free Trade Agreement (NAFTA).²

B. The WTO

¹ WTO, Uruguay Round Agreement, Agreement on Government Procurement, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm (last visited Feb. 1, 2010).

² North American Free Trade Agreement (NAFTA), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpid=ALL#A1001>.

The WTO has published the Appendices and Annexes to the Agreement on Government Procurement (which it refers to as “the GPA” instead of “the AGP”) submitted by each party.³ For Canada, Annex I lists eighty-one Federal Government entities, including most governmental departments and agencies, that are generally bound by the AGP and a special list of goods that are covered if they are purchased by the extensively exempted Department of Defence and the Royal Canadian Mounted Police. Annex II offers to extend the AGP to Canada’s provincial entities subject to certain exceptions as, for example, restrictions designed to promote environmental quality if a plurilateral agreement on subcentral agencies is reached, but no such agreement has been concluded and no provinces have been added to this list. This is in sharp contrast to the United States, which has already included thirty-seven states in its Annex II despite the lack of a plurilateral WTO agreement on government procurement by subcentral agencies.⁴ Annex III adds nine Government Enterprises to the AGP, including the Canada Post Corporation and four museums that Canada has offered to include in the AGP. However, like Annex II, Annex III does not currently bind Canada because the parties to the AGP have not reached an agreement to include enterprises, such as Crown-owned corporations, that are not considered to be “entities.”⁵ Similarly, Annex IV offers to make certain non-construction services subject to the AGP, including legal services, accounting and software implementation, and Annex V offers to add most construction services to the AGP.⁶

Canada has also submitted General Notes, which basically summarize some of the Canadian understandings or interpretations of the limitations and exclusions contained in the AGP and confirm or add to the derogations Canada has included in its Appendices and Annexes to the AGP. These General Notes state that the Agreement does not cover shipbuilding, urban rail, certain types of electronic equipment, set-asides for small and minority businesses, agricultural support programs, and national security exemptions respecting oil and nuclear technology. They also note that the AGP does not cover “any type of government assistance, including but not limited to, cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services, given to individuals, firms, private institutions, and subcentral governments.”⁷ As will be seen, this provision is one that has been cited by U.S. authorities in defense of the legality of the “buy American” provisions contained in the economic stimulus package, which have been widely criticized in Canada. The General Notes also state that the services Canada has included extend only to parties that grant reciprocal access⁸ and that for the European Union, the AGP does not apply to activities in the

³ WTO, Appendices and Annexes to the GPA, available at http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#cane (last visited Feb. 1, 2010).

⁴ *Id.* Participation varies from state to state. Some states bind all executive branch agencies while others only bind listed agencies. In both cases, participation is on a reciprocal basis.

⁵ Foreign Affairs and International Trade Canada, *World Trade Organization: Government Procurement: WTO Agreement on Government Procurement: Explanatory Note Regarding Canada’s Annex 2, Sub-Central Government Entities, and Annex 3, Government Enterprises, of Appendix I*, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/wto-omc/entity.aspx> (last visited Feb. 1, 2010).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

field of drinking water, energy, transport, or telecommunications due to restrictive EU policies in these areas.⁹

C. NAFTA

Since 1999, the percentage of merchandise exports from Canada destined for the United States has actually declined from almost 90% to approximately 75% of all Canadian exports.¹⁰ Nevertheless, in 2008 bilateral trade between the two countries was approximately \$660 billion,¹¹ reportedly making it the largest bilateral trading relationship in the world.¹² Thus, the United States remains by far the largest export market for Canada and a market that is vitally important to the Canadian economy. Canada is also the United States' largest trading partner. In fact, its purchases of U.S. goods and services are more than twice that of the U.S.' second and third largest trading partners despite the fact that it has less than thirty-five million inhabitants.¹³ One reason for this is that Canada and the United States both import large quantities of manufactured or partially completed parts from each other, which are then included in finished products. This is particularly true in the automotive sector, which has been fully integrated since the 1960s.

Since 1994, the primary instrument regulating U.S.-Canada trade has been NAFTA. Between 1989 and 1994, trade between Canada and the United States was regulated by the Canada-U.S. Free Trade Agreement. This initial agreement was replaced by NAFTA when Mexico became a party. Since the original bilateral U.S.-Canada agreement went into effect, trade between Canada and the United States has reportedly tripled in dollar amounts.¹⁴

Chapter 10 of NAFTA addresses government procurement. It was originally intended to expand upon the provisions of the extant Canada-U.S. Free Trade Agreement and the extant General Agreement on Trade and Tariffs Agreement on Government Procurement, and Chapter 10 still has a wider application than the AGP. However, there are many similarities between the AGP and Chapter 10. Both have thresholds. For the AGP, there is a table of thresholds published by the WTO.¹⁵ The basic table sets out the thresholds in terms of Special Drawing Rights, but they are also converted to national currencies.¹⁶ In the case of NAFTA, the threshold

⁹ *Id.*

¹⁰ Florence Jean-Jacobs, *Diversification of Canada's Exports: What and Where to at 1* (Nov. 5, 2009) (Office of the Chief Economist Issue Brief), available at http://www.dfait-maeci.gc.ca/economist-economiste/assets/pdfs/Issue_Brief_Diversification_of_Canada_s_Exports-ENG.pdf.

¹¹ All references to dollars in this report are to U.S. dollars unless otherwise indicated.

¹² Government of Canada, *Trade and Investment: The Canada-U.S. Trade and Investment Partnership*, http://www.canadainternational.gc.ca/washington/commerce_can/index.aspx?lang=eng&menu_id=45&menu=L (last visited Feb. 1, 2010).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ WTO, *Thresholds In Annexes 1, 2, and 3 of Appendix 1 of the Government Procurement Agreement (Expressed in SDR)*, http://www.wto.org/english/tratop_e/gproc_e/thresh_e.htm (last visited Feb. 1, 2010).

¹⁶ *Id.*

for contracts of goods and services for government entities was set at \$50,000 for contracts for goods or services and \$6.5 million for construction projects; for government enterprises, the thresholds were set at \$250,000 for contracts for goods and services and \$8 million for construction services.¹⁷ However, these original figures have been indexed for inflation and are reduced to \$25,000 for procurement of goods by federal departments and agencies in the United States and Canada for U.S. and Canadian suppliers. This benefit does not extend to Mexican suppliers.¹⁸ For Mexican suppliers, the threshold is reportedly about \$56,000.¹⁹ Nevertheless, even this figure is lower than the comparable one contained in the AGP. In fact, a comparison of the thresholds in the AGP and NAFTA shows that the latter are consistently lower. This means that U.S. suppliers generally have greater access to the Canadian market as a result of the government procurement provisions of NAFTA than they do as a result of the government procurement provisions of the AGP.

Because there is a higher threshold for the benefits of the government procurement provisions by enterprises than entities, it is sometimes important to know whether a contract has been offered by an enterprise or an entity. This issue was considered by the Canadian International Trade Tribunal (C.I.T.T.) in the case of *Canada (Attorney General) v. Symtron Systems Inc.* In that case, Canada's Department of National Defence, which is an entity, offered a contract for a covered service through Defence Construction Canada, which is an enterprise. The tribunal found that the lower entity threshold should apply, as the Department of Defence would own the facilities to be built under the contract and the use of an enterprise to accept tenders could be seen as a maneuver to circumvent NAFTA's requirements.²⁰ This decision was affirmed by the Federal Court of Canada.²¹

Article 1003 of NAFTA provides that the parties must give the other parties' goods and suppliers treatment that is "no less favourable than the most favourable treatment that a Party accords its own goods and suppliers or the goods and suppliers of another Party."²² This is the principle of national treatment and nondiscrimination.

As to the rules of origin, Article 1004 of NAFTA states as follows:

No Party may apply rules of origin to goods imported from another Party for purposes of government procurement covered by this Chapter that are different from or inconsistent with the rules of origin the Party applies in the normal course of trade, which may be the Marking Rules

¹⁷ NAFTA art. 1001, available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=ALL#A1001>.

¹⁸ Trade Compliance Center, *Chapter Ten (Government Procurement) of the North American Free Trade Agreement (NAFTA)*, http://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/NAFTA_chapter10_guide.asp#P19_314 (last visited Feb. 1, 2010).

¹⁹ *Id.*

²⁰ *Canada (Attorney General) v. Symtron Systems, Inc.*, [1999] C.I.T.T. No. 46.

²¹ *Canada (Attorney General) v. Symtron Systems, Inc.*, [1999] 2 F.C. 514, available at <http://recueil.fja-cmf.gc.ca/eng/1999/1999fc23982.html/1999fc23982.html.html>.

²² NAFTA art. 1003, available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=ALL#A1001>.

established under Annex 311 if they become the rules of origin applied by that Party in the normal course of its trade.²³

Thus, NAFTA recognizes that the rules of origin may differ from country to country, but prohibits the adoption of rules of origin for government procurement that require a higher percentage of content in goods or services originating in one of the parties than they do for other purposes of the law, including for the purpose of imposing customs duties or tariffs. Article 1005 goes on to add that benefits can be denied to an enterprise that is owned or controlled by persons of a non-party or an enterprise that has no substantial business activities in the territory of the U.S., Canada, or Mexico.²⁴ Entities are not covered by this provision because most of them are government departments or agencies.

NAFTA allows the parties to deny the benefits of the government procurement provisions in a number of other situations. NAFTA partners can deny benefits to suppliers that are subject to economic sanctions or with which they do not have diplomatic relations.²⁵ NAFTA parties can also make exceptions to the rules on nondiscriminatory treatment for strategic and national security reasons as well as to protect health, safety, morals, the environment, or intellectual property. NAFTA also gives the parties the right to favor domestic suppliers to benefit small and minority-owned businesses and for research and development activities, as well as to support farm support and food programs.

Article 1016 of NAFTA establishes rules for limited tendering procedures. Limited tendering is allowed:

1. When open calls have not worked;
2. For works of art;
3. To protect intellectual property;
4. In cases of extreme urgency brought about by unforeseeable events;
5. For additional deliveries by original suppliers;
6. To procure prototypes;
7. For goods purchased on a commodity market;
8. For purchases made under exceptionally advantageous conditions that only arise in a very short term;
9. For the winner of an architectural design contest; and,
10. For confidential consulting services.²⁶

²³ *Id.* art. 1004.

²⁴ *Id.* art. 1005.

²⁵ Trade Compliance Center, *supra* note 18.

²⁶ NAFTA art. 1016, available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=ALL#A1001>.

Article 1024 of NAFTA provided that talks on further liberalization of trade under the agreement were to commence by the end of 1998.²⁷ Many experts expected that one subject that would subsequently be addressed was state, provincial, and municipal procurement, since no agreement could be reached in this area in the original round of negotiations.²⁸ However, this has not yet occurred and, consequently, NAFTA does not bind Canada's provinces or the U.S.' states. Why a supplemental agreement has not been concluded is not entirely clear, but it appears from the parallel experience with the AGP that the provinces and not the federal government of Canada have been resistant to the extension of NAFTA to subcentral entities. Why the provinces have traditionally been more resistant to an expansion of NAFTA was addressed by Patrick Grady and Kathleen MacMillan as follows:

Motivated in part by worries about opening up procurement in the health and education sector to foreign suppliers, the Canadian provinces refuse to go along with any deals negotiated by the Canadian Federal Government that allow the Americans to retain Buy American and small business carve-outs. But this may just be an excuse to say no.

It is particularly ironic that Canada, which has a preferential trading relationship with the United States under the NAFTA, has less favorable access to state and local government procurement in the United States than other countries such as the European Union and Japan, which have no such special trading arrangement. Canadian suppliers have their provincial governments to thank for this.²⁹

However, these authors also pointed out that provincial leaders had "legitimate" concerns that even their subscription to the NAFTA and WTO government procurement codes would not necessarily exempt their suppliers from all "Buy American" provisions and that an agreement that did not accomplish this may not have been in their best interest. Nevertheless, as will be seen the next section, this situation may be about to change.

II. Buy American Legislation

The economic stimulus package included in the American Recovery and Reinvestment Act (ARRA) generally requires that iron, steel, and manufactured goods used in the construction of public works projects funded by the Act are to be made in the United States.³⁰ On April 3, 2009, the Office of Management and Budget (OMB) issued guidelines on implementing the Buy American provisions of the ARRA.³¹ Ian Fergusson of the Congressional Research Service has summarized the provisions of the guidelines that directly affect Canada as follows:

²⁷ *Id.* art. 1024.

²⁸ Doing Business in Canada (LexisNexis) § 31.11[4] (2009).

²⁹ Patrick Grady and Kathleen MacMillan, *Taming Procurement, Global Economics Ltd.* (from PATRICK GRADY AND KATHLEEN MACMILLAN, SEATTLE AND BEYOND: THE WTO MILLENNIUM ROUND (1999)), available at <http://www.global-economics.ca/procurement.htm> (last visited Feb. 1, 2010).

³⁰ American Recovery and Reinvestment Act (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (2009). However, section 301 of this law creates exceptions that allow for waivers in the cases of shortages of supplies, cost differentials of more than 25%, and the interests of the public.

³¹ OMB Memorandum, Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009 (Apr. 3, 2009), available at http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-15.pdf.

Likely because Canadian provinces and territories have not undertaken any obligations under the AGP, OMB excluded Canada from the list of countries to which U.S. states participating in the AGP have international obligations. This means that for state and local projects funded by federal money from the stimulus bill, there is no obligation to treat Canadian firms in a manner consistent with U.S. obligations under the AGP. Thus, Canadian firms would be ineligible to bid on contracts for iron, steel, and manufactured products procured for public works projects undertaken by state and local governments using federal stimulus money. However, U.S. obligations under the AGP do extend to Canadian firms bidding on federal procurement funded by the ARRA, and Canadian firms would be able to bid for those contracts. Nonetheless, there have been several anecdotal reports in the Canadian press that U.S. contractors and suppliers are increasingly choosing to source domestically in order not to be hassled with complying with Buy American provisions in certain procurements.³²

The inclusion of the Buy American provisions in the ARRA program has raised great concern at the highest levels in Canada about what is widely seen as rising protectionism in the U.S. This concern was perhaps best demonstrated when, in September of 2009, the Prime Minister traveled to Washington, D.C. to meet with the President and Congressional leaders, to discuss proposals that would result in a waiver for Canadian suppliers.³³ Visits to Capitol Hill by prime ministers are not unprecedented, but they are unusual and Prime Minister Harper's visit emphasized the importance of the issue to Canada.³⁴

Although the U.S. has responded that "the language of the [ARRA] and subsequent implementing regulations were written to be consistent with U.S. obligations under the WTO Agreement on Government Procurement and U.S. free trade agreements including NAFTA,"³⁵ and that they were not a new form of protectionism,³⁶ it has appointed a negotiator to explore various alternatives to largely excluding Canadian suppliers from ARRA funds.

Critics of the Canadian complaints have largely blamed the current problem on Canada's provinces for not agreeing to bind themselves to the AGP and NAFTA.³⁷ Christopher Sands, a leading expert on Canada-U.S. trade relations, has reportedly suggested that "Canadian officials 'have done themselves a great deal of damage' with the Obama administration for the way they've handled the Buy American dispute,"³⁸ and that Canadian officials now realize that they made a mistake in not adding the provinces to the AGP or NAFTA.³⁹ However, as mentioned above, in fairness to the provinces, it is not clear that their inclusion in the AGP or NAFTA

³² IAN FERGUSON, BUY AMERICAN PROVISIONS 3 (Congressional Research Service, 2009).

³³ Sheldon Alberts, *Harper Asks Congress to Fight Buy American*, NATIONAL POST, Sept. 17, 2009, available at <http://www.nationalpost.com/story.html?id=2004525>.

³⁴ *Id.*

³⁵ FERGUSON, *supra* note 32, at 3.

³⁶ *Id.*

³⁷ David Hale, *Canada Isn't Blameless in the 'Buy American' Dispute*, FINANCIAL POST, July 6, 2009, available at <http://www.canada.com/business/fp/Canada+blameless+American+dispute/1764716/story.html>.

³⁸ *Buy American Deal Close But Political Issues Slowing Things Down*, CANADIAN PRESS, Dec. 4, 2009, available at <http://www.canadaeast.com/rss/article/879071>.

³⁹ AOL News, *Inside Look: New Front in Trade War?*, available at <http://video.aol.com/video-detail/inside-look-new-front-in-trade-war/2604933001> (last visited Feb. 5, 2010).

would have guaranteed Canadian suppliers more ARRA- funded contracts, because of the provisions of the AGP and NAFTA that allow set-asides for federal grants.

In June 2010, Prime Minister Harper asked Canada's provinces to modify their procurement laws to allow U.S. suppliers of goods and services the benefits of the government procurement provisions of NAFTA.⁴⁰ The extent to which provincial procurement markets are closed to U. S. firms is not clear because many provincial and municipal restrictions are in the form of policies or are inserted into individual tenders rather than into written laws. Also, in June 2010, the Federation of Canadian Municipalities voted 189 to 175 to bar bids from companies whose countries impose trade restrictions against Canada.⁴¹ This was a nonbinding resolution, but indicates that many Canadian municipalities believed that Canadian firms should have been allowed to bid on goods and services funded by the ARRA even though Canada's provinces are not listed in the AGP and NAFTA does not cover subcentral entities or grants to subcentral entities by national governments. The actions of the Federation of Canadian Municipalities received widespread media coverage in Canada, but was seen by the federal government of Canada as being more of an expression of disapproval than an effort that would ultimately have a significant impact upon U.S. suppliers.⁴²

The only provincial leader to immediately respond positively to the Prime Minister's request for support of a bilateral agreement on government procurement was the Premier of Quebec.⁴³ Quebec's support for the Conservative federal leader was not unexpected because even though it has a Liberal government, Quebec has traditionally been the strongest supporter of NAFTA, in part because it has a relatively large manufacturing base. The group that generally opposed the Prime Minister's request most vocally was organized labor. For example, in August 2009, the president of the Canadian autoworkers called on the other premiers to reject federal proposals that would eliminate or restrict the provinces' right to establish purchasing policies intended to benefit the Canadian economy.⁴⁴ The diverse labor groups he represented issued a statement, which read as follows:

Rather than attacking these successful and popular "Buy American" policies, Canadian governments should increase and speed up funding for public infrastructure projects and attach "Buy Canadian" conditions to the funding.⁴⁵

We oppose expanding NAFTA to cover all sub-national procurement and the related effort to negotiate a "free trade" deal with the European Union that would also bind sub-national governments to NAFTA-like restrictions. This approach would drain needed stimulus from the Canadian economy, worsen the current crisis in manufacturing and interfere with provincial governments' authority to provide and regulate local services.

⁴⁰ Hale, *supra* note 37.

⁴¹ Flaherty Plays Down 'Buy American' Retaliation, CBC NEWS, June 28, 2009, available at <http://www.cbc.ca/canada/british-columbia/story/2009/06/08/flaherty-protectionist-economy008.html?ref=rss>.

⁴² *Id.*

⁴³ Hale, *supra* note 37.

⁴⁴ *Premiers Must Reject Federal Proposals That Would Deepen NAFTA*, CAW President Says, CANADA NEWSWIRE, Aug. 5, 2009, <http://caw.ca/en/7728.htm>.

⁴⁵ *Id.*

This statement was signed by the Canadian Auto Workers, the Canadian Labour Congress, the Canadian Union of Public Employees, the United Steel Workers, six provincial and territorial Federations of Labour, and five other labor organizations.⁴⁶ One issue the statement does not discuss is the extent to which organized labor believes that Canadian manufacturers are currently benefiting from provincial and municipal “buy Canadian” policies or programs.

On December 4, 2009, the Canadian Press reported that “a deal on the Buy American trade dispute is still a long way off ... but progress is being made on new rules regarding the implementation of the protectionist provisions that could ultimately benefit Canada.”⁴⁷ However, on January 28, 2010, the *National Post* ran a story entitled “*End Near for ‘Buy American.’*”⁴⁸ This article stated as follows:

Sources within the Obama administration say that an agreement to fix Buy American is close to being concluded and could be announced within days. The President is said to be resolved that future economic growth can only be achieved by boosting exports and keeping markets open, rather than by raising tariff walls.

Because Mr. Obama cannot rely on Congress to pass legislation exempting Canada from Buy American provisions, the complicated deal will rely on the President using his executive power to treat sectors of the Canadian economy as American, by claiming supply chains are so integrated they cannot be separated.

When confirmed, the agreement will be a major relief for Canadian companies doing business in the United States, not to mention for U.S.-based companies who export north of the border. The U.S. Recovery and Reinvestment Act included sections that all iron, steel and manufactured goods used in projects paid for by stimulus funding must be sourced in the United States.⁴⁹

The information contained in this article was not immediately confirmed by government officials or reported by other news organizations. However, on February 5, 2010, a number of news organizations reported that a deal on the Buy American provisions is to be announced soon. According to Paul Viera of the *National Post*, in return for opening their markets, the Canadian suppliers will have access to the government procurement market and will be able to bid on programs and projects funded by the ARRA in the thirty-seven states covered by the AGP. However, the provinces will reportedly retain restrictions on foreign bids in the fields of health care, education, and correctional facilities. While the deal is reportedly limited to programs and projects funded by the ARRA, negotiations on a broader agreement are continuing.⁵⁰

⁴⁶ *Id.*

⁴⁷ *Buy American Deal Close But Political Issues Slowing Things Down*, *supra* note 38.

⁴⁸ John Ivison, *End Near For ‘Buy American’: Obama To Use Executive Power to Skirt Rules: Sources*, NATIONAL POST, Jan. 28, 2010, available at <http://www.nationalpost.com/story.html?id=7891f95d-c9e1-4c24-8a47-9d96cbc85ccc&k=81622>.

⁴⁹ *Id.*

⁵⁰ Paul Viera, *Buy American Break Coming; Deal to Shield Canada From Protectionism*, CALGARY HERALD, Feb. 5, 2010. (Lexis-Nexis News File).

Access to the provincial government procurement market could be highly significant to U.S. suppliers. That market has been estimated as being worth approximately US\$18 million, including the excluded sectors.⁵¹

III. Canadian Implementing Legislation

Canada does not have a federal “Buy Canadian Act.” The limitations on the national treatment provisions allowed for in the AGP and NAFTA are incorporated into Canadian law through the acts implementing those agreements.⁵²

IV. Federal Procurement

The Government of Canada reportedly spends about Can\$20 billion or approximately US\$18.7 billion a year on Goods and Services.⁵³ Most goods and services are purchased by Public Works and Government Services Canada (PWGSC). Government departments spend up to Can\$5000 on goods and can purchase services directly. For contracts for over Can\$5000, they must go through PWGSC.⁵⁴

Provincial governments reportedly spend an almost identical Can\$18 billion amount on goods and services. While access to this market has not been guaranteed by the AGP or NAFTA, this situation may be changing.

Canada uses a Government Electronic Tendering Service through MERX for most contracts for goods and services valued at Can\$25,000 or more, most construction and leasing services worth Can\$100,000 or more, and most architectural and engineering consulting services worth Can\$76,500 or more. MERX is a subsidiary of Mediagrif Interactive Technologies, which also provides information on U.S. tenders.⁵⁵

PWGSC buys goods and services using competitive contracts, standing offers, and supply arrangements. The Government of Canada has explained how these three methods are employed in the following terms:

⁵¹ *Id.*

⁵² World Trade Organization Implementation Act, 1994 S.C., c. 47, as amended, available at <http://laws-lois.justice.gc.ca/eng/W-11.8/index.html>; North American Free Trade Agreement Implementation Act, 1993 S.C. ch. 44, available at <http://laws-lois.justice.gc.ca/eng/N-23.8/index.html>.

⁵³ Government of Canada, *How the Government of Canada Buys Goods and Services*, <http://www.contracts.canada.gc.ca/en/how-e.htm> (last visited Feb. 1, 2009). At the current exchange rate, Can\$1.00 is worth approximately US\$.94.

⁵⁴ *Id.*

⁵⁵ MERX, *What Is Merx?*, <http://www.merx.com/English/nonmember.asp?WCE=Show&TAB=1&PORTAL=MERX&State=5&hcode=qorWp5tSAAW4tCCIA4RRSw%3d%3d> (last visited Feb. 1, 2010).

Contracts

Contracts between PWGSC and its suppliers contain a pre-defined requirement or scope of work, and set terms and conditions including pre-determined quantities, prices or pricing basis, and delivery date. A contract is the best method of supply when the requirement is customized and unique to one government department.

Sometimes, for contracts for services only, when the Government is unable to define the precise nature and timing of a service in advance, PWGSC includes a provision for “task authorizations.” A task authorization is a structured administrative process to authorize work by a supplier on an “as and when requested” basis in accordance with the terms and conditions of an existing contract. In other words, when the services are eventually required, the Government issues a task authorization to the supplier. This task authorization identifies the scope of the services, the timing, and any specific instructions (such as expenditure reporting based on pre-established financial limits). Examples of services where task authorization contracts might be considered appropriate are professional services for translation, informatics professional services, and some types of repair and overhaul services.

Standing Offers

Standing offers are the preferred method of supply when one or many government departments repeatedly order the same goods or services, which are readily available, or when the actual demand (i.e. quantity, delivery date) is not known in advance. Standing offers are put in place, for a specific period of time with pre-qualified suppliers who have met the technical criteria, and include set terms and conditions, which cannot be further negotiated.

Standing offers save the Government time and money, as a separate process does not need to be conducted for each purchase and prices are often reduced due to volume discounts. The Government is not obliged to purchase any goods or services until a need arises, at which time a contract is put in place. Items bought through this method of supply include food, fuel, pharmaceutical supplies, spare parts, paper supplies, office equipment, and some professional services.

Supply Arrangements

Supply arrangements, like standing offers, are put in place for goods or services that are purchased on a regular basis from pre-qualified suppliers but the Government is not obliged to purchase any goods or services until a need arises, at which time a contract is put in place.

However, although supply arrangements include some set terms and conditions that will apply to any subsequent contracts, not all are predetermined. For example, prices, pricing basis or terms and conditions for hazardous waste disposal or cleanup may be further negotiated based on the actual requirement or scope of work. PWGSC routinely purchases IM/IT professional services using this method of supply.⁵⁶

PWGSC has published a guide for doing business with the Government of Canada. This guide utilizes a five-step approach for small and medium businesses.⁵⁷

⁵⁶ Government of Canada, *supra* note 53.

⁵⁷ PUBLIC WORKS AND GOVERNMENT SERVICES CANADA, OFFICE OF SMALL AND MEDIUM ENTERPRISES, YOUR GUIDE TO DOING BUSINESS WITH THE CANADIAN GOVERNMENT (Oct. 2009), <http://www.tpsgc-pwgsc.gc.ca/app-acq/pme-sme/resource-eng.html> (last visited Feb. 1, 2010) (click on document title).

V. Concluding Remarks

Canada has implemented the government procurement provisions of NAFTA and the AGP. The former does not cover subcentral entities and Canada has not yet added any provinces to Annex II of the latter so as to bind the provinces to it on a reciprocal basis. However, Canada and the United States have reportedly reached a deal that could change this situation. On the federal level, Canada has followed the legal requirements respecting federal government procurement, and the exceptions and exemptions its laws allow for are those contained in Canada's two major international trade agreements. Canada does not have a "Buy Canada" Act. Federal government procurement is generally handled by PWGSC. Exceptions exist for departmental purchases of goods valued at less than Can\$5000 and purchases of services.

The major issue in government procurement in Canada today arises out of the inclusion of "Buy American" provisions contained in the ARRA. Because provincial and municipal procurement is not covered by NAFTA and Canada did not add any provinces to Annex II of the AGP, it was not initially given a waiver from the "Buy American" provisions of the ARRA. The Government of Canada has been seeking a waiver for the past eight months, and the *National Post* and *Calgary Herald* are two of a number of news organizations that have recently reported that the government's efforts may soon be successful.

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CHINA

GOVERNMENT PROCUREMENT LAW & POLICY

Executive Summary

Under Chinese law, “government procurement” refers to the use of government funds by government authorities, institutions, and social organizations to procure goods, projects and services that fall within the centralized procurement catalogue, or that are above the purchase thresholds. As required by law, the principal method for the government procurement is public tender.

The law requires government procurements to come from domestic sources, with some exemptions. A government procurement regulation currently being drafted defines “domestic goods” as the goods manufactured within the territory of China, and domestic manufacturing cost as “above a certain percentage.” “Domestic projects and services” are projects and services provided by Chinese citizens, legal persons or other organizations.

The Government Procurement Law may not apply to procurements relating to the military, emergency and national security, international loans and mechanical and electronic products.

I. Legislative Framework

Government procurement in China is primarily under the regulation of two national laws: the Government Procurement Law and the Tender Law, and local government procurement measures. The State Council is currently drafting implementation regulations to the Government Procurement Law, which was recently published in order to solicit public opinions.

A. Government Procurement Law

On June 29, 2002, the People’s Republic of China (PRC or China) Government Procurement Law (GPL) was promulgated, and entered into effect on January 1, 2003.¹ It is the first national law passed by China’s top legislature to exclusively regulate government

¹ Zhonghua Renmin Gongheguo Zhengfu Caigou Fa [The People’s Republic of China Government Procurement Law] (adopted by the Standing Committee of the National People’s Congress (NPC Standing Committee) on June 29, 2002, effective on Jan. 1, 2003), 4 ZHONGHUA RENMIN GONGHEGUO QUANGUO RENMIN DAIBIAO DAHUI CHANGWU WEIYUAN HUI GONGBAO [GAZETTE OF THE NPC STANDING COMMITTEE] (NPC GAZETTE) (2002), 228-236. For English translation, THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA (2002), 21-42 (2003). See also the English translation provided by CHINA LAW AND PRACTICE (July/Aug. 2002).

procurement activities. In the past, government procurement in China was conducted by government agencies and local governments with money from their budgets without reference to a uniformed set of government procurement rules. This system was plagued with a lack of transparency, uncertain rules and standards, corruption and a lack of dispute resolution mechanisms.² According to the GPL, the aim of the GPL is to bring fairness, transparency and integrity to the government procurement in China.³ Although China started to introduce regulations on transparent and competitive government procurement system in the mid-1990s, the passage of this law was believed to be a major step in establishing a comprehensive government procurement regulation system by the government of China.⁴

B. Tender Law

The PRC Tender Law is incorporated by the GPL provision, which provides that the PRC Tender Law applies to the procurement of construction projects that require tenders under the GPL.⁵ The Tender Law was adopted in 1999, and became effective January 1, 2000.⁶ The Tender Law is designed to standardize tendering and bidding activities in China.⁷ As with the GPL, the Tender Law is a primary law on government procurement in China.

C. GPL Implementation Regulations

The GPL authorizes the State Council of China to formulate the implementation regulations of the GPL. On January 11, 2010, the State Council published the draft of the Implementation Regulations of the Government Procurement Law (Draft Implementation Regulations) on its website in order to solicit public opinions.⁸

D. Local Government Procurement Measures

Local governments at the provincial and municipal levels also publish the government procurement measures applicable within their jurisdictions. As early as 1998, Shenzhen Special Economic Zone has enacted its own government procurement rules, under which public bidding

² See generally, Immanuel Gebhardt & Matthias Mueller, *China's New Government Procurement Law: A Major Step Towards Establishing a Comprehensive System?* CHINA LAW AND PRACTICE (July/Aug. 2002); JAMES ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES (2nd Ed.), Chapter 8, Tender Law and Government Procurement, 307-333 (2005).

³ The GPL, art. 3.

⁴ Gebhardt & Mueller, *supra* note 2.

⁵ The GPL, art. 4.

⁶ Zhonghua Renmin Gongheguo Zhaobiao Toubiao Fa [The PRC Tender Law, also translated as the “PRC Law on Bid Invitation and Bidding,” or the “PRC Law on Invitation and Submission of Bids”] (adopted by the NPC Standing Committee on Aug. 30, 1999, effective Jan. 1, 2001), 5 NPC GAZETTE 432-441. For the English translation see THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1999), 143-160 (2000).

⁷ *Id.* art. 1.

⁸ The full text of the Implementation Regulations [in Chinese] (Jan. 11, 2010) is available on the website of the Legislative Affairs Office of the State Council, at <http://www.chinalaw.gov.cn/article/cazjgg/201001/20100100193904.shtml>.

is required for contracts to purchase goods or services in excess of RMB100,000 (approximately US\$14,000), and contracts to rent, repair and landscape in excess of RMB200,000 (approximately US\$27,000).⁹ Beijing Municipal Government published The Measures of Beijing Municipal Government Procurement on April 22, 1999, which became effective on June 1, 1999.¹⁰

II. World Trade Organization (WTO) Guidelines

While China's trade partners have made considerable efforts to persuade China to join the WTO Agreement on Government Procurement (GPA) before and after China's WTO accession China has not yet become a party.¹¹ China was accepted as an observer to the GPA on February 21, 2002.¹² On December 28, 2007 after five years of negotiation, China has signed a written application to join the GPA. The application includes an offer of GPA coverage ("Appendix I Offer"), which signaled the initiation of China's GPA accession process.¹³

III. Government Procurement Process

A. Coverage of Government Procurement

"Government procurement" is defined by the GPL as the use of government funds by government authorities, institutions and social organizations to procure goods, projects and services that fall within the centralized procurement catalogue or that are above the purchase thresholds.¹⁴ The law further defines "procurement," as the obtaining of goods, projects and services in the form of contracts for consideration, including by acquisition, lease, appointment, and employment.¹⁵

"Goods" under this law refers to all types and categories of articles including raw materials, fuel, equipment, and products. The Draft Implementation Regulations further interpret that "goods" could be tangible or intangible, and include intellectual property (trademarks,

⁹ Shenzhen Special Economic Zone Government Procurement Regulations (promulgated by the Shenzhen Municipality People's Congress on Oct. 27, 1998, effective Jan. 1, 1999). The text in Chinese is available at <http://www.szlh.gov.cn/main/zfjg/qzsdw/zfcg/xgfg/61053.shtml> (last visited Jan. 15, 2010).

¹⁰ The text in Chinese is available at, <http://www.sjsfg.gov.cn/news/200943/n0914388.html> (last visited Jan. 15, 2010).

¹¹ Ping Wang, *China's Accession to WTO's Government Procurement Agreement: Domestic Challenges and Prospects in Negotiation*, The University of Nottingham China Policy Institute Briefing Series-Issue 48 (March 2009), available at <http://www.nottingham.ac.uk/cpi/documents/briefings/briefing-48-china-gpa-ascension.pdf>. For parties to the WTO GPA, see Parties and Observers to the GPA, http://www.wto.org/english/tratop_E/gproc_e/memobs_e.htm#parties (last visited Jan. 15, 2010).

¹² Parties and Observers to the GPA, http://www.wto.org/english/tratop_E/gproc_e/memobs_e.htm#parties (last visited Jan. 15, 2010).

¹³ Wang, *supra* note 11.

¹⁴ The GPL, art. 2.

¹⁵ *Id.*

copyrights and patents).¹⁶ “Projects” means construction projects, including new construction, alteration, expansion, decoration, demolition and renovation of buildings and structures. “Services” means the objects of government procurement other than goods and projects. The Draft Implementation Regulations specify that “services” may include professional services, information network developments, financial and insurance, and transportation.¹⁷

B. Methods of Government Procurement

Under the GPL, government procurement may be conducted by use of the following six methods:

- (1) Public tender.
- (2) Private tender or tender by invitation.
- (3) Competitive negotiation.
- (4) Single-source procurement.
- (5) Inquiry.
- (6) Other methods approved by the State Council regulatory authority for government procurement.¹⁸

Among the specified methods, public tender is required by the GPL to be the principal method for the government procurement.¹⁹ The other five methods may be used in government procurement of goods and services under prescribed situations.²⁰

For projects, the Tender Law requires that all construction projects to include, among others, all large-scale infrastructure or public utility projects relating to the public interest of society or public security, and projects wholly or partly utilizing state capital or state finances to be subject to tenders.²¹ For goods and services under central government budgets, the purchase thresholds above which a public tender is required will be decided by the State Council; for those under local budgets, the purchase thresholds will be decided by provincial governments.²²

¹⁶ The Draft Implementation Regulations, art. 4.

¹⁷ *Id.*

¹⁸ The GPL, art. 26.

¹⁹ The GPL, art. 26.

²⁰ The GPL, arts. 29-32.

²¹ The Tender Law, art. 3.

²² The GPL, art. 27.

C. Government Procurement Contracts

Under the GPL, government procurement contracts must be concluded in written contracts. These contracts are subject to the PRC Contract Law enacted in 1999.²³ The competent departments under the State Council will decide the mandatory provisions which must be included in government procurement contracts.²⁴ Once the bidding process is successfully completed, the purchaser and the winner of the bid or the successful supplier have 30 days from the date the notice informing the said winner or supplier of their acceptance is sent out to sign the government procurement contract.²⁵

IV. Domestic Sourcing Requirements

The GPL requires government procurements to be derived from domestic sources, with prescribed exemptions. Article 10 of the GPL provides that domestic goods, projects and services must be used for government procurement, except in the following circumstances:

1. The required goods, projects or services are not available in China, or are not available under reasonable commercial conditions;
2. The objects of procurement are for use outside of China; or
3. It is specified otherwise in other laws or administrative regulations.

A. Definition of Domestic Goods, Projects and Services

The GPL does not define domestic goods, projects and services. Rather, it authorizes the State Council to determine the definition. In the newly published Draft Implementation Regulations, “domestic goods” is defined as goods manufactured within the territory of China, and domestic manufacturing cost is “above a certain percentage.”²⁶ “Domestic projects and services” are defined to be projects and services provided by Chinese citizens, legal persons or other organizations.²⁷

Under these definitions, it is still not clear whether goods produced in China by joint ventures established by foreign and Chinese partners would be considered to be domestic goods. With regards to this issue, the Draft provides that more detailed standards in recognizing domestic goods, projects and services are to be jointly formulated by relevant departments under the State Council and the State Council finance department.²⁸

²³ The GPL, arts. 43 & 44.

²⁴ The GPL, art. 45.

²⁵ The GPL, art. 46.

²⁶ The Draft Implementation Regulations, art. 10.

²⁷ *Id.*

²⁸ *Id.*

B. The “International Misunderstanding” of “Buy China” Requirements in the Stimulus Package

On May 26, 2009, Chinese authorities issued a circular on tightening government procurement supervision of tenders and bids in connection with government-invested projects (Circular).²⁹ The Circular orders the purchase of domestic products in government-invested projects. Commentators believe that by this order, “China has imposed a requirement for its stimulus projects to use domestically made goods - a move that could strain ties with trading partners after Beijing criticized Washington’s “Buy American” stimulus provisions.”³⁰

In response to the “Buy China” requirement charge, Chinese government used the GPL as a defense. On June 26, 2009, the Ministry of Commerce (MOFCOM) and the National Development and Reform Committee (NDRC) issued a joint statement denying that China has imposed a “Buy China” order as part of its stimulus package, and said it was a misunderstanding by foreign media to label the orders in the Circular as a method of trade protectionism (Joint Statement).³¹ The Circular, according to the Joint Statement, was just reiterating the requirement of procuring domestic products in accordance with the GPL. The Joint Statement said that the requirement to buy domestic products in the Circular applies only to the procurements in government-invested projects that are within the scope of the GPL. The domestic products referred to under the GPL include the products of foreign-invested enterprises legally incorporated in China. Further, according to the Joint Statement, China has not signed the WTO GPA, thus the requirement to buy domestic products under the government procurement system is not against China’s WTO commitments.³²

V. Exemptions to Application of the GPL

According to the GPL and the proposed Draft Implementation Regulations, the requirements of the GPL may not apply to the following government procurement activities:

A. Military Procurement

The GPL does not apply to military procurement. The regulations for military procurement will be formulated separately by the Central Military Commission.³³

²⁹ FGFG [2009] No. 1362 (promulgated by National Development and Reform Committee (NDRC) and eight other central government departments). The text in Chinese is available at the NDRC website, at <http://www.ndrc.gov.cn/zcfb/zcfbtz/2009tz/W020090604340199778069.pdf> (last visited Jan. 15, 2010).

³⁰ See, e.g. Joe McDonald, *Beijing Orders “Buy China” for Stimulus Projects*, THE MONITOR, June 17, 2009, available at http://hosted.ap.org/dynamic/stories/A/AS_CHINA_ECONOMY?SITE=TXMCA&SECTION=HOME&TEMPLATE=DEFAULT. For more information on the Notice, see Laney Zhang, *Order to “Buy China” in Government-Invested Projects*, GLOBAL LEGAL MONITOR, June 25, 2009, available at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1384_text.

³¹ MOFCOM and NDRC: *So-Called “Buy China” Policy Was a Misunderstanding*, XINHUANET, June 26, 2009, available at http://news.xinhuanet.com/fortune/2009-06/26/content_11607929.htm.

³² *Id.*

³³ The GPL, art. 86.

B. Emergency and National Security Procurement

For emergency procurement due to serious natural disaster or other matters of *force majeure*, or procurement involving national security or state secrets, the GPL does not apply.³⁴ The Draft Implementation Regulations require the procurement involving national security or State secrets to be approved by national security organs on the same level of the purchaser.³⁵

C. Procurement with International Loans

When government procurement that makes use of loans from international organizations or foreign governments is carried out, and there are other stipulations on the substantial conditions on procurement in the agreement between the lender, the financier and the Chinese party, these stipulations may apply provided that they do not harm the State or social interests.³⁶

D. Procurement of Mechanical and Electrical Products

It has been proposed in the newly published Draft Implementation Regulations that the tender be otherwise regulated for the import of mechanical and electrical products which have been approved by the finance authorities.³⁷

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³⁴ The GPL, art. 85.

³⁵ *Id.* art. 114.

³⁶ The GPL, art. 84.

³⁷ The Draft Implementation Regulations, art. 112.

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EUROPEAN UNION

GOVERNMENT PROCUREMENT LAW & POLICY

Executive Summary

Government Procurement is governed by two EU Directives: (a) Directive 2004/17/EC on Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Service Sectors; and (b) Directive 2004/18/EC on the Award of Public Works Contracts, Public Supply Contracts and Public Services Contracts. Within the single market of the EU where the principles of nondiscrimination, equal treatment and transparency apply, there is no requirement for preference of domestic sourcing. Public contracts are awarded on the basis of only two criteria: (a) “the most economically advantageous tender”; and (b) the lowest price.

Directive 2004/18/EC contains a list of public contracts which are excluded from its scope, including public telecommunications networks or services; secret contracts and contracts that require special security measures; public contracts governed by an international agreement between a Member State and one or more third states; and public contracts concluded on the basis of an international agreement relating to the stationing of troops.

Directive 2004/17/EC excludes inter alia the following: works and service concessions which are awarded by contracting entities involved in gas, heat, electricity, water, transport services, and postal services, and exploration for, or extraction of oil, gas, coal, or other solid fuels, as well as ports and airports, contracts awarded for the purpose of resale or lease to third parties, and contracts awarded for the purpose other than the pursuit of a covered activity or for the pursuit of such an activity in a third country.

With regard to the WTO Government Procurement Agreement, to which the EU and the twenty-seven Member Countries of the EU are parties, EU Members are required to apply the “no less favorable” treatment to products, services, and suppliers of any other party to the Agreement that they give to their domestic products, services, and suppliers.

EU Members are also required to ensure that their entities do not treat a locally established supplier less favorably than another locally established supplier based on the degree of foreign affiliation or ownership.

With regard to economic benefits, a Commission report issued in 2004 found that the EU directives on public procurement contributed to reducing prices paid by national, regional, and local authorities for supplies, works, and services by around 30%. They have also increased intra-EU competition, and prices paid by public authorities for goods traded between Member States have decreased.

I. Introduction

Public procurement is subject to the general, basic freedoms enshrined in the Treaty on the Functioning of the European Union, as amended by the Lisbon Treaty; that is, free movement of goods, freedom to provide services, and freedom of establishment within the territories of the twenty-seven EU Member States. In practice, EU Member States within the single market may not discriminate in awarding public contracts against firms from other EU Members; they are obliged to treat contracts based on the principles of equal treatment, nondiscrimination, mutual recognition, proportionality, and transparency. Public procurement has been regulated by a number of Directives, which require further implementation by the Member States. In 2004, following a lengthy debate, the European Union (EU) reformed the rules on public procurement in light of case law of the Court of the European Union and adopted two Directives, the so-called Public Procurement Directives, which replaced prior directives.

Within the EU framework, cross-border procurement occurs in two ways; Direct cross-border procurement and indirect cross-border procurement. Direct cross-border procurement occurs when firms that operate from their home market bid and win contracts for invitations to tender initiated in another EU Member; while indirect cross-border procurement takes place when firms bid for contracts through subsidiaries.¹

The EU legal regime on public procurement also applies to signatories to the WTO Agreement on Government Procurement.² For the purposes of the award of contracts, Member States are required to apply “in their relations conditions as favorable as those which they grant to economic operators (the term includes contractors, suppliers and service providers) of third countries in implementation of the Agreement on Government Procurement (AGP).”³ Pursuant to the AGP, EU Members are also required to ensure that their entities do not treat a locally established supplier less favorably than another locally established supplier based on the degree of foreign affiliation or ownership; moreover, EU Members must also ensure that their entities do not discriminate against locally established suppliers on the grounds of the country of

¹ European Commission, *A Report on the Functioning of Public Procurement Markets in the EU: Benefits from the Application of EU Directives and Challenges for the Future* 8 (Mar. 2, 2004), available at http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf.

² For a discussion of compliance with the enforcement of the Rules Under the WTO Government Procurement Agreement, see CHRISTOPHER H. BOVIS, *EU PUBLIC PROCUREMENT LAW* 443 (2007).

³ Directive 2004/17/EC art. 5, incorporating the “no less favorable treatment” of the World Trade Organization. See also WTO, *The plurilateral Agreement on Government Procurement (AGP)*, http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited Feb. 2, 2010) (stating in art. III, paragraph 1 that parties are required to grant to the products, services, and suppliers of any other party to the Agreement treatment “no less favorable” than they give to their domestic products, services, and suppliers).

production of the good and services being supplied, if the country of production is a party to the AGP.⁴

In 2002, pursuant to the European Commission's estimates, the total public procurement in the EU—that is, the purchase of goods, services and public works by governments and public utilities—was close to 16% of the Union's GDP or €1,500 billion (US\$2,099 billion at the current exchange rate of €1 to approximately US\$1.399).⁵ The value of public procurement varies among the EU Member States from 11% in Italy to 21.5% in the Netherlands.⁶

II. Public Procurement Legislation

The two basic public procurement Directives, which were adopted in 2004, are as follows:

- (1) Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;⁷ and,
- (2) Directive 2004/17/EC on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.⁸

The principles governing the award of public contracts are equal treatment, nondiscrimination, and transparency. As for the award criteria, these are the same in both Directives. Contracting authorities—that is, State, regional, or local authorities, or bodies governed by public law—are required to award public contracts on the basis of either the bid that is most economically advantageous in terms of quality, price, technical merit, environmental characteristics, cost-effectiveness, and delivery date, or the lowest price only.⁹

A. **Directive 2004/18/EC**

1. Scope of Directive

Directive 2004/18/EC applies to public contracts that are not excluded from the scope of the Directive and that have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:¹⁰

⁴ AGP art. III.

⁵ European Commission, *supra* note 1, at 4.

⁶ *Id.*

⁷ Directive 2004/18/EC, 2004 O.J. (L 134) 114, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF>.

⁸ Directive 2004/17/EC, 2004 O.J. (L 134) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0001:0113:EN:PDF>.

⁹ Directive 2004/18/EC art. 53; Directive 2004/17/EC art. 55.

¹⁰ Directive 2004/18/EC art. 7.

- a) Euro 125.000 for public supply and service contracts, other than those covered by point (2)(c), directly below; in the case of public supply contracts awarded by contracting authorities in the field of defense, this applies only to contracts involving products listed in Annex V; and
- b) Euro 193.000 for (a) public supply and service contracts awarded by contracting authorities other than those listed in Annex IV; (that is, central government authorities); (b) public supply contracts awarded by contracting authorities listed in Annex IV operating in the field of defense, where these contracts involve products not covered by Annex V (related to defense); and (c) for public service contracts awarded by any contracting authority in respect of the services listed in Category 8 of Annex IIA or Category 5 (telecommunications services); and,
- c) Euro 4,845,000 for public works contracts.¹¹

2. Excluded Contracts

Directive 2004/18/EC does not apply to the following contracts:

- Public contracts for procurement procedures operating in the water, energy, transport and postal services sectors regulated under Directive 2004/17/EC (*see* Part II(B), below);
- Public telecommunications networks or services;¹²
- Secret contracts and contracts that require special security measures;¹³
- Public contracts governed by an international agreement between a Member State and one or more third states;¹⁴
- Public contracts concluded on the basis of an international agreement relating to the stationing of troops; and,
- Those contracts pursuant to the international procedure of an international organization.¹⁵

¹¹ The thresholds of Directives 2004/18/EC and 2004/17/EC were replaced by Commission Regulation (EC) No. 1177/2009, 2009 O.J. (314) 64, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:314:0064:0065:EN:PDF>.

¹² Directive 2004/18/EC art. 13.

¹³ *Id.* art. 14.

¹⁴ *Id.* art. 15.

¹⁵ *Id.*

3. Specific Exclusions

Directive 2004/18/EC does not apply to public service contracts for:

- The acquisition or rental of land, or immovable property;
- The acquisition, development, production, of program material intended for broadcasting;
- Employment contracts;
- Arbitration and conciliation services;
- Financial services related to the sale, purchase, or transfer of securities;
- Service concessions; and
- Service contracts awarded on the basis of an exclusive right.¹⁶

4. Reserved Contracts

Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed within the context of sheltered employment programs where most employees are handicapped.¹⁷

5. Defense Procurement

Defense procurement is governed by Directive 2009/81/EC on the coordination of procedures for the award of certain work contracts, supply contracts, and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC.¹⁸

B. Directive 2004/17/EC

Directive 2004/17/EC applies to contracts that have a value estimated to be no less than the following thresholds: (a) €387,000 in the case of supply and service contracts; and (b) €4,845,000 in the case of works contracts.¹⁹

¹⁶ *Id.* art. 16.

¹⁷ *Id.* art. 19.

¹⁸ Directive 2009/81/EC, 2009 O.J. (L 216) 76, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:216:0076:0136:EN:PDF>.

¹⁹ Directive 2004/17/EC art. 16.

1. Contracts Outside the Scope of the Directive

Directive 2004/17/EC does not apply in the following cases:

- Works and service concessions that are awarded by contracting entities involved in gas, heat, electricity, water, transport services, and postal services, and exploration for, or extraction of, oil, gas, coal, or other solid fuels, as well as ports and airports;²⁰
- Contracts awarded for the purpose of resale or lease to third parties;²¹
- Contracts awarded for purposes other than the pursuit of an activity covered or for the pursuit of such an activity in a third country;²²
- Contracts that are secret or require special security measures;²³
- Contracts awarded pursuant to international rules;²⁴ and
- Contracts awarded to an affiliated undertaking, or to a joint venture.²⁵

2. Tenders with Products Originating in Third Countries

Tenders that comprise products originating in third countries outside the European Union are subject to special rules provided for in Article 58 of Directive 2004/17/EC. Under this Article, tenders that cover products originating in third countries with whom the EU has not concluded a bilateral or a multilateral agreement and that ensure comparable and effective access for Community companies to the markets of those third countries may be rejected where the proportion of products originating in third countries, as determined by the Community Customs Code, “exceeds 50% of the total value of the products constituting the tender.”²⁶

B. Contracts Below the Required Threshold

Certain contracts below the thresholds prescribed by both Directives are subject to the general rules deriving from the EC Treaty. The following public contracts remain wholly or partially outside the scope of the Directives:

- Contracts below the thresholds for application of the directives—that is, those provided by Article 7 of Directive 2004/18/EC and Article 16 of Directive 2004/17/EC;

²⁰ *Id.* art. 18.

²¹ *Id.* art. 19.

²² *Id.* art. 20.

²³ *Id.* art. 21.

²⁴ *Id.* art. 22.

²⁵ *Id.* art. 23.

²⁶ *Id.* art. 58.

- Contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC; and,
- Awards of services concessions.

Award of the above public contracts is governed by a number of standards, as developed by the Court of the European Union based on the rules and principles of the EC Treaty. Consequently, the principle of equal treatment and nondiscrimination on grounds of nationality require some transparency in the award procedure. The Court has held that it “consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed.”²⁷

III. Economic Benefits Derived from Directives on Public Procurement

In 2004, the European Commission issued a report on the functioning of public procurement markets in the EU.²⁸ The report states that the EU directives on public procurement adopted in the 1970s have contributed considerably to improving competition and transparency and also to increasing cross-border activity through the requirement of invitations to tender and contract award notices above a certain threshold.²⁹ The report also suggests that direct cross-border procurement remains low, at approximately 3% of the total number of bids. The rate of indirect cross-border public procurement—that is, bids won by foreign firms through their local subsidiaries—is higher, constituting close to 30% of the total bids. Application of the EU rules also contributed to:

- Reducing prices paid by national, regional and local authorities for supplies, works, and services by around 30%; and
- Increasing intra-EU competition and prices paid by public authorities for goods traded between Member States have been less. For example, regarding small iron and steel rails traded between EU countries, export prices dropped from around 21% in 1988-92 to over 7% in 1998-2002.³⁰

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²⁷ Case C-324/98, *Telaustria*, 2000 ECR I-10745, para. 62 & Case C-458/03, *Parking Brixen*, Judgment of Oct. 13, 2005, para. 49, *quoted in* European Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, 2006 O.J. (C 179) 2.

²⁸ European Commission, *supra* note 1; *see also* Press Release (No. IP/04/149), European Commission, Public procurement: EU rules deliver big savings for taxpayers; scope for more gains (Feb. 2004), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/149&format=HTML&aged=1&language=EN&guiLanguage=en> (summarizing report).

²⁹ Press Release, *supra* note 28.

³⁰ *Id.*

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INDIA

GOVERNMENT PROCUREMENT LAW & POLICY

Executive Summary

Legal framework for government procurement of goods and services is derived from provisions of the Constitution of India. The President of India has assigned the responsibility for this to the Ministry of Finance. As India is a union of states, some states have established their own rules. Overall, the objective of the various procurement policies of the states under the framework rules is to provide equal opportunity, fairness and transparency to all domestic and foreign companies who compete for procurement contracts. After inviting tenders from bidders and scrutiny of their proposals, the lowest bid is accepted as the successful contract bidder.

I. Organization Framework

The institutional and legal framework for procurement in India is derived from the Constitution of India. The Constitution vests the executive powers of the Union of India in the President of India.¹ The President, by his order, and in pursuance of allocation rules of the Government of India,² vested the financial powers of the Indian Government in the Ministry of Finance. These powers in turn are delegated to the subordinate authorities under the 1947 General Financial Rules, which were revised in 2005.³

The General Financial Rules (GFR), developed by the Ministry of Finance, establish the principles for general financial management and procedures for government procurement. The rules contained in chapter 6 concern the procurement of goods and services, while chapter 8 addresses contract management. All government purchases must strictly adhere to the principles outlined in the GFRs. The Manual on Policies and Procedures for Purchase of Goods⁴ contains guidelines for the purchase of goods.

¹ INDIA CONST. art. 53.

² The Government of India (Allocation of Business) Rules 1961, http://cabsec.nic.n/abr/abr_odr.htm (last visited Dec. 24, 2009).

³ General Financial Rules, 2005, http://finmin.nic.in/the_ministry/dept_expenditure/GFRS/gfr2005.pdf (last visited Dec. 24, 2009).

⁴ http://www.finmin.nic.in/the_ministry/dept_expenditure/GFRS/MPProc4ProGod.pdf (last visited Dec. 24, 2009).

There is no central legislation governing procurement in India. Comprehensive rules and directives in this regard are contained in the GFR 2005 and Delegation of Financial Powers Rules (DFPR). A broader framework is also provided by the Contract Act, 1872,⁵ the Sale of Goods Act, 1930,⁶ the Law on Arbitration⁷ and Limitation⁸ and the recent Right to Information Act, 2005.⁹

As India is a union of states, each state, including the Union Territories, have their own rules, guidelines or legislation on procurement. State governments and Central Public Sector Units (CPSUs) have their own general financial rules, which are based on the broad principles outlined in the GFR. Some states have even introduced legislation for procurement, e.g., Tamil Nadu and Karnataka.

The constitutionally appointed Comptroller and Auditor General (CAG) oversee the accounts of the Union and states.¹⁰ The reports of the CAG on Union accounts are presented to each house of the Indian Parliament, while those relating to the accounts of the states are presented to the legislature of each state assembly. These reports also cover procurement. The Parliamentary Accounts Committee (PAC), the Standing Committees and the Legislative Accounts Committees in the states oversee the functioning of the executive power. To ensure transparency in the process at each level of the Indian Government, a local fund audit for local bodies has been established. Reports on the audits are presented to each state legislative assembly.

Complaints of corruption and the vigilance administration of the central government are investigated by the Central Vigilance Commission, a statutory body founded as a result of the enactment of the Central Vigilance Commission Act, 2003.¹¹ As a signatory to the U.N. Convention against Corruption, internationally, India has also pledged its commitment to the zero tolerance of corruption.

II. Procurement Guidelines

One of the objectives of the various procurement policies under the framework of the general principles contained in the GFR is to ensure responsibility, accountability, efficiency and economy. The policies also ensure the transparent, fair and equitable treatment of suppliers and the promotion of competition in public procurement. The cardinal principle in any public buying is to procure the materials and/or services of the specified quality, at the most competitive prices

⁵ No. 9 of 1872.

⁶ No. 3 of 1930.

⁷ The Arbitration and Conciliation Act, No. 36 of 1996.

⁸ The Limitation Act, No. 36 of 1963.

⁹ No. 22 of 2005.

¹⁰ INDIA CONST. art. 148-151.

¹¹ Act No. 45 of 2003.

in a fair, just and transparent manner, as outlined in the Manual on Policies and Procedures for purchase of Goods,¹² issued on August 31, 2006.

The competent authority invites tenders with a view to purchase goods and services. Suppliers, including foreign companies, who are centrally registered with the Director General of Supplies and Disposal (DGS&D) and willing to compete, may submit tenders agreeing to supply goods of the requested specifications. Indian agents who desire to quote directly on behalf of their foreign manufacturers/principals are also required to register themselves with the appropriate authority for submission of tenders.

Evaluation of the tenders received is one of the most significant areas of purchase management. The entire process of evaluation and contract awarding must be transparent. The Purchase Officer is required to prepare a comparative statement of quotations received, in the order in which the tenders were received. All tenders must be evaluated solely on the terms and conditions incorporated in the invitation for tenders. No new conditions may be added at the tender evaluation stage; in this way no bidder may have an unfair advantage.

If a minor informality/irregularity is found while scrutinizing the proposals, the purchase officer may waive the same provided it does not affect other bidders. However, all such actions must be waived or approved by the competent authority. Upon completion of the scrutiny, tenders are consolidated into a statement, in ascending order of the evaluated prices, so as to get a clear picture of their standing as well as comparative financial impact.

Before awarding a contract to the lowest evaluated responsive tender, the purchase organization must ensure that the price to be paid is reasonable. This may be determined by comparing the contract price with the price last paid for such item, the current market price, the price of raw materials, receipt of competitive offers from different sources, and the quantity of materials involved.

Before placing an order with the successful bidder, the latter is informed in writing of the acceptance of his proposal and the time within which he is required to furnish performance security. An individual who has submitted a tender for the contract may also complain about a grievance and be heard regarding any irregularity in procedure or otherwise which occurred while scrutiny of the tenders was being conducted.

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¹² http://www.finmin.nic.in/the_ministry/dept_expenditure/GFRS/MPProc4zProGod.pdf (last visited Dec. 28, 2009).

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JAPAN

GOVERNMENT PROCUREMENT LAW & POLICY

Executive Summary

Under the Accounts Law, each government agency in Japan does its procurement. While open tendering is the standard method under the law to be used to award a procurement contract to a supplier, in practice restricted tendering is more common. Japan is a participant of the WTO Agreement on Government Procurement and implemented the Agreement by the passage of domestic regulations. Japan took measures to open procurement for foreign suppliers more than that required by the WTO Agreement.

I. Basic Framework

The Accounts Law¹ contains the basic provisions concerning national government procurement agreements. There are no specialized procurement bodies in Japan. Each government agency administers its own procurement agreement.² Each agency has its own contract administrative rules. The Local Autonomy Law³ regulates local government procurement. This article focuses on the national government procurement. For large government contracts, the World Trade Organization (WTO) Agreement on Government Procurement is applied, and special Cabinet Orders are applied, as stated in the last part of this report.

A. Open Tendering

Under the Accounts Law, open tendering is the standard method of government procurement.⁴ When the contract value is small, however, open tendering can be avoided.⁵ Prequalification is generally required to participate in tendering. Government agencies publish the conditions for prequalification for each type of agreement, *i.e.* construction, manufacturing, and sales of goods.⁶ Agencies publish the list of prequalified suppliers.⁷ In addition, agencies

¹ Kaikei hō [Accounts Law], Law No. 35 of 1947, *last amended by* Law No. 53 of 2006.

² *Id.* art. 29.

³ Chihō jichi hō [Local Autonomy Law], Law No. 67 of 1947, *last amended by* Law No. 79 of 2009.

⁴ Accounts Law, Law No. 35 of 1947, *last amended by* Law No. 53 of 2006, art. 29-3, para. 1.

⁵ *Id.* art. 29-3, para. 5.

⁶ *Id.* and Yosan, kessan oyobi kaikei rei [Cabinet Order concerning the Budget, Settlement of Account and Accounting (BSA Order)], Imperial Ordinance No. 165 of 1947, *last amended by* Cabinet Order No. 130 of 2009, art. 72, para. 1.

can require prequalification for specific procurement if it is necessary because of the nature and the purpose of the procurement.⁸ In order to make the tendering process more efficient, in 2001, the national government unified the qualifications for participating in tendering contracts that relates to the manufacture and sale of products. The national government provides information and accepts application through a website.⁹

Government procurement opportunities are advertised in the official gazette (Kanpo) and other media (*e.g.* newspapers) as well as government websites,¹⁰ until ten days before the open tendering. In urgent cases, this advertisement period can be shortened to five days.¹¹ Participants in a tender must deposit 5% or more of their estimated price of the procurement with the procuring agency.¹² The government agencies can exempt the deposit requirement from a participant if the participant has insurance that provides that the government agency is a beneficiary when the participant fails to perform the agreement, or may exempt all participants from the deposit requirement when only qualified participants can participate in the tender.¹³

A government agency must set an “expected price” before the tender, write that price on a paper, and place the paper at the place of the tender in such a way that the price is invisible.¹⁴ With a procurement that requires that government agency pay for service or goods, the expected price operates as the maximum price. For a procurement where a government agency receives money, the expected price operates as the minimum price.¹⁵ When the expected price operates as the minimum price, the participant who tendered highest price above the expected price is the winner. When the expected price operates as the maximum price, the participant who tendered the lowest price below the expected price is the winner.¹⁶ In the case of the latter, in limited cases when the procurement is regarding construction or manufacturing and the expected price is 10 million yen (US\$ 110,000) or more, the government agency can award the participant who tendered the second lowest price.¹⁷ These cases are: (1) when the price is too low, so that it is expected that the participant cannot provide the quality of service or products; or (2) it is unfair

⁷ BSA Order, Imperial Ordinance No. 165 of 1947, *last amended by* Cabinet Order No.130 of 2009, art. 72, para. 3.

⁸ *Id.* art.73.

⁹ Toitsu shikaku shinsei uketsuke saito [Site to accept unified qualification], <https://www.chotatujo.go.jp/va/com/ShikakuTop.html> (last visited Jan. 19, 2010).

¹⁰ Procurement information can be searched in English at the government website at <http://www.chotatujo.go.jp/csjs/pr006/JohoInActionEN.do> (last visited Jan. 19, 2010).

¹¹ BSA Order, Imperial Ordinance No. 165 of 1947, *last amended by* Cabinet Order No.130 of 2009, art. 74.

¹² Accounts Law, Law No. 35 of 1947, *last amended by* Law No. 53 of 2006, art. 29-4, para. 1.

¹³ BSA Order, Imperial Ordinance No. 165 of 1947, *last amended by* Cabinet Order No.130 of 2009, art. 77.

¹⁴ *Id.* art. 79.

¹⁵ Accounts Law, Law No. 35 of 1947, *last amended by* Law No. 53 of 2006, art. 29-6, para. 1.

¹⁶ *Id.*

¹⁷ *Id.* and BSA Order, Imperial Ordinance No. 165 of 1947, *last amended by* Cabinet Order No.130 of 2009, art. 84.

to award the contract to the participant and the awarding would obstruct fair trade practices.¹⁸ This may occur, for example, when the participant has tendered a much lower price than the reasonable commercial price for the honor (*i.e.* it is very honorable to be awarded a contract for imperial house construction), but it is expected that the participant will not sacrifice the quality because the participant can afford the loss.¹⁹

When a government agency sells movable property, the procurement may be done through auction.²⁰ The government procurement agreement is made when the agency representative and the winner sign the agreement unless the contract amount is small.²¹ The contractor must submit 10 % of the contract amount as a deposit.²² Payment of the deposit can be exempted in cases where the contractor has an insurance or where tender participants were pre qualified.²³

B. Restricted Tendering

Restricted tendering may be used when there are only a limited number of suppliers or when there would be a disadvantage to the government have an open tendering.²⁴ In reality, open tendering has been rarely used, and restricted tendering has generally been used for government procurement, that is until the WTO Agreement on Government Procurement became effective in Japan.²⁵ A limited number of supplier exists typically where a limited number of firms have a license under the relevant law. For example, when the procurement concerns the manufacture of an airplane, there are not very many licensed airplane manufacturers in Japan.²⁶ Typical indicating the existence of disadvantages to have an open tendering are:

- (1) Some competitors conspire;
- (2) Extreme difficulty in examining the quality of buildings or goods because they are very special; and,

¹⁸ Accounts Law, Law No. 35 of 1947, *last amended by* Law No. 53 of 2006, art. 29-6, para. 1.

¹⁹ See MITSUAKI USUI, KOKYŌ KEIYAKU HŌ SEIGI [DETAILED COMMENTARIES ON PUBLIC CONTRACT LAW], 153 (2005).

²⁰ Accounts Law, Law No. 35 of 1947, *last amended by* Law No. 53 of 2006, art. 29-5, para. 1 and BSA Order, Imperial Ordinance No. 165 of 1947, *last amended by* Cabinet Order No.130 of 2009, art. 93.

²¹ Accounts Law, Law No. 35 of 1947, *last amended by* Law No. 53 of 2006, art. 29-8. and BSA Order, Imperial Ordinance No. 165 of 1947, *last amended by* Cabinet Order No.130 of 2009, art. 100-2.

²² Accounts Law, Law No. 35 of 1947, *last amended by* Law No. 53 of 2006, art. 29-9, para. 1.

²³ *Id.* art. 29-9, para. 2. and Cabinet Order art. 100-3.

²⁴ *Id.* art. 29-3, para. 3.

²⁵ Tetsuo Kondo, Nyūsatsu Keiyaku ni kansuru mondai [Issues on tendering and contracts] in ZAISEI NO TEKISEI KANRI TO SEISAKU JITSUGEN [PROPER MANAGEMENT OF PUBLIC FINANCE AND MATERIALIZATION OF POLICIES], 61, 72 (Nihon zaisei hō gakkai [Japan public finance academic society] ed. 2005).

²⁶ USUI, *supra* note 19, 68-9.

- (3) A breach of the contract will cause severe damage to the government undertaking.²⁷

When an agency has restricted tendering for reasons other than those listed above, the agency must discuss the matter with the Minister of Finance.²⁸ Agencies designate those who may be participants in restricted tendering. Similar to prequalification for open tendering, agencies must establish the conditions which will apply to the participants in a restricted tendering and publish the applicable conditions for each type of agreement.²⁹ While agencies are required to publish the list of qualified suppliers for restricted tendering the agency is not required to publish the list of suppliers where one of the following situations exist:

- If the conditions for the participants in an open tender and restricted tender are the same;
- If only a small amount of procurement occurs for the type of procurement needed for the agency; or,
- If there is any other special reason.³⁰

Agencies must establish the standards that it would designate at a tendering and report those standards to the Minister of Finance.³¹ Agencies must designate ten or more restricted tendering participants, if possible.³² The procedures for restricted tendering are generally the same as open tendering.³³

C. Direct Negotiation

When the procurement is not suitable for competition, when severe time constraints render other methods impractical, or when there is a disadvantage to having an open tendering, direct negotiation may be used.³⁴ Additionally, when tendering has been unsuccessful twice, an agency may negotiate directly with a supplier within the framework of conditions of the tendering.³⁵ An agency may also negotiate directly when a winner of a tendering did not enter

²⁷ BSA Order, Imperial Ordinance No. 165 of 1947, *last amended by* Cabinet Order No.130 of 2009, art. 102-4, item 2.

²⁸ *Id.*

²⁹ *Id.* art. 95, para. 1.

³⁰ *Id.* art. 95, paras. 3 and 4.

³¹ *Id.* art. 96.

³² *Id.* art. 97, para. 1.

³³ *Id.* art. 98.

³⁴ Accounts Law, Law No. 35 of 1947, *last amended by* Law No. 53 of 2006, art. 29-3, para. 4.

³⁵ BSA Order, Imperial Ordinance No. 165 of 1947, *last amended by* Cabinet Order No.130 of 2009, art. 99-2.

into a contract.³⁶ Before an agency official negotiates with a supplier, the agency must estimate the expected price in the same way it does before tendering.³⁷ An agency officer must have two or more suppliers' estimates, if possible.³⁸ After the agency determines the contractor, a written agreement is signed.³⁹

D. Anti-Bid-Rigging Legislation

After many bribery and bid-rigging cases concerning public works procurement became public, in 2000, the Diet (Japanese Parliament) passed the Act for Promoting Properness of Bidding and Contracting in Public Works.⁴⁰ This Act regulates both national and local public work procurement. This Act made additional public works information public and established guidelines on public works procurement. In 2002, the Act Concerning Exclusion and Prevention of Bid Rigging Involving Government Officials was enacted.⁴¹ The Act introduced penalties, including imprisonment, for government officials who initiate, assist, or coordinate bid rigging.

E. Small and Medium-Sized Enterprises

The Small and Medium-sized Enterprises Basic Law provides that the national government must take measures to increase the opportunities for small and medium-sized enterprises to be awarded government procurement contracts.⁴² Based on this Law, the Act to Secure Small and Medium-sized Enterprises to Receive Orders from Government and Public Entities requires the government to determine government contract policies concerning small and medium-sized enterprises, which must be drafted by the Ministry of Economy, Trade and Industry.⁴³ Each year since the enactment of this Act the government has released the Guidelines on Government Contracts Concerning Small and Medium-sized Enterprises.⁴⁴ At the

³⁶ *Id.* art. 99-3.

³⁷ *Id.* art. 99-5.

³⁸ *Id.* art. 99-6.

³⁹ Accounts Law, Law No. 35 of 1947, *last amended by* Law No. 53 of 2006, art. 29-8.

⁴⁰ Kōkyō kōji no nyūsatsu oyobi keiyaku no tekisei ka no sokushin ni kansuru hōritsu [Act for Promoting Properness of Bidding and Contracting in Public Works], Law No. 127 of 2000, *last amended by* Law No. 51 of 2009.

⁴¹ Nyūsatsu dangō tō kanyo kōi no haijo oyobi bōshi narabini shokuin ni yoru nyūsatsu tō no kōsei o gaisu beki kōi no shobatsu ni kansuru hōritsu [Act Concerning Exclusion and Prevention of Government Officials' Involvement in Bid-Rigging and Punishment of Government Officials' Acts that Damage Fairness of Tendering], Law No. 101 of 2002, *last amended by* Law No. 51 of 2009.

⁴² Chūshō kigyō kihon hō [Small and Medium-sized Enterprises Basic Law], Law No. 154 of 1963, *last amended by* Law No. 80 of 2009, art. 21.

⁴³ Kankōju ni tsuite no chūshō kigyō sha no juchū no kakouho ni kansuru hōritsu [Act to Secure Small and Medium-sized Enterprises to Receive Orders from Government and Public Entities], Law No. 97 of 1966, *last amended by* Law No. 58 of 2007, art. 4.

⁴⁴ 2009 Guidelines are available at the Small and Medium Enterprise Agency's website at <http://www.chusho.meti.go.jp/keiei/torihiki/2009/download/090612Houshin.pdf> (last visited Jan. 20, 2010).

end of the fiscal year, each government agency must report regarding contracts with small and medium-sized enterprises.⁴⁵

II. Domestic Sourcing Requirements

There is no particular requirement in Japan for domestic sourcing.

III. Exempted Industries

No industry in Japan is exempted from application of the Accounts Law.

IV. Cohesion With World Trade Organization Guidelines

Japan was a party to the GATT Agreement on Government Procurement, and is a party to the WTO Agreement on Government Procurement. The government issued cabinet orders and ministerial ordinances to implement the Agreement. National government procurement is governed by the Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services.⁴⁶ This Cabinet Order created exceptions to the Cabinet Order Concerning the Budget, Settlement of Account and Accounting⁴⁷ in order to meet the WTO Agreement requirements. Local government procurement is governed by the Cabinet Order Stipulating Special Procedures for Government Procurement of Products and Specified Services in Local Government Entities.⁴⁸ The WTO Agreement on Government Procurement is applied to government procurement where the estimated value is the relevant threshold or more that is specified in Japan's Appendix 1 to the Agreement. Procurements of the Ministry of Defense or government procurements that involve national secret are excluded from the application of the WTO Agreement and this Order.⁴⁹

The Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services facilitates the participation of foreign suppliers in government procurement tendering. Requirements for prequalification are advertised at the beginning of the fiscal year by each agency, and a prequalification examination is done any time.⁵⁰ Advertisement of open tendering procurement is done at least forty days before the tendering,

⁴⁵ Act to Secure Small and Medium-sized Enterprises to Receive Orders from Government and Public Entities, Law No. 97 of 1966, *last amended by* Law No. 58 of 2007, art. 5.

⁴⁶ Kuni no buppin tō mata wa tokutei ekimu no chōtatsu tetuduki no tokurei o sadameru seirei [Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services], Cabinet Order No. 300 of 1980, *last amended by* Cabinet Order 3 of 2007.

⁴⁷ *Id.* art. 1.

⁴⁸ Chihō kōkyō dantai no buppin tō mata wa tokutei ekimu no chōtatsu tetuduki no tokurei o sadameru seirei [Cabinet Order Stipulating Special Procedures for Local Government Procurement of Products and Specified Services], Cabinet Order No. 372 of 1995, *last amended by* Cabinet Order No. 344 of 2004.

⁴⁹ Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services, Cabinet Order No. 300 of 1980, *last amended by* Cabinet Order 3 of 2007, art. 3, para. 1.

⁵⁰ *Id.* art. 4.

though this can be reduced to ten days in case of urgency.⁵¹ The 40 day minimum advertisement period was extended to 50 days by the Government Action Program that is explained below. In case of restricted tendering, the period for minimum advertisement is 20 days, except for procurement in the field of supercomputers, telecommunications, medical technology and satellites not for research and development purpose. These procurements require an advertisement period of 40 days. Direct negotiation can be used for procurement under the WTO Government Procurement Agreement in situations defined in the Agreement. The Cabinet Order requires the direct negotiation that is available under the Accounts Law and regulations in conformity with the WTO Agreement.⁵²

In addition to the Cabinet Order which implemented the WTO Agreement on Government Procurement, the Japanese government has voluntarily improved the access that foreign suppliers have to the government procurement process. Japan tried to open access for foreign suppliers to more than those contained in the GATT requirements by enacting the Action Program to Improve Market Access in 1985. The Action Program had programs in six areas, which included customs, import restrictions, and government procurement. The Action Program Implementation Promotion Committee monitored the progress of the programs, and implementation of the programs was completed in 1988.⁵³

The Committee continued to review three areas of programs; standards and certifications, import process, and government procurement. In 1991, the Committee adopted the Arrangement on Government Procurement. This Arrangement included requirements concerning beginning of fiscal year advertisement, extension of advertisement period, among others.⁵⁴ The government also expanded the scope of government procurement required by the GATT Agreement by lowering the threshold estimated value of applicable procurement that the GATT Agreement assigned.⁵⁵

After many bid-rigging cases of public works surfaced in 1993 and pressure came from the United States to improve fairness of government procurement, the Committee adopted the Action Program Concerning Government Procurement and the Guidelines on Government Procurement on Goods in 1994.⁵⁶ Further, the Committee adopted the Guidelines on Government Procurement on Services in conformity with the WTO Agreement in 1995, just before the WTO Agreement became effective. The goal of these guidelines was to increase the clarity, fairness and competitiveness of the government procurement procedure, and improve advertisement methods. The Guidelines created the Government Procurement Review Board to

⁵¹ *Id.* art. 5.

⁵² *Id.* arts. 12-3.

⁵³ Cabinet Secretariat, 2008 nen seifu chōtatsu ni okeru waga kuni no shisaku to jisseki [2008 Policies and achievement concerning government procurement], Chap. I, Sec. 2 (1) (Mar. 2009), available at <http://www.kantei.go.jp/jp/kanbou/20tyoutatu/>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* Chap. I, Sec. 2 (2).

hear complaints about procurement over a certain threshold by central government agencies.⁵⁷ Overall, Japanese regulations opened government procurement for foreign suppliers more than that required by the WTO Agreement.

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⁵⁷ *Id.*

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RUSSIAN FEDERATION

GOVERNMENT PROCUREMENT LAW AND POLICY

Executive Summary

The Russian government procurement system has been in place since 2006, and undergoes constant changes in order to enhance its efficiency and transparency. Most contracts are awarded to the winners of anonymous online auctions. Other methods of government procurement can be used depending on the price of the contract and the scope of work. The law does not provide for exemptions other than for reasons of state secrecy, and protectionist measures are minimal.

I. Basic Principles of the Procurement System

Federal Law No. 94 on Placing Orders for Provision of Goods, Works, and Services for State and Municipal Needs of July 21, 2005,¹ is the main document that regulates government contracts and procurement system in the Russian Federation. This law, which has been amended 18 times since it entered into force on January 1, 2006, created a unified nationwide procurement system. The law also established mandatory procedures applicable to all federal, provincial, and municipal institutions that are authorized to conclude government contracts, if the contracts are paid for by federal, provincial or local appropriations. As stated in the Law, government contracts are concluded to meet the needs of the Russian Federation and its constituent components in the areas of national defense, security, other vital government tasks, and for implementing international, federal, and provincial programs. The needs of a government institution for products and services required for its functioning are considered federal needs and are covered through government contracts.²

The Russian procurement system consists of such elements as defining state needs, the creation of orders and their placement, conclusion of government contracts, and fulfillment of contractual obligations. Restrictions established by this law do not apply when the contract's amount is below the limit established for cash transactions between the legal entities established by the Central Bank of Russia.³

¹ Federal Law No. 94, July 2005, ROSSIISKAIA GAZETA (government daily newspaper, official publication, thereafter RG), July 28, 2005, available at www.rg.ru/2005/07/28/goszakaz.html (last visited Jan. 13, 2010).

² *Id.* art.3.

³ Presently, this amount is equal to RUB 60,000 (approximately, US\$2,000) (Directive of the Central Bank of Russia No. 1050-U, Nov. 14, 2001).

This Law regulates issues related to the offering and awarding of contracts. The drafting and execution of contracts follow the principles of the Civil and Budget Codes of the Russian Federation. Government procurement policies and practice must conform to provisions of the Federal Law on Competition and Restriction of Monopolistic Activities.⁴ A special department at the Federal Antitrust Agency has been established to monitor the compliance of government procurement with the law.

Violation of the prescribed procedure for placement of contracts is an administrative misdemeanor and is punishable by a fine in the amount of 200 minimum monthly labor wages (approximately US\$30,000). A contractor is allowed to charge interest for the unpaid amount of money if payment is delayed by a government customer.

II. Contracting Procedures

The ways of announcing and offering government contracts are specified by law. They include:

- Calls for bids;
- Auctions, including electronic;
- Requests for proposals;
- Offering a contract to a single contractor; and,
- Placing orders on mercantile exchanges if the contract price exceeds the amount of RUB 5 million (approximately US\$170,000).

In order to achieve budgetary savings, orders placed on similar goods or services by the same government customer are to be conducted simultaneously. Calls for bids and auctions must be open most of the time. Closed auctions are allowed when the contract requires the supply of goods or the performance of works or services, information on which is classified as secret.

The difference between a call for bids and an auction is that when a call for bids is announced, a contract will be awarded to the contractor who offers the best conditions for performing the contract.⁵ At auctions, a contract is awarded to an anonymous contractor who offers the lowest price for the contract.⁶ Since January 1, 2010, the qualification of a contractor is considered to be an important factor in the awarding a contract, in addition to the requirement that the contract be awarded to the lowest priced bidder. Special requirements were established for contractor's qualifications in construction work. In order to participate in an auction, a contractor must have at least five years experience in performing similar works and prove that in his previous projects he did at least 30% of the contracted work on a specific jobsite.⁷

⁴ VEDOMOSTI VERKHOVNOGO SOVETA I S'EZDA NARODNYKH DEPUTATOV RSFSR [Bulletin of the RSFSR Supreme Soviet and Congress of People's Deputies, then the official gazette] 1991, No. 16, Item 499.

⁵ Federal Law No. 94 on Placing Orders for Provision of Goods, Works, and Services for State and Municipal Needs of July 21, 2005, art. 20(1).

⁶ *Id.* art. 32(1).

⁷ RG Nov. 23, 2009.

Requests for proposals are announced on the website of the agency which intends to offer a contract, and the winner is the contractor who proposed the lowest price. This type of announcement has restrictions due to the length of contract and its amount (not to exceed US\$10,000 per quarter) and is usually used to provide services to government organizations located in foreign countries.

A contract can be offered to a single contractor in cases when:

- The contract relates to the activities of natural monopolies;
- The government acquires cultural valuables;
- The contractor has exclusive rights to offer the requested goods, works, or services; and,
- The contract requires the performance of works related to military mobilization activities.

In some cases, a government contract can be awarded without competition. Circumventing the prescribed rules is allowed when time-consuming procedures would be counterproductive in force majeure circumstances and in need of urgent medical intervention.

In November 2009, the Russian Federation approved a list of goods, services, and works, which since January 1, 2010, must be acquired by federal customers through open online auctions only. Presently, this list includes construction contracts, contracts related to the supply of medicines, food, and office equipment. As of July 1, 2010, all traditional auctions will be prohibited and all auctions will be conducted exclusively online. For provincial and municipal customers, this requirement will enter into force as of January 1, 2011.⁸ It is expected that up to 70% of all government contracts will be distributed through online auctions. The remaining 30% of contracts (primarily those for research work, engineering, architectural drafting, and medical services) will be awarded through calls for bids.⁹

III. Access to Government Procurement Information

Originally, the Law required that announcements of government contracts be published on the website of the customer organization and in the official publication, which is a special newspaper designated by the federal Ministry of Economic Development. Announcements are to be published no later than 30 days before the sealed envelopes with the proposals/bids were to be opened. The government was supposed to synchronize the newspaper and online publication of the announcement concerning the contract. The requirement to publish information about government contracts in federal mass media has been cancelled since January 1, 2008, and since January 1, 2010, the only official source of information available on all government contracts is the federal online portal administered by the Russian Federation Ministry for Economic Development. This portal publishes information on all contracts offered by federal, provincial,

⁸ *Id.*

⁹ Elena Vladimirova, *Torgi po Spisku* [Trade According to a List, in Russian] RG, Dec. 22, 2009, available at <http://www.rg.ru/2009/12/22/zakupki.html> (last visited Jan. 14, 2010).

and municipal authorities. The publication of government procurement information in mass media in constituent components of the Russian Federation will cease as of January 1, 2011.¹⁰ It is expected that this will simplify legal control over ensuring that all contract awards are in compliance with legal requirements, increase transparency and eliminate possible further correction of contract information, and enhance opportunities for contractors who will no longer be required to review multiple sources of information.

Information on this government website is to be published in the Russian language, to be free from advertisement, and accessible by anyone at any time, free of charge and free of any restrictions. The only contracts exempted from this publication are those which include information classified as state secrets. It is required that no special equipment, computer programs or skills be needed to access this information. For security reasons, the use of electronic signatures, electronic registration of operations, and daily preservation of backup information is required.

IV. Specifics of Government Procurement

A. Price of a Contract

It is estimated that about ½ of the 2009 national budget was spent on contracts concluded on behalf of the Russian Federation government.¹¹

Under Russian law, all prices for government contracts are fixed and defined in the contract at its conclusion. The correction of the contract price is allowed if:

- Natural monopolies need to be compensated for inflation;
- The government agency insists on changing the contract in order to increase the volume of works and services provided; and,
- The execution of a long-term contract for the amount exceeding RUB 10 billion (US\$300 million) is impossible without price change due to substantial increase in contract costs.

Advance payments can not exceed 30% of the contract price, and the contractor must prove that he has secured funds to fulfill his contract obligations in the amount equal to 1/3 of the contract price. There is no requirement for a contractor to purchase breach of contract insurance.

According to the ruling of the Highest Commercial Court of the Russian Federation No. 24 of June 22, 2006,¹² the government procurement procedures are applicable in all cases where the contract price exceeds RUB 60,000 (approximately US\$2,000). However, if the institution

¹⁰ Federal Law No. 218-FZ of Jul. 24, 2007.

¹¹ Irina Smotriskaia, *Goszakupki v Sisteme Mer Antikrizisnogo Regulirovaniia Ekonomiki* [Government Procurement as an Anti-crisis Measure, in Russian], *VSEROSSIISKII EKONOMICHESKII ZHURNAL*, 2009, No. 7, at 148.

¹² RG, 2006, Aug. 22.

offering the contract is not an institution specifically authorized to award government contract and the services provided by a contract are aimed at securing normal functioning of this institution, and the amount of a contract is under RUB 200,000 (approximately US\$7,000), it is not required to follow all the prescribed procurement procedures, and a regular contract based on provisions of the Civil Code and Budget Code can be concluded.

Amendments to the Law, which would allow increasing the amount of the contract price when offering contracts without conducting auctions or following the prescribed formalities, are presently under consideration of Russian legislators.¹³

B. Length and Execution of a Contract

The Budget Code of the Russian Federation provides for a three-year budget cycle. This allows agencies to enter into government contracts lasting for a three-year period. Contracts for implementing long-term federal government target programs can be concluded for the duration of these programs and are not limited to three years.

A contractor that has submitted a request for participation in an auction cannot refuse to accept the contract if the contract is subsequently awarded to him. If a contractor cannot perform the contracted work in full, part of the contract can be awarded to the contractor who was evaluated as being next in line.

C. Privileged Contractors

Organizations representing or employing handicapped persons and correctional institutions receive special priority in placing orders. These organizations may request an increase of up to 15% in the contract price.

The Law provides that no less than 15% of all government contracts must be awarded to small business enterprises.¹⁴ This does not apply to contracts in the military and national security fields. As a rule, the requirement for small business participation is met through the organization of special auctions or calls for bids established exclusively for small businesses. According to the opinion of Russian experts, this measure excludes small businesses from competition for large projects outside of those which were preliminarily selected by the government for distribution to small business.¹⁵ It is not clear how this provision will be implemented through the participation of anonymous contractors in online auctions.

¹³ Julia Vasilieva, *Zakazchikam Uprostiait Zhizn* [Life Will be Easier for Customers, in Russian], RG, Nov. 10, 2009.

¹⁴ See also, Federal Law No. 88 of June 14, 1995 on State Support of Small Entrepreneurship, SOBRANIE ZAKONODATELSTVA ROSSIISKOI FEDERATSII (official gazette) 1995, No. 25, Item 2343.

¹⁵ Liubov Andreeva, *Organizatsionno-Pravovye Voprosy Sovershenstvovaniia Sistemy Goszakupok* [Legal and Organizational Issues Related to Improvement of the Government Procurement System, in Russian], ZAKON, 2006, No. 3, at 102.

D. “Buy Domestic” Requirement

The Law does not provide restrictions with regard to the contractor’s citizenship. While the law establishes a national regime for government procurement, foreign contractors and suppliers participate in bids and auctions and have the same rights as Russian legal entities. The government, however, may establish prohibitions or restrictions for acquisitions of goods, works, and services originated outside of Russia in case of military contracts or when issues of national security are at stake. There is no comprehensive information on the percentage of government contracts awarded to foreign companies. However, the share of foreign companies contracting for the Russian government can be assessed by comparison. In 2006, for example, Russia concluded approximately 60 contracts to supply medical equipment for state needs. The entire amount of the contracts was RUB 608.2 million (approximately, US\$25 million). Approximately 60% of this money was spent on imported supplies.¹⁶

In order to use the government procurement system for protectionist purposes, in December 2008, the Ministry of Economic Development of the Russian Federation issued a regulation which allowed for preferences for Russian enterprises in the amount of up to 15% of the contract price in selected economic areas. The areas selected are agriculture, metal industry, machine building, and some others.¹⁷ This regulation was issued in a package with other measures aimed at fighting the economic crisis. This measure has proven to be ineffective because no qualifying requirements for contractors were established. All interested foreign contractors were able to create Russia-based legal entities which met the necessary requirements for participation in bids.¹⁸

From time to time, the Russian government considers different protectionist measures aimed at ensuring that the priority in government contracts is given to domestic suppliers of goods and services. For example, in the middle of 1990s there was an unsuccessful attempt to require that Russian high-level officials use domestically produced cars for their official transportation needs. This attempt failed because of the unreliability of Russian cars and bureaucrats’ unwillingness to lose the comfort of better foreign car models. Presently, there is no requirement for the Russian officials to only use Russian airlines when they fly outside of the country for official business. In November 2009, Russian national air carrier Aeroflot proposed that the government introduce this requirement legislatively. Major transportation agencies tentatively agreed with this idea, and there is a high probability that a relevant legislative proposal will be submitted to the legislature in 2010.¹⁹

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¹⁶ Irina Smotriskaia, *Goszakupki v Sisteme Mer Antikrizisnogo Regulirovaniia Ekonomiki* [Government Procurement as an Anti-crisis Measure, in Russian], *VSEROSSIISKII EKONOMICHESKII ZHURNAL*, 2009, No. 7, at 144.

¹⁷ RG Dec. 3, 2008.

¹⁸ Elena Vladimirova, *supra* note 10.

¹⁹ “Aeroflot” Will Fly All Bureaucrats, Reported at <http://www.vsesmi.ru/news/3507007/> (last visited Jan. 19, 2010).