

BOOK REVIEW

Government Procurement in the WTO. By Sue Arrowsmith (New York: Kluwer Law International, 2003, ISBN Number: 90-411-9884-9, hardbound, 481 pages, US\$170.¹

Beneath its somewhat ordinary title is a work of extraordinary depth and quality. Although written by a law professor, this book is far more than a traditional legal textbook. In exceptionally lucid writing, the author sets forth a comprehensive study of the World Trade Organization (WTO) regulations (“Articles”) on public procurement and their implications. Fortunately, the book is not simply an overview of the rules, but, as the author states, an “explanation and assessment,” which offers important criticism of various facets of the WTO’s public procurement regime.

In the Preface and Chapter 1, the author makes clear her fundamental concerns, which most practitioners will share. She argues with refreshing candor that WTO rules may adversely affect member nations’ need to develop their own methods of obtaining “value for money and an efficient procurement process” (p. xxii). Regulatory restrictions are typically the bane of the practitioner’s existence, and Professor Arrowsmith displays a keen awareness of this perspective, arguing that “stringent and detailed award procedures are of limited value and that their commercial costs and other disadvantages have not been fully appreciated” (p. 2). She conveys a concern for “the limitations of law as a means for achieving both national and international objectives” (p. 7). Practitioners will find this book offers a wealth of practical insight into the WTO’s world, replete with a wide variety of illustrations and examples of specific procurement actions. The author frequently cites the absence of definitions of key terms in WTO procedures that hamper the ability to follow their mandates. What the WTO’s rules lack in terms of useful guidance and comprehensive understanding of working-level

application of those rules, she supplies in common-sense interpretations of the regulations that procurement officials may use to adhere to the WTO's basic tenets.

The book's scope is impressive, ranging from the theoretical aspects of the WTO approach to government procurement as a barrier to free trade (Chapter 1) to the more operational elements of procurement such as late offers and opening bids (Chapter 10). The book reviews the basic economic principles of free trade in non-technical terms, but should have discussed the work of Jagdish N. Bhagwati, Robert Gilpin, and Anne O. Krueger.

Throughout the book, the author reviews not just key decisions of WTO dispute resolution panels, but also "the actual way in which the detailed procedures operate" (p. 167), and nearly every chapter offers practical advice. The author notes on page 167 what is apparent to most public procurement professionals upon reading the GPA, namely, that there was little input from practitioners during its drafting. It is this defect that she so successfully responds to in her work.

Chapter 2 provides detailed historical background of the origins of the WTO, its institutional structure including the dispute resolution mechanism, and the Agreement on Government Procurement (GPA). Arrowsmith highlights the ambiguities inherent in the GPA by describing how a nation could enact a law authorizing a discretionary price preference in favor of its own products, even though it would seem contrary to fundamental WTO policy, if the law will not have a "chilling effect" on trade (p. 45).

The author provides a readable exposition of the labyrinth of WTO agreements in Chapter 3, distinguishing among the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the GPA. The primary subject of the book is the GPA. She offers a concise introduction to the GPA rules on offsets (p. 53) and later (in Chapters 6 and 13) evaluates their effect. The book's thoroughness is reflected in the fact that it encompasses procurement by state-controlled companies, licensees, and similar unusual cases, as well as the impact of Most Favored Nation (MFN) status. The author convincingly argues that the lack of an MFN rule on government procurement under GATT means that nations may take discriminatory action such as banning purchases from a given country due to human rights violations.

Chapter 3 concludes with a comment on the WTO's periodic reports of reviews of member nation practices, observing that they are not useful for research purposes. The general nature of the information contained in these reports and a lack of data on costs and benefits mean that the true effects of trade policies on public procurement have not been measured. In Chapter 14, the author sensibly suggests that the Committee on Government Procurement commission a study of the GPA's impact, using a carefully selected data sample, rather than seek to compile an exhaustive set of statistics that will invariably be difficult to gather and will likely be error-prone (p. 407).

A complete description of how nations may join the GPA, which countries are bound by the agreement, and which nations have "observer status" appears in Chapter 4, along with procedures for joining or withdrawing. The author notes that even non-signatory nations can benefit from the effects of the WTO rules as other countries develop and maintain more transparent public procurement systems.

A crucial chapter (5) addresses the coverage of the GPA in terms of procurement entities, types of contracts, and thresholds. Under the GPA, each signatory nation negotiates an Appendix with rules (Annexes) specific to that country, consistent with the overall policies of the Articles on how procurement must be conducted. The author gives a particularly effective criticism of this methodology in her analysis of GPA coverage issues. She observes that the more appealing "flexible" approach to GPA coverage, in which negotiations with individual states dictate which contracts and organizations are included, is in stark contrast to the "hard" approach to regulating procurements that are covered by the GPA. These "hard" restrictions and detailed rules on solicitation and award procedures make it difficult to negotiate broad-based common rules on what is covered (p. 108).

Reflecting the GPA's almost exclusive pre-award emphasis, the book does not offer much detail on post-award contract administration. Nevertheless, in Chapter 5, the author takes the WTO to task for ignoring this crucial aspect of public procurement. She notes that one can claim that the GPA governs contract administration in principle, but there is an "absence of transparency rules" and "the issue has been addressed only in a very limited way by international procurement systems."

Chapter 5 also uncovers an important flaw in the GPA's lack of coverage of "tied aid" procurement, and the author convincingly argues

for correcting this defect. Reflecting her practical orientation, she suggests that the current approach add administrative complexity for developing countries. Instead of relying on GPA standards, these nations must learn the procurement procedures of each donor nation (p. 153). She cites concession contracts as an example of GPA's lack of clarity, as it is not readily apparent whether such contracts are within GPA's ambit. Further, she reports that the GPA's treatment of "mixed" contracts (part supplies, part services, for example) is unclear, but she provides several different approaches to clarify the matter.

On the impact of specific GPA rules, the author explains the fundamental dilemma of trying to apply the GPA timelines to an emergency buy. She states that "a procuring entity should not be put in a position whereby it is required to choose either to violate the law or to endanger health or other important interests" (p. 147). On the GPA's mandatory 40-day publicizing and response period for solicitations, Arrowsmith makes the case in Chapter 15 for a simple principle that time limits must be adequate for suppliers to respond (p. 421).

Chapter 6 reviews most-favored-nation (MFN) status and its implications. In characteristic fashion, the author identifies an ambiguity in the GPA by noting that it is unclear whether a Japanese supplier of U.S. products has a right to challenge a decision by a Japanese government contracting office to reject its offer because of the U.S. content (p. 155). On a topic so critical to public procurement as the rule of origin for supply contracts, she finds that this subject is not explicitly defined in GPA. "This means that the parties can in principle apply their own rules of origin" (p. 158), such as those found in Part 25 of the Federal Acquisition Regulation in the U.S., at least until common global rules are developed. As she puts it, "the apparent simplicity of the rules conceals numerous anomalies and problems" (p. 167).

Chapters 7 through 13 give an in-depth analysis of the GPA's contract award procedures and how they affect front-line contracting personnel. The author finds a need to strike a balance between GPA principles and national procurement policies. She sees a tension between "best value" source selection and the desire for a completely objective, price-only evaluation scheme. The latter approach makes it harder to "hide such a decision behind the cloak of subjective commercial assessment" (p. 175) when awarding contracts. She recognizes the potential conflict between the need for process efficiency and the desire for open, transparent competition.

One of the book's strengths is how it depicts public procurement in its larger context. The author admits that "the optimum balance between transparency and discretion is heavily affected by such structural factors" as the pay and career structure of the procurement workforce, the availability of training, the number of potential suppliers, and the effectiveness of audits or benchmarking (p. 176). She believes that training a procurement staff is more likely to influence the success of a procurement policy than transparency rules. Reflecting recent trends, she subscribes to the view that commercial purchasing practices are worthy of emulation. "To the extent that rules do hinder governments from purchasing in a commercial manner the result is to detract from the ultimate goal of optimum resource allocation" (p. 177).

The heart of the author's exposition and critique of the GPA in practical terms appears in Chapter 8. She points out the inability to establish qualification requirements in open rather than selective tendering under GPA Article XI (p. 189) and contradictions in the rules regarding the timing and content of advance notices of upcoming procurement actions. It would be easy enough for Arrowsmith simply to lodge her criticism and do no more, but she goes out of her way to craft a workable interpretation of Article XI that practitioners would be well advised to follow. On page 188, she even offers advice on how to handle the publicizing of upcoming road construction solicitations using different scenarios. It would not surprise the reviewer to see this volume on the office bookshelves of public procurement officials around the world who seek this sort of sage advice on operational procurement issues.

Both U.S. and Canadian readers will appreciate the author's analysis of the problems in the GPA's rules on procurement lead-time in Chapter 8. For example, an issue as basic as how long a government must allow offerors to submit proposals is uncertain in GPA Article XI. Further, "GPA gives no indication of how the specified time periods, including the general 40-day minimum, apply in a multi-stage process" (p. 200). Fortunately, Arrowsmith offers a solution: apply the 40-day period to the first phase, as this is when the most time is needed by prospective offerors.

One anomaly not mentioned by the author is that GPA Article XI.4 on publicizing and offer response times includes a mandate regarding reasonable delivery dates for supply contracts. The regulation confuses industry production lead-time with procurement lead-time, and the topic

should more appropriately be addressed in Article XII.2 on the required contents of solicitation documents. Perhaps the single most important area for regulations to be clear is the matter of procurement lead-time (or “throughput” in Canada), because it usually represents an uncontrollable delay in the procurement process. Hence practitioners will likely share the author’s perspective that “[i]n general, GPA tendering procedures are too long” (p. 201). The author has provided a valuable service to the WTO by demonstrating that the GPA is noticeably ambiguous on this important subject. Her analysis (especially on pages 208-209) should be viewed by the WTO as a call for action to amend the GPA.

In Chapter 9, the author points out again the poor drafting of the GPA on the subject of supplier qualification and supplier lists. She tries to construct a reasonable method of interpretation. Chapter 10 delves into the details of how to handle the submission and opening of offers, late offers, “abnormally low tenders,” contract award criteria, and related topics that will be of interest to scholars and practitioners alike. Arrowsmith favors a flexible interpretation of permissible proposal evaluation criteria under the GPA that comports with most current practices. She outlines how a multi-stage or “iterative” offer evaluation process can be managed with the GPA parameters. With regard to “framework” contracts (in the U.S., indefinite delivery type contracts) and the requirement to publish contract award notices, she crafts a way for buying offices to comply with the potentially burdensome GPA rules. She shows how contracting officers can issue a single notice at the time of contract award that lists all firms receiving a contract, rather than interpreting the GPA to say that a separate notice is required when each delivery order is placed (p. 276).

The GPA was written before the revolution of Internet-based public procurement, so the agreement’s shortcomings are particularly apparent in areas such as mandatory publicizing and response timelines. As the author observes in Chapter 10, the GPA is silent on the issue of submitting offers electronically (either by e-mail or web site submission). She considers this approach to be permitted, as the only express prohibition in the GPA concerns submission by telephone. Here and throughout the book she offers sensible advice.

Chapter 11 provides a detailed discussion of limited tendering (in essence, “other than full and open competition” in U.S. parlance). The author resists the “narrow construction” approach to interpreting the GPA Articles on this subject that some WTO panels have followed. Her

more liberal interpretation is aimed at providing practical solutions for government contracting offices facing emergencies and other difficult procurement situations. The discussion of emergency contracting is particularly apt in today's crisis-laden international environment, and she consistently views public procurement in terms of the balance needed "between transparency and commercial freedom" (p. 291).

This work is not entirely critical in nature. A case in point is her discussion of research contracts. The GPA does not mandate open competition, but rather allows limited tendering, even though U.S. procurement officials are accustomed to robust competition for research projects. The author supports the WTO's approach by offering a logical explanation for the exception and thereby lends credibility to the rules. In the case of construction contracts, she describes the 50% limitation on additional work (such as change orders) without further competition but does not cite this as an example of an inflexible or arbitrary rule, though many might be tempted to do so. In fact, her summation of Chapter 11 is labeled a critique of the GPA's limited tendering rules but in fact finds them to reflect a fair tradeoff "between transparency and competing concerns" (p. 301). To her credit, under the heading of limited tendering she advocates greater use of limited competition to further the GPA's overall objectives, rather than constant sole source contracting

An entire chapter (12) is devoted to the crucial issue of technical specifications and their effect on the public procurement process. The author's savvy awareness of the opportunities for abuse in this area makes her presentation more readable than most treatments. The only limitation is that the chapter focuses on supplies rather than services, even though service contracts have in recent years become more prevalent and arguably more difficult to manage.

Chapter 13 deals with secondary (collateral or socioeconomic) policies in terms of their compatibility with the GPA. Arrowsmith reveals many uncertainties in this area that can arise when nations try to carry out Article X's directive that contract awards be made in a fair and non-discriminatory manner. She recommends that secondary policies be justified on a case-by-case basis to ensure that the GPA's ultimate goals are attained.

The key topic of surveillance and enforcement is presented in Chapter 14, where the author thoroughly reviews the process for filing complaints. An interesting feature of the WTO system is that dispute

resolution panels are set up only on an ad hoc basis in response to a specific complaint. The panel must be staffed by officials knowledgeable in government procurement, and the panel's report goes to the Dispute Settlement Body for approval or rejection. Only nations may file complaints, not contractors, as the latter must pursue remedies in national challenge procedures (such as the General Accounting Office in the U.S. and the Canadian International Trade Tribunal in Canada). Due to the paucity of case precedents, the principles to be gleaned from a review of panel reports are yet to be fully determined. In a significant passage (p. 384), the author describes the hazards of trying to strengthen the GPA's enforcement mechanisms when the WTO is trying to gain more members. Chapter 14 ends with the author suggesting that the GPA's governing body, the Committee on Government Procurement, play a greater role in offering detailed guidance on the GPA rules as a means of ensuring more uniform implementation (p. 413).

Chapter 15 describes the GPA's built-in mechanism for periodic self-review and includes the author's overall evaluation of the GPA. She states that the GPA rules are "sufficiently flexible to accommodate most national practices and should not constitute a significant deterrent to membership" (pp. 415-416). The remainder of the chapter recaps her suggestions for improvement made earlier in the text. Of particular note is the case she makes for reducing the level of detail in the GPA rules, especially in light of the need to be able to adapt to new developments like electronic commerce. She voices caution about the resource costs inherent in such detailed rules. A principle-based approach would avoid these problems, she notes, and she addresses the human factor in rulemaking by stating: "Rules that are unnecessarily difficult to understand...are less likely to be applied in good faith" (p. 420).

Assessing GPA's prospects for success, the author observes: "One factor that will clearly affect success is the extent to which purchasers actually follow the rules" (p. 433). She believes that if buyers already operate in a commercial manner, then there would be no barrier to trade. On pages 433-434, she shows the fundamental paradox of the GPA: small firms may not be interested in competing for public contracts because of the detailed rules to be followed, even though those rules were created to facilitate open access to public procurement. The irony should not be lost on readers. Consequently, Arrowsmith sees the GPA as having a limited effect in the short term.

Perhaps the most impressive aspect of this treatise is its advocacy of a new approach to regulation (on pages 435-437 and in Chapter 16 on the potential for a WTO Transparency Agreement now being debated by a WTO working group). Recognizing that nations are emulating commercial buying practices and departing from the traditional procurement methods, the author proposes replacing detailed rules with very broad principles. In her proposal, member states would be required to adopt national measures to implement these standards, or could simply operate using commercial procurement principles. She urges us to focus on outcomes (such as whether value for money was obtained) rather than processes. While one cannot help sympathizing with this position, a consequence of its adoption would logically be the scaling back of bid protest systems, as they are antithetical to commercial buying practices.

On the issue of offer evaluation procedures, Arrowsmith recommends eliminating the difficulties of the current GPA procedures by adopting a concise rule that “award criteria must be formulated and publicised in advance” (p. 421). This sort of common sense suggestion makes the book a pleasure to read, as the author always has in mind those who must implement the rules. Her assessment of the impact of E-procurement is comprehensive and demonstrates how electronic transactions can be used within the GPA guidelines despite the lack of explicit recognition. On the technique of reverse auctions, however, she omits mention of a useful method of avoiding the problem of disclosing competing offers: it is possible to have the auction firm conceal the names of the competitors on the bidding screen. In light of developments like electronic commerce, she forcefully argues in favor of a reduction in the GPA’s timelines to reflect the new era of technology in public procurement.

Chapter 16 concludes the book with a perspective on the future of the WTO’s initiatives in terms of the prospects for expanding the GPA’s coverage to more than the 29 of 140 member nations that currently subscribe to it. She identifies several obstacles to expansion and recommends workable measures that could be taken to promote wider GPA membership.

U.S. practitioners may find this book slightly difficult to read in that it uses WTO terminology that differs from the precise terminology of the Federal Acquisition Regulation, and no glossary is included. For example, the use of the term “tender” is unclear as to whether it encompasses bids, proposals, quotations, or all three. The term “bid” or

“bidder” is used in ways that encompass more than the sealed bidding method, and the term “tender documentation” on page 219 really means “solicitation documents” for U.S. readers. The book implicitly reveals the need for a universal system of standard terminology among English speakers. Failure to agree on and share terms is as much a barrier to effective communication as it can be to free trade.

The book is up to date as of December 2001, so there is little discussion of publicizing and posting tools like “FedBizOpps” in the U.S. As a result, her recommendation that the GPA be revised to set specific time limits for submissions of expressions of interest in a solicitation (p. 209) does not closely track current practices. In the U.S., the standard procedure is to issue a notice of an upcoming procurement at www.fedbizopps.gov and then later post the solicitation there or on the contracting office’s web site, where anyone can download it for free. The compiling of manual lists of interested sources (the “optional lists” referred to in Chapter 9) is largely a thing of the past, and the U.S. Standard Form 129 (solicitation mailing list application) was abolished in 2003. Also, the book contains only excerpts from the GPA rather than an appendix with the full text. (The GPA is now available on the Internet at www.wto.org.) These are the most minor of complaints about a book that stands as a considerable accomplishment in public procurement research and insight.

This book is highly recommended to both academics and practitioners, especially those outside the U.S. U.S. public procurement officials and scholars would be well advised to read this volume to get an accurate and comprehensive global perspective on their field. The author successfully navigates the WTO rules, makes sense of their practical implications, and furnishes a cogent critique of defects found. Her thorough command of the material and exceptional awareness of implementation concerns are a rare confluence of the theoretical with the practical. Her interpretations of the admittedly difficult and frequently unclear terms of the GPA are consistently sound, reasonable, and flexible.

This book should be the standard of scholarship against which all future studies of the WTO on procurement are judged. Perhaps most importantly, the work’s lasting impact may be the many valuable, sensible, and constructive criticisms of the GPA. In trying to achieve real-world implementation of its lofty goals, the WTO would be well advised to learn from Professor Arrowsmith and seek to emphasize, as

she has so well, the practical consequences of the GPA's procurement rules.

NOTE

The views expressed are solely the reviewer's and do not necessarily represent those of any U.S. Government agency.

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