GOVERNMENT PROCUREMENT

Trade vs Socio-Economic Objectives

November 26, 2020
What is Government Procurement in Trade Agreements?

- Procurement of goods, services and construction services for governmental purposes *not* procured with a view to commercial sale or resale

- Procurement by any contractual means, including purchase, lease, or rental with or without option to buy

- Procurement does not include a number of government contracts, such as public-employment contracts
Why is it important to include GP in trade?

- Promotes transparency, integrity, impartiality and fairness in spending of tax dollars

- Promotes competition, predictability of procedural process, and deters corrupt practices

- Is it still possible to advance socio-economic priorities, such as green procurement or promote small and minority businesses?
Structure of Government Procurement in Trade

- **Procedural rules**
  - National treatment and non-discrimination
  - Prohibition of offsets
  - Competitive tendering as the norm, with limited exceptions
  - Domestic review and dispute settlement

- **Market access commitments divided into country-specific schedules**
  - List of governmental entities
  - Specified dollar thresholds for covered goods, services, construction
  - General notes (country-specific exclusions)
Market Access: Annex 1 Central Entities

- Positive list of central (federal) departments, agencies, and others

- Specified monetary threshold for goods, services and construction services that will determine if a procurement by a listed entity will apply

- CETA:
  - Goods above SDR 130,000
  - Services above SDR 130,000
  - Construction services above SDR 5,000,000
Market Access: Annex 2 Sub-Central Entities

- Negative or positive list or a combination thereof
  - In CETA, British Columbia uses a negative list to include all of its provincial government entities, as well as regional, local, district or other forms of municipal government, and, school boards, publicly-funded academic, health and social service entities (MASH)
  - In GPA, British Columbia uses a negative list for provincial level entities **but does not include the MASH sector**

- CETA thresholds:
  - Goods above SDR 200,000
  - Services above SDR 200,000
  - Construction services above SDR 5,000,000
Market Access: Annex 3 Other Entities

- The purpose of this annex is to specify different thresholds for some entities listed in Annexes 1 and 2.

- Other entities are defined by each Party.

- CETA thresholds for Canadian Crown corporations (central and sub-central):
  - Goods and services above SDR 355,000
  - Construction services above SDR 5,000,000

- CETA thresholds for entities that have core activities, such as air, marine and rail transportation:
  - Goods and services above SDR 400,000
  - Construction services above SDR 5,000,000
Market Access: Annexes 4, 5 and 6

- Annex 4 Goods: negative list, meaning all goods are covered with limited exclusions
  - EXCEPT purchases by defense and policing entities
    - Negative list – only those goods listed are covered
    - Much more limited coverage

- Annex 5 Services, positive list most often used

- Annex 6 Construction Services, negative list most often used
Market Access: Country-Specific Exclusions

- Parties further specify what’s not included

- For example, in CETA Canada does not include any measure adopted or maintained with respect to Aboriginal peoples, nor set-asides for aboriginal businesses; existing aboriginal or treaty rights of any of the Aboriginal peoples of Canada protected under section 35 of the Constitution Act, 1982

- In agreements like the GPA and the CPTPP, there are also reciprocity notes
  - For example, US uses a negative list for services; however, in its general notes, the US specifies that services is covered with respect to a particular Party only to the extent such Party has included that service
COVID and GP Commitments

- Public Services and Procurement Canada has new emergency contracting limits to execute an effective and rapid response to the pandemic.

- Until March 31, 2021, emergency contracting limit increased to $500,000,000 for COVID-19 related procurements.

- Until March 31, 2021, the Minister has been granted and unlimited emergency contracting limit for the research, development, acquisition and deployment of vaccines related to COVID-19.

- Until March 31, 2021, the Minister has been granted the authority to indemnify contractors and transfer risk to the Crown when entering into vaccines-related contracts.
Negotiating Dynamics with the US

- Had NAFTA chapter 10 – no Canada/US GP commitments in CUSMA
- Had TPP – no US in CPTPP
- WTO-GPA only agreement with Canada/US commitments

US GPA commitments exclude

- Buy America funding for mass transit and highway projects
- Restrictions attached to Federal funds for airport projects
- Buy American waiver on all power generation projects
- Set-asides for small and minority businesses
- 13 states, plus the 37 states that are covered have BIG exclusions
- All entities below the state level (e.g. cities)
- And more!
Conclusion: Why is it Important to include GP in Trade?

- It does promote transparency, integrity, impartiality and fairness in spending of tax dollars
- It does promote competition, predictability of procedural process, and deters corrupt practices
- It does offer a complaint mechanism for bidders
- Yes, it is possible to advance socio-economic priorities, such as green procurement, and promoting small and minority businesses