

The Revised GPA – More Scope for Green Public Procurement?

Judge Marc Steiner,
Swiss Federal Administrative Court

Purpose and topics of the presentation

- The relevance of the GPA and Sustainable Public Procurement / global policy coherence
- Relevance of the EU public procurement reform 2014
- Relevance of the revised GPA and the EU directives for the ongoing Swiss redesign of public procurement regulation
- GPA is not about regulating private consumer choice, but about the public consumer choice itself -> more policy space

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



Bern, May 2018

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

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

The revised GPA is a success story

“Bringing the revised GPA entry into force also has implications for the WTO, even though the GPA is a plurilateral agreement [...].

It demonstrates that WTO Members can conclude negotiations and implement agreements that expand and improve the international trading system.”

(Jean Heilman Grier, involved as a negotiator for the US when revising the GPA)

The revised GPA is more than a market access tool

“While benefits of the GPA are often seen in terms of providing market access rights for national suppliers in the other GPA parties’ markets, the Agreement can also be seen as a powerful tool for improving governance and promoting development.”

(Nicholas C. Niggli, former Chairman of the WTO Committee on Government Procurement)

Revised GPA / Work Programmes I

Art. XXII (8) revised GPA:

The Committee shall undertake further work to facilitate the implementation of this Agreement and the negotiations provided for in paragraph 7, through the adoption of work programmes for the following items:

(iii) the treatment of sustainable procurement;

Revised GPA / Work Programmes II

Art. XXII (8) revised GPA + Annex E:

The work programme on sustainable procurement shall examine [...] the ways in which sustainable procurement can be practiced in a manner consistent with Parties' international trade obligations.

[This is especially true concerning social aspects.]

Revised GPA: WTO Symposium 2015

SESSION 3: Ensuring the continuing relevance of the GPA: the New Work Programmes of the GPA Committee and related policy considerations

Chair: Mr Antony Taubman, Director, Intellectual Property Division, WTO Secretariat

📅 Thursday, 17 September, 14.30-16.30

▼ [More](#)

14.30 Chairman's introductory remarks

Revised GPA / Work Programmes III

Dispatch of the Swiss Federal Council on the ratification of the revised GPA:

Working Programmes serve the purpose of finding a consensus between the members of the GPA on topics/areas where they couldn't agree when negotiating the revised GPA (2012) or where further clarification is needed. (Federal Gazette/BBI 2017 2071)

Revised GPA / Work Programmes IV

Dispatch of the Swiss Federal Council on the ratification of the revised GPA:

The implementation of the Working Programmes can lead at a later stage to another revision of the GPA or to recommendations which are inspired by good practice examples of the Member States.
(Federal Gazette/BBI 2017 2071)

Revised GPA / Work Programmes V

Prof. Hans Rudolf Trüeb:

“Bahnbrechende Erkenntnisse aus diesem Gremium sind nicht zu erwarten.” (Handbuch Verwaltungsrecht, S. 1026)

-> Groundbreaking discoveries cannot be expected from this this structure/body.

WTO is fundamentally challenged and needs to assure the relevance of the GPA

Silk road: In their report, the EU ambassadors wrote that China wanted to shape globalization to suit its own interests. “At the same time the initiative is pursuing domestic political goals like the reduction of surplus capacity, the creation of new export markets and safeguarding access to raw materials,” it reads.

They warned that European companies could fail to clinch good contracts if China isn't pushed into adhering to the European principles of transparency in public procurement, as well as environmental and social standards. (Handelsblatt, 17th April 2018)

Revised GPA 2012 / WTO Symposium February 2017 on Sustainable Procurement I

Day 1, Wednesday, 22 February 2017, Afternoon

SESSION 3: How are sustainability measures in procurement processes practiced in a manner consistent with both the principle of "best-value for money" and international trade obligations?

Chair: Mr Robert Anderson, WTO Secretariat

Time	Subject	Speaker
14.30 - 14.50	3.1 SPP, best value for money and international trade obligations: the GPA as a model agreement	 Presentation

Revised GPA 2012 / WTO Symposium February 2017 on Sustainable Procurement II



WORLD TRADE
ORGANIZATION

GPA/W/341

30 May 2017

(17-0000)

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Committee on Government Procurement

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

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

Report by the Secretariat

Bern, May 2018

What is SPP? Total cost of ownership? Green public procurement? Including social aspects?

**Total cost of ownership
is more than the price
paid by a procuring
entity.
Best price-quality ratio
<> lowest price.**

**Coffee which has
been unfairly
marketed leaves a
sour taste (CJEU).**

**GPP:
Not each award criterion
... used to identify the
most advantageous
tender must necessarily
be of a purely economic
nature (CJEU).**

Bern becomes a “fair trade town”

14 February 2017: Bern, the capital of Switzerland, gets the label “fair trade town”. Accordingly a Bernese politician would argue that social award criteria should be endorsed during the ongoing reform of the Swiss public procurement law. Classical WTO-lawyers hate social aspects because of their potential to be abused as disguised protectionism. But these are local social aspects; influencing social conditions abroad (as a consumer) is different.

PPMs: There is more policy space within the GPA compared to “normal” WTO-law

Technical specifications – this was true already concerning Art. VI of the GPA 1994 – may include the characteristics of the products ... such as ... the processes and methods for their production ...

PPMs: There is more policy space within the GPA compared to “normal” WTO-law

Compared to classical WTO law this formula allows for more policy space; it's a *lex specialis* compared with the ordinary PPMs debate. Why? GPA doesn't deal with measures such as an import ban or a trade sanction in the general WTO context. The GPA is **not about regulating** private consumer choice but about public **consumer choice** itself.

Revised GPA and Sustainability Issues I

Art. X (6) revised GPA

on technical specifications:

For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.

Revised GPA and Sustainability Issues II

Art. X (9) revised GPA

on the tender documentation:

The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery.

Interplay GPA and EU Directives

The contracting authorities ... which apply [this Directive] ... should therefore be in conformity with the [Government Procurement] Agreement (Recital 7 Directive 2004/18/EC). -> **Framing and applying EU law is interpreting the GPA!**

EU: Green Paper COM(2011)15 final (I)

The **first** objective [of public procurement] is to increase the efficiency of public spending (**best value for money**; p. 4).

EU: Green Paper COM(2011)15 final (II)

Another **complementary** objective is to allow procurers to make better use of public procurement in support of common societal goals: These include protection of the environment ... and combating climate change, promoting innovation and social inclusion (p. 5).

Single Market Act COM(2011)206 final

Key action: Revised and modernised public procurement legislative framework, with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works (p. 19).

Swiss Approach on Award Criteria I

Art. 21 (1) FAPP: Contracts will be awarded for the economically most advantageous offer (“wirtschaftlich günstigstes Angebot”). In seeking the economically most advantageous offer, a number of criteria will be taken into account, particularly deadlines, quality, price, profitability, operating costs (“Betriebskosten”), customer service, expediency of the service, aesthetics, environmental impact aspects (“Umweltverträglichkeit”) and technical value.

Swiss Approach on Award Criteria II

Interestingly enough, the construction industry, engineers and architects back home complain about the focus of the procuring entities on price. Lesson learned: It is not enough to change the law, it's about procurement culture (“Vergabekultur”). There are no exact legal rules on the weighting of the award criteria; accordingly there are policy choices to make.

Swiss Approach on Award Criteria III

According to the press release of the Economic Affairs and Taxation Committee of the Swiss Parliament (National Council) of 28th March 2018 the focus on competition based on quality should be confirmed if not stressed even more when reframing the regulation on public procurement in Switzerland.

European Parliament Resolution “Modernisation of Public Procurement” (25 October 2011)

Takes the view that [...] the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender [...] taking into account the entire life-cycle costs of the relevant goods, services or works;

EP Resolution “Modernisation of Public Procurement” 25 October 2011

[...] stresses that this would not exclude the lowest price as a decisive criterion in the case of highly standardised goods or services; [...]; stresses that supporting the criterion of ‘maximum economic benefit’ would foster innovation and efforts to achieve the best quality and value, i.e. to comply with the requirements of the Europe 2020 strategy

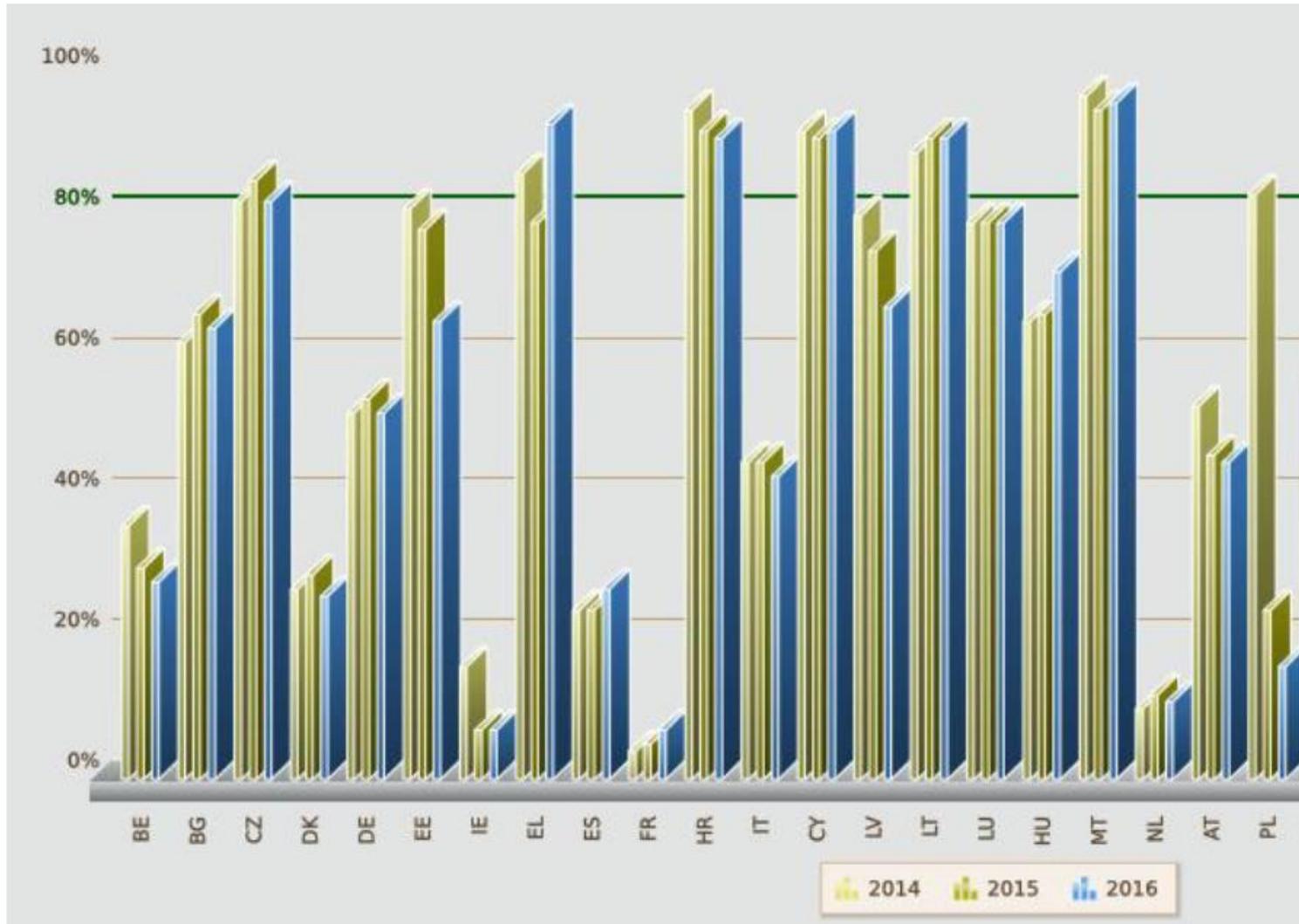
Directive 2014/24/EU – Award Criteria I

Thanks to the new criterion of the "most economically advantageous tender" (MEAT) in the award procedure, public authorities will be able to put more emphasis on quality, environmental considerations, social aspects or innovation while still taking into account the price and life-cycle-costs of what is procured. "The new criteria will put an end to the dictatorship of the lowest price and once again make quality the central issue," Mr Tarabella explained. (press release EP)

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

While the choice of criteria depends on what is being purchased, over-reliance on price suggests better criteria could have been used – and thus a better purchase made. The "Award Criteria" indicator measures the proportion of procedures which were awarded only on the basis of lowest price.

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



Directive 2014/24/EU – Philosophy I

Recital 2: Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. [...]

See also recital 17 on buying innovative goods.

Directive 2014/24/EU – Philosophy II

Recitals 47 and 95:

Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges.

Directive 2014/24/EU – Philosophy III

Recital 95: In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement.

Communication COM(2008) 400 final

Such a shift (to a greener economy) could also boost the competitiveness of European industry by stimulating innovation in eco-technologies – which have been recognised as a high-growth sector where Europe is already a world leader (p. 2).

Directive 2014/24/EU – Award Criteria II

Art. 67 / Recitals 89-92: “most economically advantageous tender” / “best price-quality ratio” / “social, environmental and innovative characteristics” / including factors involved “in the specific process of production”

Directive 2014/24/EU – Award Criteria III

Art. 67 / Recital 92: When assessing the best price-quality ratio contracting authorities should determine the economic and qualitative criteria **linked to the subject-matter of the contract** that they will use for that purpose.

Directive 2014/24/EU – Award Criteria IV

In a ruling on the purchase of electricity, an award criterion relating to the amount of electricity produced from renewable sources **in excess** of the expected consumption of the contracting authority was ruled inadmissible, as it was not linked to the subject matter of the contract (C-448/01 EVN/Wienstrom).

Directive 2014/24/EU – Life-cycle costing

Art. 68:

Life-cycle costing shall .. cover parts or all of the following costs:

(b) costs imputed to environmental **externalities** linked to the product ... during its life cycle, provided their monetary value can be determined and verified; ... costs such as emissions of greenhouse gases ...

Environmental externalities in Switzerland

According to the dispatch of the Swiss Federal Council the award criterion “sustainability” will allow to cover environmental **externalities** linked to the product following the model of Art. 68 of the directive 2014/24/EU.

(Federal Gazette [BBI] 2017 1943)

GPA and secondary policies / Does a “purity principle” apply? I

According to the purity principle one purpose of public procurement regulation would be to establish a system that reduces as far as possible the insertion of non-economic criteria into the procurement process (definition by Sue Arrow-smith / Christopher McCrudden discussing the GPA).

GPA and secondary policies / Does a “purity principle” apply? II

Based on this “purity principle” it was logical to describe sustainability aspects as “vergabefremde Aspekte” (vergabefremd = unrelated to public procurement).

The new EU philosophy “strategic use of public procurement” takes now the opposite view. Public procurement serves the purpose to achieve EU sustainability goals.

Revised GPA – Rules on Award Criteria

Art. XV: [..] the entity shall make the award to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notices, has submitted

- a) the most advantageous tender; **or**
- b) where price is the sole criterion, the lowest price.

GPA 1994 – Basic Rule on Award Criteria (unchanged in revGPA 2012)

Given the objective of the GPA of laying down minimum standards to be applied, it has opted for flexibility and, in addition to allowing awards on price, also allows other criteria to be taken into account, provided they have been set out in the tender documentation (Peter Trepte).

GPA 1994 – Abnormally Low Tenders

One can realistically not expect from an international framework like the GPA a substantial contribution to the solution of the problem when discussing abnormally low tenders (Gerhard Kunnert), because the GPA is about minimum standards.

Conclusion on the interpretation of the GPA: GPA is setting minimum standards and not to be seen as a comprehensive procurement codification

The GPA as setting minimum standards is meant to be **compatible with different views on economic policy**; a strict "purity principle" would rather be a possible characteristic of a full fledged / comprehensive (national) regulation.

Peter Kunzlik on Neoliberalism and EU Public Procurement

Neoliberals: Public Procurement should not merely abolish restrictions on international access to public contract opportunities but should “neoliberalise” the public contracts market (Kunzlik, The Cambridge Yearbook of European Legal Studies, Vol. 15, p. 311). -> Neoliberals go for the “purity principle”.

A minimum of consistency as a precondition of further relevance of the GPA?

WTO, ILO, UNCTAD, UNEP etc. are subsystems of the same overarching system. This presupposes the idea of an at least to some extent coherent legal framework / world order. The GPA is not only about trade, but also on governance and to a certain extent on sustainability, without disregarding the core principles of the GPA (balance of interests).

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