

National Interest Analysis [2018] ATNIA 15

with attachment on consultation

Revised Agreement on Government Procurement

(Annex to the Protocol Amending the Agreement on Government Procurement,
adopted on 30 March 2012 (GPA/113))

[2018] ATNIF 34

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

Revised Agreement on Government Procurement

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Nature and timing of proposed treaty action

1. The proposed treaty action is for Australia to accede to the World Trade Organization (WTO) *Revised Agreement on Government Procurement*¹ (GPA) on the terms agreed between Australia and the parties to the GPA, as set out in the Decision of the Committee on Government Procurement of 17 October 2018 (GPA/CD/1), including its attachments (the Decision of the Committee).
2. Paragraph 2 of the Decision of the Committee provides that Australia shall submit its instrument of accession within 12 months (that is by 17 October 2019). The GPA shall enter into force for Australia on the 30th day following the deposit of its instrument of accession (Article XXII:2). Australia proposes to deposit its instrument of accession as soon as practicable following consideration by the Joint Standing Committee on Treaties (JSCOT) and once all implementing measures are in place.

Overview and national interest summary

3. Australia's accession to the GPA will provide legally binding rules for market access for Australian goods, service and construction suppliers to access the government procurement markets of GPA parties. The WTO estimates GPA parties' procurement markets to be worth over US\$1.7 trillion annually. The GPA was revised in 2014, which expanded the market access opportunities under the agreement by around an additional US\$80 billion to US\$100 billion annually², and brought changes that aligned the GPA more closely with Australian practices.
4. There are currently 47 parties to the GPA. Accession opens new opportunities in the European Union, Canada, European Free Trade Association states, Ukraine, New Zealand and Chinese Taipei where Australia does not currently have legally binding rules for procurement access, as well as any future GPA parties. In addition to opening new markets, the GPA would provide greater security and certainty for Australian firms against any future protectionist measures introduced by GPA parties.
5. In some instances, the GPA improves on Australia's government procurement outcomes from existing Free Trade Agreements (FTAs), such as broadening access under the Australia-United States FTA by including access to additional US states.

¹ Annex to the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012 (GPA/113).

² WTO estimate.

6. GPA accession would allow Australia to be involved in reviewing and negotiating accessions of prospective GPA parties to secure optimal outcomes for Australian suppliers in additional markets, and help shape the GPA in line with our national interests.
7. The consultation process has shown there is strong support within the business community for Australia's accession. Further information on the consultation process is provided in the Attachment on Consultation.

Reasons for Australia to take the proposed treaty action

The GPA provides significant market access opportunities for Australian businesses

8. Accession to the GPA will provide new opportunities for Australian businesses to bid for government procurement services contracts in countries with which Australia does not have existing FTA government procurement commitments, including:
 - a. Accounting, auditing and taxation services in the European Union, Norway, Switzerland, Chinese Taipei, Armenia, Iceland, Israel, Liechtenstein, Moldova, Montenegro, and Ukraine;
 - b. Management consulting services in the European Union, Norway, Switzerland, Chinese Taipei, Armenia, Iceland, Israel, Montenegro, and Ukraine;
 - c. Computer and related services in the European Union, Norway, Switzerland, Armenia, Hong Kong, Israel, Liechtenstein, Moldova, Montenegro, Norway, Switzerland and Ukraine;
 - d. Architectural engineering and other technical services in the European Union, Norway, Switzerland, Armenia, Iceland, Israel, Liechtenstein, Moldova, Montenegro, and Ukraine;
 - e. Telecommunication and related services in the European Union, Norway, Armenia, Hong Kong, Iceland, Israel, Liechtenstein, Moldova, and Ukraine;
 - f. Environmental protection services in Norway, Switzerland, Chinese Taipei, Armenia, Hong Kong, Iceland, Israel, Liechtenstein, Moldova, Montenegro and Ukraine;
 - g. Education services in Armenia, Israel, Moldova, and Ukraine;
 - h. Financial services in Armenia, Moldova and Montenegro;
 - i. Insurance and banking and investment services in the European Union, Hong Kong, Iceland, Israel, Liechtenstein, Norway and Switzerland;
 - j. Advertising services in Norway, Switzerland, Chinese Taipei, Armenia, Israel, Liechtenstein, Moldova, Montenegro, and Ukraine;
 - k. Health and social services in Armenia and Ukraine; and

1. Construction services to all GPA parties.
9. Australian suppliers will also gain new opportunities to bid for government procurement goods contracts, including in areas of Australia's export strengths, such as:
 - a. Construction and highway maintenance equipment;
 - b. Mining equipment and technology;
 - c. Agricultural machinery and equipment;
 - d. Water purification and sewage treatment equipment;
 - e. Environmental goods; and
 - f. Health and pharmaceutical supplies.

Membership of the GPA will continue to grow, opening up more markets

10. Accession to the GPA reinforces Australia's support for the multilateral trading system and the importance of trade rules. Australia's accession to the GPA demonstrates the commercially meaningful outcomes that the multilateral system can provide for our exporters.
11. Nine additional WTO members are seeking to accede to the GPA, including some with large government procurement markets that Australia does not have relevant agreements with, such as China and Russia. For example, China's total government procurement market is estimated to be worth up to US\$2.5 trillion (at around 20 per cent of China's GDP), with possible expected GPA coverage of up to US\$783 billion³.
12. Australia's accession to the GPA will ensure Australian firms are not at a competitive disadvantage relative to firms of GPA parties, and Australia will also have a greater opportunity to influence the terms of new GPA parties' accession, to support our national interest.

The GPA includes a range of exceptions to provide policy flexibility

13. The GPA contains exceptions ensuring governments are not prevented from taking actions considered necessary for the protection of essential security interests in relation to certain procurements, or from imposing measures necessary to address public policy objectives.
14. The GPA contains general exceptions according to which Parties are not prevented from taking measures necessary to protect public morals, order or safety; human, animal or plant life or health; the protection of intellectual property; or relating to goods or services

³ GDP is from World Bank National Accounts Data for 2017, with possible expected GPA coverage assumed to be up to 6.4 per cent.

provided by persons with disabilities, philanthropic institutions or prison labour (Article III).

15. The GPA specifies conditions under which Parties can apply technical specifications to promote and conserve natural resources or protect the environment (Article X:6). Goods for resale are not covered by the GPA (Article II:2). Unless expressly included by a party in its annex, the GPA also contains exceptions relating to the following procurements: land and immovable property, non-contractual agreements, fiscal agency or depositary services, public employment contracts, international aid, and procurements related to troop stationing and international organisations (Article II:3).
16. The GPA provides access to the legally-binding WTO dispute settlement mechanism for disputes brought by GPA parties.
17. Australia has negotiated specific exceptions from coverage in its offer, which are consistent with Australia's existing FTAs. There are also exceptions within Australia's offer for states and territories.
18. Examples of Australia's exceptions include:
 - a. any form of preference to benefit small and medium enterprises (SMEs)⁴;
 - b. measures for the health and welfare of Indigenous people;
 - c. measures for the economic and social advancement of Indigenous people;
 - d. protection of essential security, such as Defence materiel procurement, or defence services relating to support of military forces overseas or military systems and equipment;
 - e. health and welfare services;
 - f. plasma fractionation services;
 - g. government advertising services;
 - h. research and development services;
 - i. blood and blood-related products, including plasma derived products; and
 - j. each state and territory government has also nominated exceptions which are included in the terms of Australia's accession to the GPA to allow them to address specific sensitivities and largely continue with existing procurement arrangements. This includes motor vehicle exceptions for South Australia, Victoria, New South Wales and the Australian Capital Territory.

⁴ 'SMEs' is undefined in Australia's offer, which provides us with further flexibility in how we categorise SMEs and the application of the exception.

Australia's government procurement market will be compliant with GPA requirements

19. The Commonwealth Procurement Rules (CPRs) are a non-disallowable legislative instrument under the *Public Governance, Performance and Accountability Act 2013*. The CPRs have been amended over the past several years to bring the rules in line with international best practices and Australia's existing trade obligations.
20. The implementation of Australia's commitments in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) along with other minor domestic reforms to modernise the CPRs mean that Australian Government procurement practices will be GPA compliant from 1 January 2019.
21. Australia's government procurement system is based on principles of value for money, non-discrimination and competition. Australia's procurement market is already open to competition from foreign suppliers, including from all GPA parties. Accession to the GPA will not preclude Australia from having policy flexibility for particular interests, in line with Australia's existing government procurement practices.
22. All states and territories agreed to Australia's accession to the GPA. States and territories will also take necessary steps to ensure compliance with the obligations.

Obligations

23. The GPA consists of 22 Articles and associated schedules. The GPA includes obligations which are broadly consistent with obligations contained in Australia's existing FTA government procurement chapters. The GPA sets high quality standards for government procurement, reflecting the principles of non-discrimination (Article IV:1 and IV:2), transparency and procedural fairness (Article XVI).
24. For procurements covered by the GPA, it requires parties to follow world class procurement processes, providing increased transparency and certainty for business, and ensures that governments do not discriminate against foreign suppliers when assessing and awarding contracts.
25. The GPA requires that parties treat suppliers from other GPA parties no less favourably than their own domestic suppliers (known as the national treatment obligation: Article IV:1). Article IV:2 prohibits discrimination against local suppliers just because they are partly foreign owned or use foreign goods and/or services. Articles IX:3 and X:1 further prohibit creating specifications or procedures that create obstacles for foreign suppliers to compete for the contract.
26. Transparency is an important commitment in the GPA. The GPA includes obligations to promptly publish any laws, regulations, judicial decisions and other documents that affect covered procurement as well as a range of publication requirements around procurement notices (Article VI).
27. Another major feature of the GPA is that parties must generally use an open tendering procedure for contracts above a certain threshold to ensure that government procurement is open to all suppliers, unless specified exceptions apply (Articles IX:4 and XII:1). This is already standard practice in Australia but not necessarily in other countries.

28. For open tenders, the GPA:

- a. encourages all procuring entities to put information on their procurement system (including notices and tender documentation) online and make such information readily accessible to the public (Article VII:1), whilst certain procuring entities are obliged to make tenders available through electronic means (Article VII:1(a));
- b. encourages procuring entities to publish, as early as possible in the financial year, a notice outlining its future procurement plans (known in Australia as an Annual Procurement Plan) (Article VII:4);
- c. requires procuring entities to allow suppliers no less than 40 days to submit a tender, although this can be reduced to as low as 25 days if the tender process is conducted solely electronically, and to 10 days in a number of circumstances, including if the tender is both conducted electronically and relates to the purchase of commercial goods or services (Article XI:3-8); and
- d. requires procuring entities to limit any conditions for participation in a procurement to those that are essential to ensure the legal, financial, commercial and technical abilities of suppliers (Article VIII:1).

29. Parties may use selective tendering or limited tendering, but only in specific circumstances outlined in the GPA. Where a party uses selective tendering, certain procedural rules must be followed, and the system of pre-qualification must not create unnecessary obstacles to the participation of suppliers (Article IX:3-6).

30. A party may only use limited tendering in a narrow range of circumstances and only if limited tendering is not used to discriminate or avoid competition among suppliers. If a procuring entity uses limited tendering, it must publicly prepare a written report outlining the circumstances and conditions that justified the use of limited tendering (Article XIII).

31. The GPA requires that procuring entities conduct procurement in a manner that avoids conflict of interest and prevents corrupt practices.

32. The GPA provides access to the legally-binding WTO dispute settlement mechanism for disputes brought by GPA parties (Article XX). Additionally, each party must establish or designate at least one impartial administrative or judicial authority to hear challenges by suppliers in relation to procurements. This review procedure must be timely, non-discriminatory and effective (Article XVIII).

33. Australia's market access schedule of commitments lists the range of procurements and government entities that will be covered by the GPA for Australia. Australia's market access schedule is largely consistent with its existing FTA coverage.

34. Australia's procurement market is already open to competition from foreign suppliers, including from all GPA parties and these obligations are largely consistent with Australia's existing FTAs and procurement practices.

Implementation

35. Commonwealth procurement practices and legislation will be GPA compliant from 1 January 2019, including in light of amendments introduced to implement TPP-11.
36. Australian state and territory governments are currently largely compliant with GPA commitments, with minor changes to procurement rules required for implementation. Each state and territory supports Australia's accession to the GPA, and has indicated that they will take the necessary steps to ensure their procurement policies and procedures comply with the GPA commitments prior to binding treaty action being taken.
37. Some GPA parties will also amend their GPA Annexes in line with Australia's offer. These amendments will apply from the date of entry into force of the GPA for Australia.

Costs

38. The financial cost and regulation impact is expected to be neutral. The Office of Best Practice Regulation has confirmed that a Regulatory Impact Statement is not required.

Future treaty action

39. Article XXII:11 of the GPA provides that the parties may amend the Agreement. A decision to adopt an amendment and to submit it for acceptance by the parties shall be taken by consensus, which includes any amendments to Australia's terms of accession. Amendments enter into force upon acceptance by two-thirds of parties, either for all parties if the amendment does not alter rights and obligations or for those parties that have accepted it for all other amendments.
40. As a party to the GPA, the terms of accession submitted by prospective members will be subject to Australia's agreement, along with the other GPA parties.
41. Article XXII:14 provides that the GPA shall not apply as between any two parties where either party, at the time either party accepts or accedes to the GPA, does not consent to such application.

Withdrawal or denunciation

42. Article XXII:12 provides that any party may withdraw from the GPA. The withdrawal shall take effect upon the expiration of 60 days from the date the Director-General of the WTO receives written notice of the withdrawal.

Contact details

Goods and Government Procurement Section
Office of Trade Negotiations
Department of Foreign Affairs and Trade

ATTACHMENT ON CONSULTATION

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CONSULTATION

43. Public consultation and stakeholder engagement on Australia's accession to the World Trade Organization Agreement on Government Procurement (GPA) commenced with a call for public submissions as part of the 2014 announcement that Australia would work towards joining the GPA.
44. The Department of Foreign Affairs and Trade (DFAT) met with peak bodies and industry stakeholders and held a public consultation process to decide if there was a market access case to accede to the GPA. A list of stakeholders that provided feedback on Australia's accession to the GPA through consultation events, stakeholder meetings, and phone calls is set out below.
45. State and territory governments were consulted through the Trade and Investment Ministers Meeting, Senior Officials Trade and Investment Officials' Group (SOTIG) and Commonwealth-State-Territory Standing Committee on Treaties (SCOT) meetings. All states and territories provided written support for Australia's accession to the GPA.
46. Additionally DFAT, in conjunction with other government agencies, consulted widely with industry and other stakeholders in formulating Australia's final offer to accede to the GPA.
47. Civil society and industry groups provided the majority of GPA accession submissions, with peak bodies, industry associations and services institutes broadly supportive of Australia's accession to the GPA, highlighting its market access benefits. Particular interest has been shown in potential market access outcomes should China subsequently accede to the GPA.
48. A concern raised by civil society stakeholders was the need to retain current exemptions in Australia's existing government procurement system. Australia's final offer maintains existing exceptions, particularly for SMEs, defence, health and Indigenous procurement.
49. Overall, stakeholders in the public consultation process appreciated the benefits of accession to the GPA. Most stakeholders supported an accession to the GPA, noting opportunities to compete equally in government procurement markets of GPA members beyond existing free trade agreements as well as the elimination of discriminatory procurement that has previously made Australian suppliers ineligible to compete in some GPA parties.
50. Stakeholder engagement will continue after the formal accession to raise awareness of the GPA. This will ensure Australian government procuring entities at Commonwealth and state

and territory level are aware of their obligations under the GPA and Australian businesses are aware of government procurement opportunities.

51. DFAT will integrate GPA information into its existing international trade agreement information and advocacy program. DFAT will also continue to publish GPA information, outcomes and summary factsheets on its website upon Australia's formal accession, as well as following the accession of any new Members.

52. Stakeholder consultation list:

- a. Australian Capital Territory Government
- b. New South Wales Government
- c. Northern Territory Government
- d. Queensland Government
- e. South Australian Government
- f. Tasmanian Government
- g. Victorian Government
- h. Western Australian Government
- i. ANZ
- j. Association of Consulting Architects of Australia
- k. Australian Chamber of Commerce and Industry
- l. Australia China Businesses Council
- m. Australian Fair Trade Network
- n. Australian Forest Products Association
- o. Australian Industry Group
- p. Australian Manufacturing Workers' Union
- q. Australian Services Roundtable
- r. Australian Textile Mills Pty Ltd
- s. Brambles
- t. Business Council of Australia

- u. Chartered Institute of Purchasing and Supply Australia
- v. Cochlear
- w. Consult Australia
- x. CSL Limited
- y. Drummond and Kindred Pty Ltd
- z. European Australian Business Council
- aa. Export Council of Australia
- bb. Land Equity International
- cc. Law Council of Australia
- dd. Law Institute of Australia
- ee. Lend Lease
- ff. Media Entertainment and Arts Alliance
- gg. Optias
- hh. Professionals Australia
- ii. Recall
- jj. Telstra
- kk. Textiles, Clothing and Footwear Union of Australia