

trade hot topics

Public Procurement in the EPAs: Issues, Costs and Benefits for the ACP

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Background

Public procurement constitutes a major part of public expenditure in many African, Caribbean and Pacific (ACP) states as it typically includes expenditure on, among other things, transport and communications infrastructure, and construction of public works such as roads, schools and hospitals. The European Union is pushing for the inclusion of provisions on public procurement in its comprehensive Economic Partnership Agreements (EPAs) with ACP states. Such a procurement process is to be subjected to open competitive supply accounts for at least 10 per cent of GDP across the ACP group of states, and possibly more in some countries. This issue of Commonwealth Trade Hot Topics explores what the inclusion of public procurement entails, and what the associated costs and benefits are for the ACP.

Transparency or liberalisation?

In the debate about rules on public procurement in trade agreements a distinction is generally made between framework rules, or what is generally included under transparency, and liberalisation. In the Doha Development Agenda discussions on public procurement, developing countries were, for example, asked to consider the inclusion of transparency rules only, not liberalisation. The distinction between transparency and liberalisation

is relevant and useful in negotiating terms, but reality is rather more complicated.

Typical framework rules cover transparency and enforcement, while 'liberalisation' takes the form of commitments to provide national treatment. Transparency rules will include the provision of information on the laws, procedures and guidelines governing public contracts as well as information on individual calls for tender. Some frameworks, such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on public procurement, also place great emphasis on post contract award transparency as a means of ensuring those awarding contracts do so according to objective criteria. Framework rules usually provide a good measure of flexibility for procuring entities with the option of open, restricted or limited tendering procedures and general contract award criteria, such as the most economically advantageous bid rather than simply the lowest price. As the specification of a particular standard can favour local suppliers, there is generally also a requirement to use agreed international or performance standards rather than so called design standards, but generally with a let-out for cases in which there are no agreed international standards.

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Importantly, framework rules also often include provisions on enforcement. As central monitoring and enforcement is impossible given the many thousands of contracts awarded in the course of a year, bid challenge has emerged as a de facto norm for procurement. Bid challenge provides aggrieved bidders with access to reviews and remedies under the law or administrative rules of the host country of the purchasing entity.

Liberalisation tends to mean commitments to national treatment for specific categories of procurement that then precludes de jure preference for local or national suppliers. In developed countries and many developing countries de jure preference is the exception to the rule of de facto preference thanks to complex and opaque contract award procedures that only local suppliers understand, specifications designed so that only local suppliers can comply, or the use of discretion in the interpretation of contract award criteria to favour local suppliers. As 'transparency' rules address these distortions, framework or transparency rules can make markets more open and competitive.

For ACP states de jure preferences are generally more important than in developed economies, where de facto barriers are by far the more important. Thus commitments to national treatment in ACP and other developing countries could well have a more liberalising effect than in the developed economies such as the EU.

Coverage of agreements can specify both the procurement to be covered by national treatment, liberalisation commitments and transparency rules. Coverage is determined by schedules with positive or negative listing of entities covered and thresholds. The aim of thresholds, which are typically in the order of 130,000 Special Drawing Rights (SDR) for goods and services and 5 million SDR for construction, is to capture the most economically important contracts while exempting many smaller less significant contracts in order to reduce compliance costs. This, of course, invites contract splitting in order to avoid the disciplines in the various regimes. One important point with regard to coverage is that under the Agreement on Government Purchasing (GPA) as under the EPAs, coverage is determined by reciprocity-based, bilateral (or region-to-region) negotiations, which puts developing countries at a disadvantage in most cases because of the asymmetry in relations with developed economies.

Agreements can and do include provisions on special and differential treatment and technical assistance. The revised GPA of the World Trade Organization (WTO) includes scope for special and differential treatment in the form of exemptions from national treatment commitments for developing countries, but these also have to be negotiated bilaterally. Discussion on transparency in public procurement in the WTO in the late 1990s also showed a widespread recognition of the need for technical assistance to help some developing countries introduce consistent and open procurement procedures.

The emergence of de facto international norms?

Public procurement was explicitly excluded from the General Agreement on Tariffs and Trade (GATT) 1948 on the grounds of the high compliance costs and because GATT Contracting Parties wished to retain it as an instrument of industrial and employment policy. There are still no binding multilateral rules on public procurement, but the plurilateral Agreement on Government Procurement was adopted by developed-country WTO members in 1979 as part of the Tokyo Round, and strengthened to include sub-central procurement, utilities and stronger (bid challenge) enforcement in 1994 as part of the Uruguay Round. The GPA was originally signed only by OECD (Organisation for Economic Co-operation and Development) economies, although some developing countries such as India and Jamaica were involved in the negotiations. In the meantime there are 39 signatories to the GPA (including 27 from the EU) and eight – mainly transition – economies negotiating accession.

In addition to the GPA policy reform has taken place through regional and bilateral trade agreements. Indeed, genuine opening of EU national procurement markets did not begin until the 1990s when a raft of Directives was introduced as part of the single European market. It was this opening of markets within the EU that helped to facilitate advances in the GPA in 1994. Before the EU reforms of the 1990s there was no coverage of utilities, such as transport and energy, nor was there any agreement on effective enforcement measures.

During the 1990s there was also a codification of international best practice in the shape of the UNCITRAL Model Law on Government Procurement. This non-binding set of rules largely follows the same approach as the framework rules for the binding GPA. (See Table 1 for a comparison.) The UNCITRAL Model Law has been used by many

developing countries, including most of the ACP states, as the basis for national reform programmes initiated in the 1990s and early 2000s aimed at making procurement more open, competitive and economically efficient. But in many developing countries and LDCs (least developed countries), including ACP states, the reform process has lost momentum. Legal and institutional frameworks for modernisation of procurement practices have been put in place, but then not always fully implemented, especially at the sub-central government level. One question for ACP states, therefore, is whether trade agreements, such as the EPAs, have any benefit in providing momentum for or 'locking in' such domestic reform.

ACP governments are under no obligation as a result of the Cotonou Agreement to include procurement in the EPA negotiations. Nor is there likely to be any pressure from multilateral level following the removal of transparency in government procurement from the Doha Development Agenda at the Cancun WTO ministerial meeting in 2003. In the WTO Working Group on Transparency in Government Procurement (WGTGP) there was consensus on the benefits of transparency and openness in public procurement, but not on the need for binding rules on procurement in trade agreements.

But procurement rules are being pushed at the bilateral (or region-to-region) level, with both the European Union and the USA including provisions on procurement in the FTAs (free trade agreements) they negotiate. As each uses the GPA rules, these bilaterals are effectively extending GPA-type rules to more and more countries, including even developing and developed countries, such as Chile and Australia, which opposed the GPA on the grounds that it was too complex and not necessary.

Taken together these various agreements are progressively establishing de facto international norms for public procurement based on the UNCITRAL/GPA type framework rules with coverage and liberalisation commitments negotiated bilaterally.

Costs and benefits for the ACP

From an ACP point of view, the 'negotiating' costs of including procurement take a number of forms: (i) the cost of a potential loss of 'policy space' or the ability to use preferential purchasing to favour local suppliers; (ii) the compliance costs; and (iii) a possible impact on the balance of trade from a de facto opening of the national procurement market

by the adoption of transparency rules.

Economically speaking a reduced ability to discriminate in favour of national suppliers and increased imports from more foreign suppliers are, of course, to be seen as benefits if the former are less and the latter more efficient, in which case both are likely to result in lower costs and thus the more efficient use of public funds. There is a real economic cost of compliance, but if transparency rules similar to the EU-CARIFORUM text are included in other comprehensive EPAs, the costs would not be more than those that would be incurred in a full implementation of the UNCITRAL Model Law, something most ACP states have as a goal.

The benefits of including procurement in a comprehensive EPA are most likely to come from (i) the economic gains from more efficient procurement practices, and (ii) increased competition between national (or regional) suppliers. On the first, complex and opaque procurement practices raise costs and thus take resources that could otherwise be used for development. Open competitive tendering that seeks the most efficient supplier, regardless of nationality, is also likely to reduce costs. Greater transparency and effective enforcement of rules will also reduce corruption. The limited quantitative studies of procurement that have been carried out show that most of the economic gains flow from increased competition between national suppliers that leads to greater efficiency and reduced costs. In the case of ACP states limitations on supply capacity are likely to reduce such gains, although opening procurement markets within ACP regions could help increase the economic benefits, promote specialisation and hence strengthen the ability of regional suppliers to compete internationally. Most ACP states are unlikely to see gains in terms of a balance of trade. Cross-border supply is not very pronounced even among developed economies, and few ACP states have the ability to compete with EU suppliers on EU procurement markets, at least not without a partner in the European Union.

Table 1: Comparison of the GPA, CARIFORUM–EU EPA and UNCITRAL provisions

	1994 GPA	CARIFORUM–EC text	UNCITRAL Model Law
Coverage	Central government supplies – ve services + ve listing (130k SDR threshold), works –ve listing (5m SDR threshold) 'voluntary' on first sub-national level no local government Utilities and other entities supplies and services 400k SDR and works 5m SDR	Central government only for CARIFORUM, central, sub-central and public enterprise for the EU (but not some key utilities) Goods, services and works covered Thresholds; as per GPA 1994 for the EU; for CARIFORUM 150k for goods and services and 6.5m SDR for works	Central government only Goods, works and services No reference
National treatment commitments	National treatment and MFN (most favoured nation) determined by bilateral, reciprocity-based negotiations	Joint Committee may decide on purchases to be covered by national treatment commitment (Art 167 (3)) Best endeavours (non-binding) national treatment within CARIFORUM	Preference for national or local suppliers allowed but must be explicit
Transparency Post contract award transparency	Information to be provided on national procurement laws and rules Contracts to be advertised to facilitate international competition Information for unsuccessful bidders and statistics on who gets contracts	Provision of information sufficient to enable effective bids Information to be provide on request as to why bids were unsuccessful	All relevant laws, regulations and decisions must be published Individual procurement contracts to be advertised Guidelines on Application of UNCITRAL rules stress importance of post-contract transparency
Contract award procedures Contract award criteria	Option of open, restricted or single tendering Lowest price or most economically advantageous bid	Open, restricted or limited/ single tendering Lowest price or most advantageous bid based on previously determined criteria	Open tendering preferred, selective tendering possible but criteria for selection must be clearly set out Lowest-price or most advantageous bid based on previously determined criteria
Technical specifications	Use of international and performance standards preferred	Use of international and performance standards preferred	Specifications should not create an unnecessary obstacle to trade
Regulatory safeguard	Public interest exception (Art XXIII)	Government may decline to award a contract on national interest grounds	
Bid challenge	Bid challenge Independent review, interim remedies, but no contract suspension National interest waiver on contract suspension	Bid challenge (Art 179) Independent review with administrative or judicial body; effective, rapid interim measures	No reference
Technical co-operation	Non-binding technical assistance including help for developing country bidders (Art V 8-10)	Exchange of experience	
Special and differential treatment	Exclusions from national treatment (NT) negotiable for developing countries on balance of payments, development or industrial policy of regional preference grounds (Art V 1-7) Offsets negotiable for developing countries (Art XVI)	Exchange of experience No reference	

Source: compiled by the author from text of the various agreements

The EU–CARIFORUM model

As Table 1 shows, the EU–CARIFORUM text is essentially about transparency in procurement, with the rules that largely follow the UNCITRAL/GPA model. Publication of laws, regulations and judicial decisions on procurement is required (Art 168) and notice of contracts must be provided through a central point of information. There is flexibility on the form of contract award procedure, with open (Art 169), restricted (Arts 170 and 174) and limited (Arts 169(2) and 171) procedures being possible. As in the GPA this makes for greater flexibility and thus reduces costs, while at the same time increasing the discretionary scope for procuring entities. Post contract transparency is required (Art 171) and performance standards should be used if possible (Art 173). Coverage is, however, limited to central government procurement (Annex 6).

The EU–CARIFORUM text requires national treatment (Art 167(3)), but not yet. Liberalisation is dependent on decisions by the Joint CARIFORUM–EU Council. The agreement includes best endeavours wording on the opening of regional procurement markets in the ACP (Art 167(2)(a)), in line with the declaratory aim of the EPAs to promote ACP regional integration.

The enforcement provisions in the EU–CARIFORUM text could be said to be ‘GPA minus’. Transparent, timely, impartial and effective bid challenge must be provided as well as rapid interim measures to correct breaches in the agreement (Art 179). But flexibility in the agreement allows this to be done through existing judicial or administrative channels. Somewhat surprisingly perhaps there is little in the CARIFORUM text on special and differential treatment, even though the revised GPA includes increased scope for such measures. It must be remembered however, that special and differential treatment such as exemptions from commitments on national treatment for development purposes have to be negotiated under the GPA and are not a right. The EU–CARIFORUM text also has fairly limited provisions in Article 182 on technical assistance.

Issues for the ACP

To conclude, the ACP states now negotiating comprehensive EPAs with the European Union need to consider the following:

- Will inclusion of transparency rules in EPAs drive forward domestic reform and thus further the aim of more open and transparent procurement that almost all ACP states have declared as an objective?

- Do the economic benefits of reduced costs and more efficient supply outweigh the costs of compliance and the threat to schemes that use preferences for local suppliers as development instruments?
- Does signing up to transparency rules mean the EU ‘gets a foot in the door’ even if there is no immediate commitment to national treatment?
- Should the ACP not get ‘dragged into’ negotiations at all costs, or can participation in negotiations on procurement in the EPAs help ensure that the emerging de facto international norms adequately reflect development needs such as through lower compliance costs, exemptions for preferential purchasing that further genuine development objectives, and technical assistance?

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- 27 January 2009: ACP-EU High Level Political Meeting on EPAs, London, UK
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- 28-29 August 2008: Regional Dialogue on ACP-EU Fisheries Relations, held in Windhoek, Namibia
- 12-13 August 2008: Global Partnership for Development, held in New Delhi, India
- 4-5 August 2008: Business Implications of EPA Negotiations for the East African Community (EAC), held in Kigali, Rwanda
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- Stevens, C et al. (2009). The CARIFORUM and Pacific ACP Economic Partnership Agreements: Challenges Ahead?, Economic Paper No. 87, London: Commonwealth Secretariat.
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