

Is there an interplay between Sustainable Public Procurement and Corporate Social Responsibility?

Judge Marc Steiner,
Swiss Federal Administrative Court

Inspiration: CSR-Roundtable ILO/OECD/UNCTAD (November 19, 2014)



GPA 1994: Basic principles

The GPA affects secondary policies directed at supporting non-competitive domestic industries (Arrowsmith, Government Procurement in the WTO, p. 328)

Trade and Labour in the GPA context

Asking for respect of the ILO Core Labour Standards in the context of public purchasing is not the same as an import ban or a trade sanction in the general WTO context. It's not about regulating private consumer choice but about public consumer choice itself.

Trade and Labour in the Swiss context

If the subject-matter of the contract is a task to be performed abroad, the bidder has to ensure at least that the ILO Core Labour Standards are respected (Art. 7 of the Ordinance on Public Procurement; version of 18 November 2009; concerning the federal level). The same is foreseen on cantonal level.

Swiss finish (federal level; since 2010)

The procuring entity requires that subcontractors and suppliers also comply with the ILO Core Labour Standards. This is assured by a contractual transfer of this obligation from the bidder to important suppliers and subcontractors (Recommendations on Sustainable Procurement).

Art. 55 para. 4 directive 2014/24 EU

Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator

Art. 55 para. 4 directive 2014/24 EU

(a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2)

International environmental, social and labour law provisions listed in Annex X include the ILO Core Labour Standards.

Trade and Labour in the EU context

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

Secondary policies / purity principle

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: Setting of minimum standards or comprehensive procurement codification?

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 (only), also allows other criteria to be taken into account (Trepte, GPA, p. 1148, cf. also p. 1161 on the revision of the GPA).

GPA: Setting of minimum standards or comprehensive procurement codification?

The GPA 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 regulation.

Art. VIII GPA 1994 – Qualification of Suppliers

Art. VIII(b): Any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capacity to fulfil the contract in question.

Art. VIII GPA 1994 – Qualification of Suppliers

Art. VIII(h): Nothing in subparagraphs (a) through (g) shall preclude the exclusion of any supplier on grounds **such as** bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

Art. VIII GPA 2012 – Qualification of Suppliers

Art. VIII(4): Where there is supporting evidence, a Party, including its procuring entities, may exclude a supplier on grounds **such as:**

- (a) bankruptcy
 - (b) false declarations
- etc.

Summary on ILO Core Labour Standards

ILO Core Labour Standards – not to confuse with other ILO Conventions – can be seen as a possible minimum standard to be applied within the public procurement context. It will be interesting to see how far EU member states make use of the exclusion ground enshrined in Art. 55(4)(a) directive 2014/24/EU. No problem with the GPA.

Revised GPA / Environment I

Article X(6) of the revised Government Procurement Agreement reads as follows:
"A Party, including its procuring entities, may - for greater certainty -, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment."

Revised GPA / Environment II

According to Art. X(9) "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".

Revised GPA / Sustainability issues

The revised GPA is meant to be a clarification on taking into account the environmental performance of a product (technical specifications and award criteria). Social aspects as award criteria are still not mentioned (“constructive ambiguity”) and there is foreseen a work programme on Sustainable Public Procurement. EU Max Havelaar doctrine.

Interplay Sustainable Public Procurement (SPP) - CSR

Coherence of the legal framework (especially on public procurement), of the policies at EU and member states level as well as the awareness of public authorities when procuring are indispensable, if the supply chain management of enterprises (especially in terms of corporate social responsibility and the management of reputational risks) and consumption behavior in general should be influenced.

Interplay Sustainable Public Procurement (SPP) - CSR

There is a benchmark situation between public entities and private business when dealing with supply chain issues.

ILO Core Labour Standards and labels (for instance FSC for sustainable timber) are – if widely implemented in the public procurement context – possible standards to create a common standard, which reputational risk management can't ignore, even if it's not legally binding.

Summary

1. The regulation on public procurement gets more “sustainable”.
2. If the EU (or Switzerland) wants to move things when dealing with Corporate Social Responsibility, the public sector has to act as a model (policy coherence).
3. If the public sector acts as a model, a benchmark situation is created, which enterprises cannot disregard. Reputational risk management is key!
4. Scientific context: CSR-specialists should follow the latest developments in SPP and vice-versa.

Contact

Swiss Federal Administrative Court

Mr. Marc Steiner

CH-9023 St. Gallen

Switzerland

phone: +41 58 705 25 74

E-mail: marc.steiner@bvger.admin.ch