Government Procurement and Free Trade in the Americas

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January 1999
Occasional Paper 3

The Institute for the Integration of Latin America and the Caribbean (INTAL) and the Integration, Trade and Hemispheric Issues Division (ITD) of the Integration and Regional Programs Department of the IDB have organized a joint publication series:

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Inter-American Development Bank
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Institute for the Integration of Latin America and the Caribbean IDB-INTAL
Esmeralda 130, 16th y 17th Floors (1035) Buenos Aires, Argentina - http://www.iadb.org/intal
Integration, Trade and Hemispheric Issues Division
1300 New York Avenue, NW Washington, D.C. 20577 United States - http://www.iadb.org/int

Printed in Argentina

INTAL - ITD
Government Procurement and Free Trade in the Americas.
Buenos Aires, 1999. 28 pages.
Working Paper 3.
Available in pdf format at:
http://www.iadb.org/intal/pub and/or *http://www.iadb.org/int/pub*

I.S.B.N. 950-738-084-1

US$ 5.00

Cover design-Editing:
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Assistance:
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GOVERNMENT PROCUREMENT AND FREE TRADE IN THE AMERICAS

Jorge Claro de la Maza[1] **and Roberto Camblor**[2]

I. INTRODUCTION

Governments in many countries – at all levels of development – struggle with increasing budget deficits and soaring national debts. Over the last century, government spending, as a percentage of gross domestic product has tended to increase and with it has increased the range of services offered by governments and the volume of public procurement resulting from it. The growth in public procurement has been accompanied by a growth in public procurement legislation.

As the public sector grew, a need made itself to seek assistance form the private sector to provide public services on a contractual and sub-contractual basis. In various countries, especially those characterized by a civil law system, government contracts took on a peculiar nature, distinct from private contracts constituting a distinct legal category, separated form private contracts rules concerning contract formation, termination, settlement of disputes and other situations.

As public procurement grew in volume and value, so did its importance to employment and the national economy. In most countries, the early procurement laws were protective of domestic industry. At the same time, competition for public business grew among nationals in step with the growth of public expenditure devoted to procurement of goods and services. These laws recognized the right of nationals to be treated equally, to have equal access to public contracts. As a result, the standard method of procurement would consist in an advertised opportunity for all interested firms to bid for public contracts on auction basis.

The second part of the 20th century saw a trend towards increased international impact on national procurement systems. A main factor was the overall recognition that all countries benefit from free trade. Following World War II, countries failed to achieve their stated ambition of creating a global trade organization but managed to put together a General Agreement on Tariffs and Trade (GATT), under which major trading nations mutually agreed to abolish restrictions on trade. However, article III of the GATT explicitly excluded government procurement from the reach of its nondiscrimination principles.

It was not until 1979, when partners to GATT agreed on a special Government Procurement Agreement (GPA) that would facilitate access to each others' procurement markets extending the principles of nondiscrimination and transparency to the tendering procedures of specific government agencies. The GPA applied only to those contracting parties that signed it and it came to be restricted to industrialized nations with the United States, Europe and Japan leading the way. The scope of coverage was also limited and selective, being that it only covered goods and it only applied to the listed entities. As part of the Uruguay round, an improved and expanded

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Government Procurement Agreement (GPA) was reached in 1994, and entered into effect on January 1st, 1996, as a one of the plurilateral agreements under the World Trade Organization.

Coupled with free trade initiatives taken in the context of multilateral trade negotiations, regional integration schemes also came into effect in the second half of the 20th century. The European Economic Community (EEC) was the first to introduce specific directives on procurement, enacting a series of procedures to ensure transparency and non-discriminatory access to government contracts without replacing national procedures and practices.

In our Hemisphere, the North American Free Trade Agreement (NAFTA) introduced rules similar to those adopted inside the European Community, in the its Chapter 10. The Group of Three (between Mexico, Colombia and Venezuela) and Mexico's bilateral trade agreements with Bolivia and Costa Rica extended NAFTA type rules on government procurement to the signatory countries.

Procurement practices also evolved in the context of international financial institutions. The World Bank, the Inter-American Development Bank and other regional development banks have played an important role in shaping generally accepted principles for public procurement. These Banks have established detailed policies and procedures for procurement in connection with the projects funded by these institutions, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.

With the encouragement of leading international financing institutions, and with the interests of developing countries in mind, the United Nations Commission on International Trade Law (UNCITRAL) decided in 1986 to undertake work in the area of procurement. The work resulted in the adoption by the Commission of Model Law on Procurement of Goods, Construction and Services. The decision taken by UNCITRAL to formulate model legislation on procurement was taken in response to the fact that in a number of countries the existing legislation was inadequate or outdated. The Model Law has the dual purpose of assisting countries in the need for improved public procurement legislation and for the overall purpose of helping remove unnecessary obstacles to international trade.

II. THE IMPORTANCE OF OPEN PROCUREMENT

In spite of current efforts worldwide to downsize governments, well known privatization efforts and an increased role of the private sector, in most countries the public sector carries out a fundamental role. Actually, because of the new structural changes that governments are experiencing through decentralization and outsourcing, and the need for new services in the social sectors, the total amount of public procurement as a percentage of public expenditures will tend to increase or at least remain the same in the future. Consequently, open procurement constitutes an issue of increasing significance in international economic relations due to its commercial importance and its implications for national, state or provincial and municipal governments.

Governments acquire large quantities of goods and services. According to the WTO, excluding defense-related goods, it is estimated that governments spend between 10 and 15 percent of their respective countries GNP, which means the world market for government procurement is well over US$1,000 billion annually. In Latin America and the Caribbean, for example, estimates for these figures show public procurement to be US$ 131 billion to 197 billion in 1996.

Because of its volume and value, public sector procurement represents a vital segment of the economy and an important element in the discussion of integration processes. In spite of this, until very recently, countries have practically excluded government procurement from trade liberalization processes, may these be bilateral, regional or multilateral.

As a result of "Buy National" legislation and other informal policies, governments have generally tended to give large contracts to national firms, awarding those contracts not only on the basis of price and quality, but on grounds of nationality as well. This had resulted in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure for public funds.

Government procurement, therefore, has been considered a non-tariff barrier to international trade. The elimination of these types of barriers to procurement contracts has various economic consequences, such as a more efficient allocation of resources through increased competition, higher quality procurement and budgetary savings to governments. In addition, efforts in this direction could translate in reduced opportunities for trade conflicts and better commercial relations among countries.

In some countries, significant proportions of public sector contracts are still awarded to domestic suppliers with little incentive for the domestic supplier to improve its competitiveness. The acquisition of goods and services through the use of effective purchasing systems can result in significant savings for governments and thus for taxpayers. Such considerations are all the more relevant in view of current efforts in many countries to reform the state and strong pressure to cut budget deficits.

There is of course many other, and perhaps less obvious, benefits derived from more open procurement policies. Fair, non-discriminatory and transparent procurement procedures render perpetration of fraud and corruption more difficult. And while transparent procedures are not sufficient in themselves to eradicate fraud and corruption, an effective and dissuasive system of monitoring, procedural checks and proportional penalties helps to protect against breaches of public trust.

III. INTERNATIONALLY ACCEPTED PUBLIC PROCUREMENT PRINCIPLES

In comparing the national procurement regimes in the Western Hemisphere and the international procurement regimes mentioned in the introduction we found that, in general, all systems seek to attain all or most of the following objectives:

- Economy
- Efficiency
- Transparency
- Non-discrimination
- Accountability
- Promotion of domestic industry and employment
- Other special objectives such as national security, regional development and social equity

Economy focuses on the price of the goods and services offered, in the first place, but can be expanded to include other criteria which affects the economic benefit to the contracting authority of the offer in question, such as cost of operation, performance and availability of parts and service.

Efficient public procurement implies a system, which operates in a timely manner, with a minimum of bureaucracy, while being responsive to the needs of the ultimate users of the goods or facilities procured.

A transparent system is one characterized by clear rules and by means to verify that those rules were followed. Means of verification are records, open to inspection by public auditors and to interested parties, such as unsuccessful bidders who wish to know the reason for their failure to win a contract.

Non-discrimination means that no undue restrictions are placed on participation in the competition of a particular contract. This does not prevent the procuring entity form insisting that participation be limited to qualified firms or form setting stringent standards with respect to the quality of the goods and services to be procured.

Accountability infers that those who carry out procurement on behalf of the state and other public bodies must be under an obligation to abide by the applicable regulations and must face the consequences -disciplinary or legal- of their failure to fulfil that obligation.

Public procurement is of great importance to domestic industry and employment. Procurement can be planned in such a way to facilitate the participation of domestic bidders, e.g. by adjusting contract sizes to prevailing capacity levels or by choosing a time that suits seasonal variations. Technical specifications can also -within limits set by economy and efficiency criteria- be adjusted to local contractors, manufacturers or service providers.

Other special policy objectives may call for special exceptions to formal public procurement procedures. National security may affect the procurement of defense related goods. Special regard for economic development in distressed areas or disadvantaged population often call for the adaptation of the normal procedure to facilitate participation of such entities.

Although all these objectives should work hand on hand, on the whole, some of these principles and objectives tend to collide with other policy objectives. For example the promotion of economy or efficiency taken to an extreme may collide with the very important objective of transparency and vice versa, and the promotion of domestic industry and employment usually collides with other policy objectives, primarily non-discrimination. It is very important that these objectives are well balanced setting up priorities for them, otherwise, over a longer perspective, the economic interest of the country concerned may be affected.

Governments and taxpayers want to see value for public funds spent on procurement of goods and services. Therefore, economy and efficiency are main objectives in public procurement at the national level. However, economy and efficiency are not as easily demonstrated in the public sector as in the private sector. Transparency, non-discrimination and public accountability are complementary objectives, which while supporting the overall economy and efficiency goals, can in some instances give rise to internal policy conflicts. The complementary objectives constitute and integral part of public procurement policy, however, primarily because a government owes a duty of transparency, accountability and non-discrimination to its constituency. Obligations towards other members of a trading community give additional incentives to pay to close attention to the complementary incentives such as those of transparency and non-discrimination. Therefore, public entities therefore find themselves, and sometimes reluctantly, obliged to give much more attention to the procedures, including openness and non-discrimination.

IV. NATIONAL PROCUREMENT LAWS AND INTERNATIONALLY AGREED PRINCIPLES

International agreements in the area of procurement do not constitute and are not meant to be a substitute for national procurement regulations but merely a set of rules designed to coordinate national rules. In fact, the existing agreements for the most part are new and contain general concepts. The fairly general nature of these concepts is a necessary consequence of the fact that they have to be applied in a wide variety of national situations and legal systems. These provisions generally deal with:

- Scope and elements of coverage
- information on bidding opportunities
- publication of invitations and awards
- eligibility and qualification requirements
- technical standards
- procurement procedures
- award criteria
- complaint procedures

In addition to the above mentioned provisions, national legislation generally deals with the organization and institutional aspects of procurement in a specific country and contain provisions on:

- Rules to safeguard the interest of the procuring entity, such as guarantees, price adjustment, etc.
- Authority to contract on behalf of the state and cooperative arrangements between public sector bodies.
- Preferences and local content requirements.
- Specific time limits to carry out the procurement process.

The overall purpose of the legislation would be to serve the country's interest in economy and efficiency while insisting on fair and open competition for contracts awarded by the public sector. Open tendering would be held out as the preferred method and essential features of this procedure would be laid down. Conditions for the use of other methods should be elaborated, based on the principle that arbitrariness and discrimination should be avoided.

The degree of detail in the legislation generally depends on the law-making style of the country concerned and the perceived need to provide procuring entities with detailed norms. The legislative level also varies depending on the legal traditions of the country concerned. In Latin America, basic principles are expressed in a law passed by the legislature, providing the executive branch of government with authority to issue detailed regulations by decree. Sometimes, authority is also given to a regulatory body designated in the law to provide information and explanations to procuring entities. In addition, countries might be under the obligation to satisfy certain requirements under an international agreement, such as the WTO

GPA or NAFTA, or to follow the guidelines of international financial institutions, such as the World Bank or the IDB.

The IDB, though its practice in Latin America and the Caribbean, has observed that national procurement legislation in a majority of the countries in the Western Hemisphere contain some type of national preference or other so called “access barriers”. We also observe that there are substantial procedural differences in the public procurement and commercial practices in most of the IDB's borrowing member countries. This, coupled with the use of different terminology, is one of the main sources of problems in procurement processes.

We find that in most countries, public procurement systems and the commercial practices in place remain behind the needs imposed by the opening of the economies of these same countries, and inconsistent with recent multilateral and regional agreements such as the WTO, GPA and NAFTA.

An example of this, is that among the integration arrangements in the region, currently, only NAFTA, the Group of Three Accord and the bilateral agreements of Mexico with Bolivia and Costa Rica contain provisions governing purchases by government entities. Consequently, of the 34 countries that would comprise the FTAA, only six countries have signed sub-regional or bilateral agreements of this type. Although the rest of the integration arrangements such as MERCOSUR, the Andean Group, the Central American Common Market and CARICOM are now contemplating the inclusion of government procurement provisions in their agreements in future negotiations, much remains to be done.

When a government procurement agreement is reached in the context of the FTAA, one of the biggest challenges will be the uniform and homogeneous application of the agreed rules among the different countries. Therefore, it will be necessary to ensure that the concepts concerned are interpreted in a way that is consistent with the policies and objectives to be achieved. In view of this, the interpretation and uniform interpretation and application will probably be one of the biggest challenges for the countries.

V. PUBLIC PROCUREMENT METHODS

National law, international trade agreements or rules mandated by international financing institutions usually prescribe open tendering as the preferred method for the procurement of goods, services and works by the government. In order to maximize economy, procurement entities need to make use of competition for each individual contract. Therefore, open tendering is the preferred procurement method. The preference for open tendering is supported also by other public procurement policy objectives. Openness helps eliminate tendencies towards favoritism and increased competition helps lower prices, all of which results in a more transparent process.

In this sense, the WTO GPA, Chapter 10 of NAFTA, The UNCITRAL Model Law and the World Bank and IDB procurement guidelines, all prescribe open tendering as the primary method of procurement of goods, services and works. The IDB, for example, prescribes international competitive bidding as the standard procedure to be applied under Bank loans. Nevertheless, the policies distinguish between international competitive bidding and national competitive bidding, which is used when the size of the contract falls below a specified threshold. However, in those situations where open tendering is for one reason or another not a suitable method an alternative method may be chosen which also makes use of competition, to the extent possible.

The advantages of full and open competition are well known. Competition provides incentives to contractors to maximize the value to the government with regard to price, quality and delivery terms, it also enhances the reality and perception to the public of the government's openness, fair-dealing and cost effective business practices.

The disadvantages of full and open competition are equally well known. Competition lengthens the time needed to award a contract, as it often requires the evaluation of numerous proposals and additional rounds of revised proposals. Further, in order to ensure that a competition for a contract is fair, it is necessary to provide for public review of the evaluation process, and consideration of protests against suspected unfair government practices.

There are, however, certain elements that serve to increase competition and transparency in open tendering procedures. These elements are:

Publicity: requires efficient means of bringing bidding opportunities to the knowledge of potential bidders and also providing those interested forms with sufficient time to prepare and submit their bids.

Qualification Criteria: requires criteria that do not discriminate against or eliminate any competitor on grounds that have no relevance to the contract in question.

Technical Specifications: they should ensure that they do not discriminate against any competitor or posing undue restrictions on the specifications of the product to be procured.

Evaluation Criteria: It should be specified in the bidding documents, allowing bidders to decide whether they want to participate and permitting them to adjust their offers to the procuring entity's requirements.

As we mentioned before, open tendering might not always be the most suitable method. In some cases restricted or selective tendering may be a more appropriate method, for example, when the complexity or specialized nature of a contract requires to only consider offers from firms with known and proven qualifications.

The WTO GPA, Chapter 10 of NAFTA, the World Bank and IDB guidelines, all acknowledge this selective tendering method. It should be stressed, however, that the same elements of open competition should be maintained in selective procedures as well. This can be accomplished by using prequalification methods for major, complex contracts. Previous registration or lists of approved suppliers can also be accepted as a prequalification method. However, close attention should be paid to make sure that these lists are periodically updated, that they are always open to all potential bidders and that registration requirements are not discriminatory.

When contracts are small in value, organizing a competitive bidding procedure can be time consuming and costly. Therefore most national and international systems in the Western Hemisphere recognize that under certain specified amounts more simplified methods should be used, such as the request for quotations. In the same way, when competition is non-existent or impractical most international systems also recognize limited tendering or direct contracting as a valid procurement method. The criteria these systems take into account to contract directly with a firm are:

- The absence of tenders in response to an advertisement.
- Situations where there is only one supplier of product in question.
- Product or prototype development or similar research and experiments
- Additional deliveries or works by the original supplier where the addition is small and the original contract was won under competition.
- Cases of extreme urgency, such as natural disasters, etc.

VI. OPEN TENDERING PROCEDURES

The typical open tendering process begins with the procurement planning, which is when the requirements are individualized, and the technical specifications, the criteria for qualification of bidders and evaluation of offers are defined. The process ends with the award of the contract and its eventual execution.

The contracting entity needs to consider the time limits for the submission of bids and the time required by the entity to carry out the different phases of the process. The procuring entity normally has to keep stringent requirements in relation to time limits, which are mandated by national law and regulations and/or international agreements. In international most bidding procedures, where bidders form a number of countries are eligible, the time limits for the preparation and submission of tenders are over 30 days and can go up to 90 days for the procurement of large works or complex items.

Publicity

A fundamental element of transparency in open tendering procedures is the publication of the invitation to tender. Procurement notices must enable vendors and suppliers to ascertain the procurement requirements of the purchaser with sufficient time to organize themselves so that they can submit appropriate tenders. Contract award notices should enable firms that have taken part in the tendering procedure to verify that their rights have not been infringed and provide useful information for analyzing market trends in different sectors.

The advantage (and sometimes the disadvantage) of a wide publication of invitations to tender is that it will attract many bidders for different countries. Most countries' legislation and international agreements specify the means of advertising invitations to tender, which in the case of most countries is the official gazette and a newspaper of major circulation. In the case of the IDB, the Bank requires that that a notice is published in at least one national newspaper, in the official gazette and also in Development Business, a United Nations publication.

The procurement notice should include sufficient information for a potential bidder to decide whether to participate or not. This information is generally the following:

- name of the procuring entity
- description of the goods
- date, time and place for obtaining tender documents
- value of the procurement
- place for the presentation of offers
- date, time and place for the public tender opening
- economic and technical requirements
- financial guarantees

In addition to the information mentioned above, the procurement notice should indicate any other important tender evaluation criteria, such as preference given to domestic suppliers or other general qualification requirements, such as minimum levels of experience, etc.

Receipt and opening of tenders

The procuring entity decides on the procedure governing the submission and receipt of bids, and shall give the bidders clear instructions about the procedure. Usually bids are accepted at the place and time specified in the tender documents and submitted in a sealed envelope. The place must be an accessible location and any bidder should be able to deliver the documents in hand to the procuring entity and obtain a receipt. Late tenders should be returned unopened to the bidder. It is recommendable that the procuring entity upon receipt of the bid envelope, registers it properly in a diary, stamps the envelope with the date and time of arrival, issues a receipt and puts the envelope unopened in safe storage.

Most national and international procurement regulations specify the tender opening procedure should be done publicly, allowing representatives of bidders to participate, and that minutes of the tender opening be prepared. Tender opening should take place immediately following the tender submission deadline. Besides form being very practical and time saving, it will spare the procuring entity any accusation of having accepted late tenders, or manipulated tenders received. Tender envelopes should be opened one at a time verifying that they are properly signed. There should also be a list of participants to document their attendance to the opening and the minutes should read in loud voice and signed by the participants. If there were any objections to the opening procedures, these should be duly documented and reflected in the minutes. During the tender opening procedure there should be no immediate rejection of any tender, except that the late submitted tender shall not be accepted.

Evaluation of Bids

The objective of the procurement process is to acquire goods and services that conform to the procuring entity's requirements and give the entity the best value for money. The purpose of the evaluation process is to obtain a ranking between tenders that reflects the procuring entity's priorities. This does not mean always mean that the tender with the lowest price should rank highest. In addition to the element of time there is usually a trade-off between quality and price. For this reason, at the IDB, we use the expression "lowest evaluated bid" to indicate the fact that not only price should be taken into consideration when evaluating a bid, but that the offer selected should be the one that is economically the most advantageous one. It is important the evaluation criteria are clearly defined in the bidding documents and that all specific data on which the valuation is based are included. Price is the simplest evaluation criterion and usually the one preferred where the quality, productivity and efficiency of the goods, services or works offered will not differ between tenders. However, there are different other considerations besides price when evaluating most offers, some of which are the following:

- Delivery schedule
- Timing of payments
- Operating and maintenance costs
- Economic lifetime of the good

The key rule to a proper evaluation is that only those factors specified in the tender documents may be considered, and only against the criteria specified in the tender documents. This underlies the need for carefully written specifications and clear and transparent criteria for evaluation. If the buyer finds during the examination and evaluation stage compelling reasons to introduce new criteria or modify the specifications, the tender process will have to be repeated.

Contract Award

In an open tendering procedure, the contract would normally be awarded, without negotiating the price, to the bidder whose tender has been evaluated as the most favorable. The procuring entity will inform the bidder that his tender has been accepted and will call the bidder in order to sign the contract. In practice, there is sometimes the need to make minor amendments. Some of these amendments may be of a technical nature and result form the clarification process during the evaluation of the bids. Other amendments may have to do with special commercial conditions, such as payment modalities or price adjustment formulas.

In the normal case, where no pre-contract negotiations are needed, the procedures to be performed by the procuring entity in connection with the contract award include: (i) notifying the bidder that his tender has been accepted; (ii) preparing the contract agreement and submitting it to the bidder for signing; (iii) checking that all effectiveness conditions have been met within the time period allowed; (iv) informing other bidders about the outcome of the tendering process and releasing the tender securities.

VII. BID CHALLENGE PROCEDURES

An essential element in the establishment of open and transparent procurement procedures and to ensure proper functioning of the procurement system and to promote confidence in that system, is a rapid and effective means to review acts, procedures and decisions of the procuring entity where bidders can submit their complaints during all phases of the procurement process.

In order for this system to be effective, the complaints should be reviewed by an authority or body genuinely independent and specialized with no interest in the outcome of the dispute, and having the power to require contracting entities to correct procedural errors. The aim of these institutions should not be the detection of errors, but the achievement of better procurement. Such authorities could play a key role in improving procurement processes, providing useful advice to contracting entities and checking procurement practices to promote efficiency.

Most international agreements have recognized the importance of this element in order to enforce the obligations derived form them. On of the main changes in the new WTO GPA, for example, is the provision of more extensive remedies than those available under the 1979 agreement. While the latter only provided challenge facilities to the signatory governments, the new agreement requires parties to "provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest" (Article XX: 2). The text of NAFTA's Charter 10 is more encompassing, providing that the parties are obliged to maintain bid challenge procedures concerning any aspect of the procurement process, which for the purpose of the Agreement begins after an entity has decided on its procurement requirement and continues through contract award. Each country is obliged to designate a body responsible for review the complaints brought against the entities. The powers to be given to review bodies under the NAFTA Agreement appear to be modeled on those given to the General Accounting Office under US national laws.

The UNCITRAL Model Law states that the right of review should be given in favor of any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to breach of a duty imposed o a contracting authority under the law. In this sense, the Model Law recognizes that in most countries' mechanisms and procedures for review of acts of administrative organs and other public entities already exist. However, it stresses the importance, when drafting procurement legislation, of providing for the right to an administrative review and eventually a judicial review. Along with this, the timely suspension of the procurement proceedings when a complaint is filed is another significant topic covered by the Model Law.

The timely suspension of the procurement proceedings is of crucial importance, given that in many countries with a civil law tradition, public procurement usually falls under administrative law. Administrative courts have traditionally held authority to decide on the legality of acts or decisions taken by public authorities. Under such authority, administrative courts occasionally invalidate contract and awards, without, however, such decisions having an effect on canceling the validity of the contract following that same award or ordering the suspension of the procurement action or the correction of error committed in the pre-award phase.

There seems to be, however, a general trend all over the world of offering increased access to remedies against breaches of procurement legislation. The bid protest mechanisms described in NAFTA's Chapter 10 seem to have spread to other agreements signed in the Western Hemisphere, such as Mexico's bilateral agreements with Bolivia and Costa Rica. At the same time, the European Union procurement directives have greatly reinforced national legislation of its member countries by the introduction of various appeal mechanisms.

VIII. POSSIBLE KEY ISSUES IN THE FTAA

Government Procurement is one of the few topics that do not have a WTO Agreement negotiation floor. The WTO Government Procurement Agreement is one of the so-called “plurilateral” agreements and, therefore, only applies to the countries that are signatories of the Agreement. In the Western Hemisphere only Canada and the United States have signed it. In spite of this, the WTO currently hosts a Working Group on Transparency in Government Procurement were most of the FTAA countries are participating. The Working Group was established "to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement".

The FTAA Negotiating Group on Government Procurement will have to pay close attention to the developments in this Working Group. Some FTAA countries, which have substantially open procurement systems where formal preferences are concerned, but whose systems could improve in the application of measures relating to transparency, could be opposed to such an agreement before the end of the FTAA negotiations. The rationale is that, since the negotiations are a single undertaking, the implementation of an agreement on transparency, without a simultaneous negation on market access, could create an unbalance in the negotiation process. There are, however, some “business facilitation” measures which FTAA countries could undertake without the risk of unbalancing the negotiation process. These could include transparency-related measures such as the publication on the Internet of bidding opportunities and procurement laws and regulations, as well as their amendments, or other transparency-related measures which do not imply a major change in the current procedures of the countries.

The Negotiating Group will also have to define the scope of the negotiations. This means that the Group will have to determine whether the negotiations will include all goods, services and works and it will also have to define over which thresholds will the future agreement apply. In addition, it will be necessary to define at what levels of the political and administrative structure will the new rules apply.

Electronic tendering

Present procurement information systems are cumbersome, technologically obsolete and inadequate to serve the needs of governments and suppliers. For the most part, current procurement systems in Latin America and the Caribbean are based on the use of traditional administrative practices and means of communication; it is mainly a paper-based system of notification, dissemination and tendering.

Today, thanks to technological advances in telecommunications and information systems, there is no need to continue working as we have had in the past. Now, procurement policies and procedures can be updated and benefit from the opportunities offered by the advances in information technology. In the short term, this could translate in the introduction of electronic notification of tender notices and the dissemination of information to suppliers. In the medium term, the use of computer systems and telecommunications will revolutionize the way in which the procurement process is carried out. An "electronic marketplace" could be developed in which

suppliers would list their products and prices in electronic catalogues, and contracting entities would compare prices and conditions and order electronically the best value item that meets their needs. The benefit will be that procurement will become more transparent, more open to dialogue with suppliers and much more efficient than any present system.

In the Hemisphere, Canada, Mexico and the U.S. already have electronic systems in place and other countries are contemplating this possibility. These countries may provide their experience and know-how in order to assist the less technologically advanced countries. All interested parties should cooperate to develop these information networks. Making these reforms in a coordinated way before they are carried out individually by each country would assure that the systems are technically compatible and thus interconnected with each other in order to reap the expected benefits of electronic tendering. The Negotiating Group will have to pay close attention to the developments in this area since they will certainly affect significantly the regulatory framework of public procurement. As with many new and exciting developments, there are opportunities as well as threats. The opportunities include greater access to public contracts. The threat could be that national systems that are incompatible with the new technologies could create in the future new trade barriers to government procurement.

Procurement data and statistics

There is currently very little information on procurement data and statistics in Latin America and the Caribbean, and data is collected in very diverse ways. Each country has its own system of gathering data and statistics and some countries do not even count with one. Therefore, another challenge for the FTAA Negotiating Group will be the standardization of gathering procedures and the creation of methods to quantify the significance of public contracts by collecting different types of information (amount and number of contracts awarded by public entities, type of award procedure, products bought, firms who have won the contract, etc.). To that end, action could be taken to create a network of databases and to encourage the establishment of description codes and standards forms and methodology that would facilitate electronic data interchange. The negotiating group will have to think about this topic not only for the purpose of the negotiation but in order to monitor the future compliance of the future agreement.

Corruption

The agreement signed at the Miami Summit which decided the creation of the FTAA was not only a compromise to create a Free Trade Area to promote prosperity through economic integration, but it was also a compromise to undertake other non-trade related goals. Among those goals are the strengthening of democracy, the promotion of cultural values, the promotion and protection of human rights, combating the problem of illegal drugs and combating corruption.

As stated by the 34 Presidents in their declaration of principles, "an effective democracy requires a comprehensive attack on corruption, which is a factor of social disintegration and distortion of the economic system that undermines the legitimacy of political institutions". In addition, the Plan of Action of the Miami Declaration provides that "Governments will give priority to strengthening government regulations and procurement utilizing the support of the IADB and other international financial institutions". An agreement on government procurement can be a

vehicle to attain some of those goals besides increasing the flow of trade among countries, particularly in the fight against corruption.

The countries of the Region, with the support of the Bank, have identified the modernization of the state and the consolidation of democratic rule supported by efficient, accountable, and participatory governments, as fundamental elements on the fight against corruption. The countries and the Bank have a rich history of work in this area, with positive experiences not only in the modernization of the State, but also in the development of civil society and adequate judicial systems.

It is our view that the elimination of corruption cannot be approached without making the necessary reforms in public procurement. Any and all of the instruments discussed before may be used as means to implement the necessary reforms. The impulse towards more open markets in the Western Hemisphere is an opportunity to start solving current problems and to reach an improved public administration as well as economic growth.

Differential treatment for smaller economies and lesser developed countries

Negotiations for a future agreement should also take into account the different stages of development among countries in the Hemisphere, as well as the size, importance and volume of trade. This may be carried out by a progressive application of their obligations, a phase-off period for the application of the stipulated thresholds, the negotiation of certain exclusions in coverage, and training and technical assistance. Provisions of this sort may serve less developed countries to adjust to the new rules and help them deal with the economic gap, which currently exists among the different countries in the Hemisphere.

IX. CONCLUSION

With the beginning of negotiations for a future regional agreement in public sector procurement, we believe that an opportunity presents itself today in the context of the FTAA to introduce some positive changes in this area. If a new agreement in public procurement represents new opportunities, it also represents a formidable challenge. New rules involve major efforts to adapt traditional ways of working. For contracting entities this means having to deal with new companies, often from another country. For suppliers this means an increased exposure to competition and the need to test new markets to remain internationally competitive. For the Governments of the Western Hemisphere the challenge is real. As major purchasers, they will have to follow new rules and be responsible for the transparency of the system. However, a political commitment for its implementation will be essential.

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