





Report to:  
**Heavy Engineering Research Association**

**International Literature Review:  
Government procurement Rules**

**HERA Report No R5-60:2016**

**May 2016**

Authors:

Konrad Hurren

Fiona Stokes

Hugh Dixon

Published by:

**New Zealand Heavy Engineering Research Association**  
**17-19 Gladding Place**  
**P O Box 76-134**  
**Manukau City**  
**New Zealand**

**Phone:** +64-9-262 2885  
**Facsimile:** +64-9-262 2856  
**Email :** info@hera.org.nz  
**Website:** www.hera.org.nz

**May 2016**

**Heavy Engineering Research Association (HERA)**  
**ISSN 0112-1758**

The New Zealand Heavy Engineering Research Association (HERA) is a non-profit research organisation dedicated to serving the needs of the metal-based industries in New Zealand. It is the national centre for steel construction, welding, metal fabrication and machining, and promotes the effective and efficient use of steel in structures.

HERA's work includes the sponsorship of research and development, the provision of educational, advisory and information services, the dissemination of technical knowledge to specifiers, fabricators and suppliers, participation in the activities of relevant national and international bodies and in the writing of standards and codes of practice.

### **Disclaimer**

Every effort has been made and all reasonable care taken to ensure the accuracy and reliability of the material contained herein. However, HERA and the authors of this report make no warrantee, guarantee or representation in connection with this report and shall not be held liable or responsible in any way and hereby disclaim any liability or responsibility for any loss or damage resulting from the use of this report.

### **Copyright**

No part of this report may be reproduced in any way, or by any means, without permission in writing from HERA.

# International Literature Review: Government Procurement Rules

May 2016

[www.berl.co.nz](http://www.berl.co.nz)



MAKING SENSE OF  
THE NUMBERS

This literature review was commissioned by HERA, the Heavy Engineering Research Association.

Authors: Konrad Hurren, Fiona Stokes and Hugh Dixon

All work is done, and services rendered at the request of, and for the purposes of the client only. Neither BERL nor any of its employees accepts any responsibility on any grounds whatsoever, including negligence, to any other person.

While every effort is made by BERL to ensure that the information, opinions and forecasts provided to the client are accurate and reliable, BERL shall not be liable for any adverse consequences of the client's decisions made in reliance of any report provided by BERL, nor shall BERL be held to have given or implied any warranty as to whether any report provided by BERL will assist in the performance of the client's functions.

## Making sense of the numbers

In New Zealand the purchase of goods or services by public sector entities is approximately 18 percent of our national Gross Domestic Product (GDP). The government has therefore established guidelines regarding procurement to assist public sector entities in their decision-making. These rules focus on balanced decision-making with an emphasis on social, environmental and economic considerations.

Balanced decision-making occurs throughout the procurement lifecycle, and the New Zealand government has identified eight stages within this lifecycle. These stages include: initiate project; identify needs and analyse the market; specify requirements; plan approach to market and evaluation; approach market and select supplier; negotiate and award contract; manage contract and relationships; review.

There are rules that must be followed – these are compulsory and non-compliance is a breach of the rules – and there are rules that should be followed – and these indicate good practice. These rules mainly focus on the process of sourcing, which is one part of the procurement lifecycle. Further, New Zealand government procurement is guided by our commitments to free trade agreements and the WTO Agreement on Government Procurement.

Much of the theoretical economics literature on government procurement is concerned with trying to explain the prevalence of domestic bias or favouritism in procurement. This literature is concerned with domestic bias in procurement because from an economics point of view domestic bias is ‘harmful’. Freer trade is better trade and truly benevolent governments should not show favouritism towards domestic firms in their public procurement. The WTO Agreement on Government Procurement also aims to address domestic bias through mutually agreed open government procurement that promotes and encourages free trade.

This literature review focuses on three questions: how have other countries implemented the Government Procurement Rules as part of the World Trade Organisation Government Procurement Agreement (WTO GPA)? How do these approaches differ from New Zealand’s Government Procurement Rules? What aspects of these countries approaches could be implemented in New Zealand to strengthen our procurement rules?

The countries (or areas) we examine are the European Union, the United Kingdom and Ireland, the United States of America, Canada, Japan and South Korea. We also discuss the situation in Australia, as Australia has yet to ratify this agreement.

In each of the countries, open and restricted competition are principally used to identify suppliers and procure goods. Price and technical specifications also play a role in the selection process, and there is an emphasis within this process on transparency. These approaches are the same as in New Zealand.

Where differences exist they are in areas such as “Quality” or exemptions or exclusions. In Japan, a procuring entity can also consider the contributions that a supplier company makes to local events, charities and disasters as part of their decision-making. Also in Japan, and in the US, the procuring entity and the prospective supplier can engage in dialogue regarding specifications, costs and prices. Interestingly, the USA also exempts some states from the WTO GPA, and Canada and the USA exclude roadworks from their GPA commitments. We are not aware of any exemptions or exclusions in New Zealand.

In Australia, government procurement is governed by the Local Government Act 1989. This procurement process is similar to the open competitive models prescribed by the EU, the USA, and Canada. However, whenever practicable this Act gives preference to supplier firms from Australia and New Zealand. This is in contrast to the New Zealand government guidelines that focus on “Be Fair to All Suppliers”, and the WTO GPA.

Government procurement in Australia also states that whole-of-life costings must be taken into consideration rather than lowest price. This is similar to the situation in New Zealand where our guidelines encourage balanced decision-making and getting the “Best Deal for Everyone”, with a focus on the social, environmental and economic effects of the procurement decision. However, the guidelines do not provide direction or guidance on how to perform balanced decision-making to get the best deal for everyone, just that it should be considered as part of procurement and whole-of-life costings. Further, this emphasis on balanced decision-making is not as obvious in procurement guidelines of other governments that we have examined in this review.

What aspects of these countries approaches could be implemented in New Zealand to strengthen our procurement rules? Based on our readings, New Zealand could strengthen procurement rules in the area of evaluation techniques by specifying that if a method other than “lowest price” is to be used to evaluate bids, then an independent audit of the decision is to be carried out. This is in line with the transparency requirements of the GPA. Currently, the check on this process is done in New Zealand when a candidate elects to protest the bid through the Auditor General, Ombudsman, or the State Services Commission.

New Zealand’s policy on bid-protesting and other disputes is comprehensive and is, arguably, an area other countries could learn from. Though the State Services Commission takes on the role of watchman, New Zealand could create a body with the specific task of watching over procurement tenders and bidding processes if, somehow, the current provisions do not seem adequate.

## Contents

<b>1</b>	<b>Introduction .....</b>	<b>1</b>
<b>2</b>	<b>The theoretical literature .....</b>	<b>2</b>
2.1	Explaining favouritism towards domestic firms in public procurement .....	2
2.2	Domestic bias in public procurement is harmful .....	2
2.3	Public procurement as a method to correct market failure or distortions .....	4
2.4	Dissenting opinion: domestic bias in public procurement is optimal .....	4
<b>3</b>	<b>The empirical literature .....</b>	<b>5</b>
3.1	Has acceding to the WTO GPA opened government procurement sufficiently? .....	5
3.2	Domestic bias in public procurement is harmful .....	5
3.3	Engaging with SMEs .....	6
3.4	Social, environmental and economic effects: the triple bottom line .....	6
<b>4</b>	<b>Government procurement, taxation, accounting and other issues .....</b>	<b>8</b>
4.1	Foreign firms and tax under GPA .....	8
4.2	Accounting .....	8
4.3	Tax considerations .....	9
<b>5</b>	<b>The implementation of the rules in some member countries .....</b>	<b>10</b>
5.1	The European Union .....	10
5.2	USA .....	11
5.3	Canada .....	12
5.4	Japan .....	13
5.5	South Korea and its attempts to open procurement markets using FTAs .....	14
5.6	Australia .....	15
5.7	International disputes settlement .....	16
<b>6</b>	<b>Implementation in New Zealand .....</b>	<b>18</b>
6.1	Procurement approaches .....	18
6.2	New Zealand Government Procurement Guidelines .....	18
6.3	Comparing other countries and New Zealand .....	20
6.4	Concluding thoughts .....	21
	<b>Appendix A   References .....</b>	<b>23</b>

# 1 Introduction

The WTO GPA is a plurilateral agreement between 45 members of the World Trade Organisation (28 of which comprise the EU – a single party to the agreement). Thirty members of the WTO also participate as observers to the agreement.

The agreement itself sets up initial rules requiring open, fair and transparent conditions for competitive government procurement. The rules do not specify which activities are covered under the agreement, these are decided by each country's coverage schedules. The coverage schedules are agreed to upon the country acceding to the agreement.

This literature review addresses three main questions:

- How have other countries implemented the Government Procurement Rules as part of the World Trade Organisation Government Procurement Agreement (WTO GPA)?
- How do these approaches differ from New Zealand's Government Procurement Rules?
- What aspects of these countries approaches could be implemented in New Zealand to strengthen our procurement rules?

The countries (or areas) considered that had literature available were: The European Union (EU), the United States of America (USA), Canada, Japan, the United Kingdom (UK) and Ireland. The UK and Ireland are a part of the EU and as such do not differ in their application of the general rules from the rest of the EU. However, some interesting applications of government procurement have arisen from these countries.

This literature review begins with an exploration into the theoretical justification of and the empirical evidence into domestic bias present in government procurement. It then discusses in Section 4 government procurement and taxation, where a sub-question is asked: "how do governments handle the taxation of income generated through firms contracting with foreign governments?". Section 5 discusses how the EU, the USA, Canada, Japan and South Korea implement government procurement rules as part of the WTO GPA, while our final section – Section 6 – discusses the situation in New Zealand.

## 2 The theoretical literature

Economists generally accept that domestic bias in public procurement is harmful. Most explanations rely on an argument that the government should be seeking to maximise the happiness of the population. The population cares only about the quality and price of the goods, not about their origin. If foreign goods are of a higher quality and lower price than domestic goods then they should be procured. This explanation is not satisfactory in most instances so some academics have attempted to explain it further.

### 2.1 Explaining favouritism towards domestic firms in public procurement

The theoretical literature in government procurement is mainly concerned with trying to explain the prevalence of favouritism in public procurement. Economists expect truly benevolent governments to not show favouritism to domestic firms. This is because they *should* be sufficiently concerned with the quality of the good or service and the benefits of this to people. Departures from this should only occur in theory, when the procuring entity is corrupt, or is otherwise not altruistic. Given the political sensitivity of trade in general, and lobbyists' preference for protectionist trade in particular, one would expect preference for domestic firms where the process is not transparent.

In academic literature on favouritism towards domestic firms, Laffont and Tirole (1991) use the (then prevailing) theory of auction design to derive conditions where a procuring entity (the 'agent' in their paper) will collude with a bidder preferentially. The mechanism that gives rise to favouritism in their model is a cost parameter that increases for foreign firms. This could be interpreted as political cost or perhaps a loss of government secrets.

In order to limit the effectiveness and incidence of collusion, Laffont and Tirole suggest the principle (in the case of government procurement this would be the central government, on behalf of the public) to require transparency either during the auction or *ex post*. This is in line with the general principles of the WTO GPA.

Breton and Salmon (1996) take a numeric approach; they consider that all contracts governments have with suppliers are incomplete. This is because some part of the performance is unverifiable to a third party. Under a set of assumptions regarding the shape of demand and supply curves, governments will discriminate against foreign suppliers when the "expected excess costs" of foreign suppliers are greater than local ones. These "expected excess costs" include political costs.

### 2.2 Domestic bias in public procurement is harmful

The *harm* caused by domestic bias in the eyes of economists comes from the inefficient allocation of resources. This only occurs if the government demand is large, no matter what the market structure is. Where government demand is small, domestic bias is unlikely to be harmful and may be optimal given the nature of the political economy.

Trionfetti (2000) considers two broad market structures to assess whether domestic bias in procurement is harmful: Constant Returns to Scale Perfect Competition (CRS PC) and Increasing Returns to Scale Monopolistic Competition (IRS MC).

Under the former there are many buyers and many sellers of the good/service and no firm can charge above the market price because all consumers will forego purchasing from that firm. Under the latter each firm has some room to set a different price to others. This is the most common market structure in real world applications and is often associated with product differentiation.

Firstly, in the case of CRS PC if the government demands more of a good than is produced domestically and has a domestic bias then factors of production at home shift to produce more of this good and imports of the good fall. This discriminatory policy changes the relative specialisation of the country to producing more of this good and reduces the volume of trade.

In the case of IRS MC it does not matter how large the government's demand is, domestic production will always shift and the volume of trade will always decrease. Trionfetti provides the following numerical example and explanation:

*To illustrate the logic of the argument, consider a sector characterised by IRS-MC, for instance, the electrical goods sector. Suppose that there are 50 domestic suppliers of electrical goods, a total of 100 suppliers in the world, and each supplier produces a different variety. It is well known that, in equilibrium, all varieties will have the same price. Let us normalise this price to \$1 per unit of output.*

*Suppose that the domestic government's demand is \$100 and the domestic private demand is \$400. Both buy all the 100 existing varieties in the world. Suppose that the demand of the private economy and the government in the foreign country are also \$400 and \$100 respectively.*

*Domestic producers face a demand of \$50 from the domestic government, a demand of \$200 from the domestic private sector, a demand of \$50 from the foreign government, and a demand of \$200 from the foreign private sector. That is, a total demand of \$500.*

*Suppose that the domestic government decides to purchase only domestic electric goods. Domestic producers now face a total demand of \$550. Notice that demand from private sources and from the foreign government remains the same, but the demand from the domestic government increased from \$50 to \$100.*

*Consequently, domestic supply will have to increase and foreign supply will have to decrease. In sum, regardless of the size of government demand with respect to domestic output, home biased procurement increases domestic output and reduces imports. (Trionfetti, 2000)*

Fujiwara and Long (2012) consider a dynamic game between foreign (F) and home (H) firms competing for procurement contracts by the government. In this dynamic game, the government is allowed to have a domestic bias and impose a tax on firms' profits. In addition, the foreign and home firms can lobby the government in order to win the contract.

The authors derive the steady state and dynamic equilibrium paths of each firms' profits. In the steady state, if government procurements are liberalised, and if the initial bias to the home firm is greater than the relative efficiency of the foreign firm, then both firms lobby more.

The equilibrium paths include lobbying expenditure, probability of winning the procurement contract, and how this changes when the bias towards domestic firms changes. The authors also consider welfare effects of liberalising trade.

Under the initial assumption that there is no trade, total welfare in the model is only the profit of the domestic firm. Liberalising public procurement and relaxing the domestic bias is shown to be beneficial to the home country when the gross profit of the foreign firm is sufficiently larger than the domestic firm. This condition implies that the foreign firm is large and efficient, while the domestic firm is not.

Interestingly, the authors conclude that only if the bias towards domestic firm is initially quite low then the country will benefit from trade liberalisation. This is because if the bias is very high then reducing it results in far more lobbying. Fujiwara and Long conclude that if the foreign firm is large and “good at what it does” then liberalising trade in public procurement is good for global welfare because it increases the profits to the foreign firm.

## 2.3 Public procurement as a method to correct market failure or distortions

A pragmatic reason for government domestic bias in public procurement is to correct a market failure or distortion by having a domestic firm bias.

Chen (1995) discusses public procurement as a correcting force for oligopolistic market structures. The author’s argument is that, in general, where a market exhibits oligopolist producers the output of this market in equilibrium will be less than socially optimal.

Chen considers a case where government procurement could be used to incentivise domestic production. The author does this by specifying that government procurement is positively related to a firm’s sales in the private sector. Each domestic firm receives public procurement orders increasing in proportion to their sales. The author derives the mathematical conditions at the equilibrium and finds that by adopting a policy to procure from domestic firms (who are oligopolists) the domestic firms have an incentive to increase production towards the competitive equilibrium level.

## 2.4 Dissenting opinion: domestic bias in public procurement is optimal

While there is almost unanimous agreement in the economics literature and academia that freer trade is better trade, our comprehensive literature search did turn up a paper with the opposite conclusion: Branco (1994). The author’s argument, at the simplest level, is that domestic profits are part of domestic welfare while foreign profits are not.

Branco (1994) tested this argument by setting up the problem as an auction run by the government with two bidders, a foreign firm and a domestic firm. The firms know their own costs but the government knows the distribution from which the costs are derived. This is quite a realistic set up; it is highly likely government analysts have some idea of where industry costs generally fall, but the firms themselves have almost perfect knowledge of project costs *ex ante*. The bias toward domestic firms and the justification for this is introduced through the welfare function, which does not contain foreign firms’ profits.

The author then considers the auction rules for when this bias might be optimal and finds it is when a sealed bid modified second price auction occurs. This is an auction where the winner of the auction is the bidder with the lowest price, but the price they are paid is the price of the second lowest bid. The modification enters in each bid as it is weighted by a domestic bias factor.

It should be noted that government procurement projects, if they are large, are unlikely to be decided on price alone. Branco (1994) does not consider non-price factors that are likely to be important in modern government procurement.

### 3 The empirical literature

This section of our literature review focuses on the empirical literature regarding the WTO GPA and procurement practises.

#### 3.1 Has acceding to the WTO GPA opened government procurement sufficiently?

The most recent attempt to assess the efficacy of the WTO GPA in removing trade barriers in government procurement has been Shingal (2011). The author uses data from Japan and Switzerland to analyse the effect of the WTO GPA in public procurement domestic bias in these countries. Only procurement of service contracts is included in the analysis, and the methodology employed was as follows:

- Two counterfactuals are created; one against time and the other against the private sector.
- In order to measure the degree of market access (or lack thereof) metrics are devised to measure the proportion of contracts that are awarded to foreigners and those awarded using non-limited tendering.
- Further metrics are devised to measure the unrealised foreign access over time and the evolution of foreign procurement over time.

The author describes how each metric changes as a result of the WTO GPA. Shingal concludes that for Japan and Switzerland acceding to the agreement has not resulted in any increase in, or even sustained, foreign access to the procurement markets for services.

Rickard and Kono (2014) took a different approach; they examined the elasticity of imports to government procurement spending. The hypothesis is that if the elasticity is zero, then the government is procuring no more than domestic agents are internationally. If it is negative, then the government is procuring less internationally so has a domestic bias. Rickard and Kono included 112 countries in their analysis, including all the WTO signatories.

Rickard and Kono's main finding is that the elasticity of imports to government procurement is indeed negative, and statistically significant. From this it can be concluded that even when countries are part of the WTO GPA they still have a domestic bias for government procurement.

#### 3.2 Domestic bias in public procurement is harmful

Trionfetti (2000) uses data from the EUROSTAT Input-Output Tables to calculate the relative proportions of private and public sector imports. The hypothesis is that if public imports are significantly less than private imports for various goods/services then there is domestic bias in government procurement.

The first major conclusion in the paper is that the private share of imports is overwhelmingly larger than the public share, indicating strong domestic bias for public procurement.<sup>1</sup> Next, the author reviews other empirical investigations into the harm of domestic bias whose findings are broadly consistent with those from the theoretical literature reviewed in Section 2.

---

<sup>1</sup> It should be noted here that the data used was collected during the time before the WTO GPA was in place.

In a 2009 policy brief, Hufbauer and Schott argue against America's "Buy American" policy in public procurement.<sup>2</sup> Hufbauer and Schott assert that the main argument in favour of domestic bias in public procurement is job creation. However, they argue that not only is this policy harmful to job growth but it harms America's reputation in international relations and *may* be breaking commitments under the GPA for the 37 states that acceded.

The authors cite a study done by Romer and Bernstein (2009) that calculated 9,000 jobs would be created in the manufacturing sector as a direct result of the "Buy American" policy.<sup>3</sup> To test this, Hufbauer and Schott considered jobs in the steel manufacturing sector, a very capital intensive rather than labour intensive sector, and calculated that the Buy American policy would result in an increase of 1,000 jobs. This sector employs 140,000 people, so the authors argue that the addition of 1,000 jobs is insignificant compared to rounding errors.

Their main argument against the policy is the possibility of retaliation policies by other countries. International trade is the quintessential example of a prisoner's dilemma game. Each country has a private incentive to erect trade barriers against their neighbours, who have none, so in equilibrium each nation has high trade barriers. It is better for both nations if they can agree to remove trade barriers by contract. By erecting the trade barrier of "Buy American" the USA's trading partners will respond with their own policy in a race to a beggar-thy-neighbour equilibrium. The authors calculate that in the worst case of retaliation 65,000 jobs will be lost.

### 3.3 Engaging with SMEs

It appears to be common practice in WTO GPA countries such as Canada, the United Kingdom, and the United States of America to suggest that large contracts are split into smaller packages to facilitate SME participation. However, there are a number of potential issues with splitting procurement into smaller chunks to allow SMEs to bid. For example, a rule that requires large contracts to be subdivided assumes that there exists a sufficient range of smaller firms to supply these services. In a small economy like New Zealand this will not always be the case.

Further, this type of activity could encourage cost-competitiveness, where there is a bidding down by firms to win the contract. This assumes that all SMEs are capable of supplying the goods and services in the same way and to the same scale as one large firm – essentially that many small firms are equivalent to (or substitutable to) one large firm. However, in reality not all firms are identical.

Some firms, usually large ones, may be able to harness efficiencies from scale and technology and add value to the process of supply that small firms cannot. Hence they may supply more benefits than cost, and this is why some countries have implemented rules such as the APQA noted in section 4.5.1.

The New Zealand government procurement guidelines therefore need to take careful consideration of this practice, as it should not be assumed that small contracts are better than bigger ones, and an inefficient allocation of resources may result.

### 3.4 Social, environmental and economic effects: the triple bottom line

Other than noting that consideration of the social, environment and economic effects is a requirement, our literature review has not specifically investigated how the evaluation of these effects is required to be undertaken by other countries.

---

<sup>2</sup> New Zealand had a similar drive in the private sector with the Green's campaign: "Buy kiwi, and we've got it made" which ended in 2009.

<sup>3</sup> Christina Romer and Jared Bernstein, "The Job Impact of the American Recovery and Reinvestment Plan," January 9, 2009.

This due to a paucity of evidence in regards to the Triple Bottom Line theme, where the Triple Bottom line is the consideration of social, environmental and economic effects in regards to procurement. Government procurement practices in Australia and New Zealand note this as a consideration, but there is no guidance on how this is to be implemented. Arguably, it is the role of government to provide direction rather than prescribe evaluation which would likely involve quite complex and burdensome requirements for firms.

## 4 Government procurement, taxation, accounting and other issues

This section of our literature review focuses on the literature regarding government procurement and taxation, where a sub-question is asked: “how do governments handle the taxation of income generated through firms contracting with foreign governments?”

The literature is largely silent on taxation of income from procurement by foreign governments from domestic firms. There is also no mention in the New Zealand International Accounting Standards on such procurement. This is unsurprising as foreign government procurement of goods and services should be treated as a normal transaction, and income earned taxed at the same rate as other income.

### 4.1 Foreign firms and tax under GPA

How do governments handle the taxation of income generated through firms contracting with foreign governments? The silence on this issue in the literature indicates that income generated from dealing with foreign governments is ordinary income for tax purposes. There do not appear to be any special considerations. Indeed, there is no good reason for a country to treat income from foreign governments to their firms as any different from any other foreign person(s) dealing with those firms.

### 4.2 Accounting

The International Accounting Standards (IAS) also fall silent on the issue of recognising transactions resulting from government procurement; so it appears that any dealings with foreign governments are equivalent to dealings with foreign person(s).<sup>4</sup>

In the UK the Cabinet Office has issued *Procurement Policy Note: Measures to Promote Tax Compliance Action Note 03/14 06 February 2014*. The key provision is that from 1 April 2013 onwards a supplier must state whether any of its tax returns submitted on or after 1 October 2012:

- has given rise to a criminal conviction for tax related offences which is unspent, or to a civil penalty for fraud or evasion; and/or
- has been found to be incorrect as a result of:
  - HMRC successfully challenging it under the new General Anti-Abuse Rule (GAAR) (contained in Part 5 of the Finance Act 2013) or the “Halifax” abuse principle; or
  - a tax authority in a jurisdiction in which the supplier is established successfully challenging it under any tax rules or legislation in any jurisdiction that have an effect equivalent or similar to the GAAR or the “Halifax” abuse principle; or
  - the failure of an avoidance scheme which the supplier was involved in and which was, or should have been, notified under the Disclosure of Tax Avoidance Scheme (DOTAS) or any equivalent or similar regime in any jurisdiction. This only applies in relation to a DOTAS scheme which a supplier has used in relation to its own tax return.

Another provision says that where a supplier declares that it has had an Occasion Of Non Compliance (“OONC”), the contracting department can, at its discretion, decide whether or not to exclude that supplier from the procurement process.

---

<sup>4</sup> Insofar as it does not constitute a government grant which is covered under IAS 20.

In reaching a judgement, Departments may take into account any mitigating factors provided as part of the supplier's response; for example measures that the supplier has implemented to ensure future tax compliance. However, it should be noted that if an OONC also falls within the mandatory exclusion criteria under the Regulations then the Authority will have no discretion.

In the USA the government passed The Tax Increase Prevention and Reconciliation Act Section 511 (g) provides that federal entities and state governments that make more than \$100m payments to government contractors withhold three percent from payments made to contractors in taxes. This can cause cash flow problems for contractors but does not affect foreign contractors engaged under the usual government procurement methods

Ireland allows for entities contracting with the government to charge Value Added Tax in accordance with VAT laws.

### 4.3 Tax considerations

There is a scarcity of evidence in regards to the tax benefits of local procurement. In procuring locally, the government receives taxation income from suppliers and employees. Arguably these are lost if suppliers go out of business through losing government procurement. Further, the government may need to allocate tax revenue to benefit payments for unemployed people following a supplier closing down.

The question often arises whether governments should factor taxation benefits into the procurement price. This is a complex area and there is a scarcity of evidence around it. In part this is because the topic is more a public policy issue than a procurement concept.

In a well-functioning economy a local supplier firm will find other opportunities to supply goods and services, if a government procures from a foreign firms. The supplier remains in business, continues to employ workers and there is no change to the tax revenue received by the government. If a government pays a higher price to a supplier than it can achieve from a foreign supplier, then it pays a subsidy to the local supplier. In a well-functioning market this subsidy distorts the behaviour of firms and creates inefficiencies in production. Governments should not interfere in markets unless there are well-understood reasons to do this. However, sometimes markets do not function well or they produce results that are not desirable. In such cases, if there are adverse consequences to sectors, regions and communities from local suppliers ceasing business, then there may be a role for the government to address them with a specific policy. Such policy, however, is not about procurement, although a result of implementing such policy may be continued procurement.

An example of a specific policy is government procurement of research and development services from local researchers through grant programmes. In this case the desirable result is increasing the capacity of local researchers which is not about local procurement, but is achieved by local procurement.

## 5 The implementation of the rules in some member countries

Information on the application of the principles and rules of the GPA has been found for five areas: the European Union (EU), the United States of America (USA), Canada, New Zealand and Japan.

This section of our report provides a description of how each area applies the agreements in the GPA. The EU, the USA, Canada and Japan are considered and compared to the policies of New Zealand. South Korea is provided as an example of a country that is part of the WTO GPA but is also using Free Trade Agreements (FTAs) to work with countries that have not acceded to be part of the WTO GPA. Finally, as an example of a member of the WTO not acceding to the GPA, Australia's policies are summarised.

### 5.1 The European Union

Transparency is at the heart of the GPA requirements. For the EU, this is achieved by Directive 2009/81/EC which requires that all procurement, which is subject to the detailed provisions of the Directive, must begin with the publication of some form of notice in the *Official Journal of the European Union, supplement S*.

The publication of these notices marks the beginning of the tender process.

The EU prescribes four types of tender that available to members under the GPA. These are:

- Open competition with price only
- Restrictive competition with price only
- Open competition using comprehensive evaluation
- Restrictive competition using comprehensive evaluation

Open and restrictive competition refers to the way the prospective tenderers are chosen. In open competition any supplier can make an offer. Under restrictive competition potential tenderers are chosen in advance by the procuring agency.

Price only and comprehensive evaluation<sup>5</sup> refer to how the winning tender is ultimately chosen. Under a price only rule the winning tender is simply that with the lowest price. Comprehensive evaluation, on the other hand, involves analysis of the technical specifications of the purchase and the needs of the buyer. These specifications can include whole of life costing, the requirement of certifications, or factors linked to the production process.

An innovation partnership is an agreement between a supplier and an entity to develop a new product or service. The prospective suppliers bid to enter into this relationship. Innovation partnerships are not a form of tender in themselves; however, an innovation partnership can be part of the four types of tenders listed above.

Procuring entities have complete discretion over which type of tender to choose when entering into the procurement process, and consultations between prospective suppliers and the procuring entity are encouraged.

---

<sup>5</sup> "Comprehensive evaluation" is not a term that is defined in any of the procurement literature but a number of the contributing academics use this term.

In technical projects the EU uses what they label a “competitive dialogue”. Article 29 of the European Parliament and Council Directive 2004/18/EC defines “competitive dialogue” as:

*[A] procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.*

### 5.1.1 Engaging with SMEs

It is a common complaint that allowing foreign companies to compete with national companies for government contracts can be disadvantageous for small to medium-sized enterprises (SMEs). The EU’s accession to the GPA does not provide any specific directive on SMEs, instead it is left up to the member states to enact their own laws as they see fit. Generally, states are supportive of SMEs in the area of government procurement.

In 2014, the UK’s Crown Commercial Service issued *A Brief Guide to the EU Public Contracts Directive*. This directive states that procuring entities are encouraged to break the procurement into smaller lots to “facilitate SME participation”. These rules are also available for all members of the EU.

### 5.1.2 Disputes resolution

Within the EU if a party to a tender feels they have been wronged they can appeal to one of the following:

- The Supreme Audit Office;
- The Local Accounting Chambers;
- The Managing Authorities, Intermediary Authorities, Intermediary Authorities of II Level (co-financed contracts);
- The President of Public Procurement Office (PPO), or
- The National Appeal Chamber.

The PPO checks the legality of the contract under the Act of 29 January 2004 - Public Procurement Law (PPL). This office can annul contracts.

## 5.2 USA

The USA employs two tendering options: full open competition and full open competition after exclusion. Generally, whichever tendering method is chosen, the USA’s directive under the GPA allows for negotiation between tenderers and the procuring entity throughout the tender process. This means back and forth dialogue between tenderers and the procuring entity with regard to specifications, costs, and prices is encouraged. Only in certain limited cases is a sealed bid auction used.

A procedure also exists whereby procuring entities can set the cost upfront and assess bids against this. A reasonable price is calculated using material costs and other market information, and bids are assessed based on whether or not they fall within some reasonable range of this.

The USA exempts some states from the WTO GPA. These states are currently Georgia, North Dakota, West Virginia and (while not a state, it is a federal controlled entity) Puerto Rico.

### 5.2.1 Engaging with SMEs

As in the EU, there is an avenue by which disgruntled suppliers may challenge the decision of the procuring entity at the end of the tender. In the USA the bidding process is held under the watchful eye of the Offices of the Inspector General (controlled by the president). A wronged supplier may also appeal to the General Accountability Office (the office responsible for public accounts).

### 5.2.2 Disputes resolution

In order to protect disadvantaged SMEs from giant foreign companies the procuring entity can choose to use open competition after exclusion. The Small Business Administration is allowed to enter into contracts with other agencies and subcontract to firms eligible for programme participation. The tender awarded is then based on other considerations than “most favourable offer”.

## 5.3 Canada

Similar to the USA, Canada employs two types of procurement tender: the competitive procurement process and a non-competitive process. In general the non-competitive tender is reserved for small procurements, emergency procurements and procurements for national security.

In order to evaluate a bid, Canadian procuring entities consider price and technical criteria separately. After all bids have been considered for their technical quality the procuring entity will consider price and select a winning bid based on overall value. In addition to this, there exists a Procurement Review Committee (PRC) to assess the socio-economic benefits of public purchases and award the tender to a contractor who does not offer the lowest price, if necessary.

### Provincial government

Prior to 2010 Canada exempted its provincial governments from the commitments of the WTO GPA. This was a response to concerns that American corporations would out-compete local ones on matters of procurement. In recent years this has reversed, all provincial government in Canada must follow the commitments of the WTO GPA.

Currently, there exists an agreement between the western provinces in Canada which covers procurement and requires corporations to have an office in these provinces in order to be awarded contracts. This, it is hoped, will increase investment in the area by international corporations seeking to obtain contracts. However, concerns have been raised that this agreement may be used to supersede the commitments under WTO GPA – this has yet to be seen.

Most Canadian provinces expressly exclude roadworks from their GPA commitments, as does the USA.

### 5.3.1 Engaging with SMEs

The Office of Small and Medium Enterprises (OSME) acts in a similar way to the USA’s Small Business Administration and helps SMEs enter into public procurement contracts. Public entities in Canada are encouraged to split potential contracts up to allow SMEs to access them, similarly to what happens in the EU.

### 5.3.2 Disputes resolution

Similar to the EU and USA's provisions for disgruntled suppliers, Canada has its own avenue for wronged suppliers to appeal a decision. Suppliers can raise concerns with the Office of the Procurement Ombudsman. Additionally, a supplier can appeal to:

- The Canadian International Trade Tribunal (CITT);
- The Competition Bureau; or
- The Contract Dispute Services.

## 5.4 Japan

Japan uses three types of procurement tender:

- Open competitive
- Designated competitive
- Non-competitive.

Open competitive tenders are open to all prospective suppliers, while designated competitive tenders are open tenders from a pre-specified list of suppliers. Similar to Canada, non-competitive tendering in Japan is allowed when the project is sufficiently small, is an emergency, is a matter of national security, or is a situation where competitive bidding might be disadvantageous.

An interesting feature of Japan's procurement process is that there is an upper limit beyond which no bid is considered. This limit is estimated before the tender process begins and an entity is precluded from contracting above this price. In a similar vein, there is an allowance for an entity to refuse a bid that is too low, out of considerations that it may be of poor quality or not fair.

### 5.4.1 The APQA, Public works legislation

The law in Japan governing procurement is the Order concerning Budget, Auditing and Accounting (the OBAA). It indicates that a price-only method is preferred for selecting successful tenders, and that comprehensive evaluation is only to be used under certain circumstances. If this is the case, an estimate is made after the successful candidate is chosen. This law requires the entity to estimate price "on the basis of the specifications and the design documents."

This price-only procurement method has been ruinous in procuring for public works as it has forced engineering and construction firms to compete much harder and led to dumping.<sup>6</sup> These requirements and directives have therefore been superseded by the Act for Promoting Quality Assurance in Public Works (APQA), which aims to address some of the shortcomings in the previous directives.

Under the APQA, comprehensive evaluation is used more often for public works than price-only competition. Included in the definition of "quality" in this case are such things as contributions to local events, charities and disaster measures.

---

<sup>6</sup> In January 2007, the Fair Trade Commission started an investigation and an analysis of the situation concerning unreasonably low bidding. See Koutori Teikakaku Nyusatsu De Sujuussha Chosa [The FTC Investigates Dozens of Enterprises for Unreasonable Low Bidding], Nihon Keizai Shimbun, Jan. 5, 2007 (Evening Ed.), at 18.

One of the fundamental parts of the APQA was the creation of a dialogue function between bidders and the procuring entity. The APQA allows the entity to provide feedback on the technical proposal of the bidder and to improve it before the date of the auction. This is similar to arrangements in other countries acceding to the GPA but, interestingly in Japan it is only for public works procurement.

The APQA has also resulted in changes to the method of estimating prices in public works procurement. Article 14 provides that a procuring entity “may cap estimates based on the results of its evaluations of proposals” in cases where it requests “technical proposals that involve advanced technologies.”

To oversee the bidding process for public works third party institutions like the Committee for the Oversight of Bidding have been set up. These committees generally consist of part-time members which include lawyers, scholars and journalists. The Committee is set up to oversee public works tenders that involve comprehensive evaluation and competitive tendering.

#### 5.4.2 Engaging with SMEs

Japan also has procurement policies in place that allow for certain projects to be awarded to SMEs through a designated tendering process. This is pursuant to the PAOA, the Public Agency Order Act.

#### 5.4.3 Disputes resolution

As far as bid protesting and avenues for disgruntled failed candidates the APQA is silent on any specific avenues for public works tenders. There is no monitoring scheme nor bid protest scheme.

In acceding to the Revised Agreement (GPA 2014) Japan created the Office for Government Procurement challenge system. This body works in a similar way to other disputes settlement bodies, it that it receives complaints and issues recommendations.

### 5.5 South Korea and its attempts to open procurement markets using FTAs

An interesting question is, “why should we accede to GPA, can’t we just enact Free Trade Agreements (FTAs) with countries with which we wish to trade?” South Korea provides an example of a country who is attempting to do both. It is a member of the WTO GPA but is also trying to open up further government procurement markets using FTAs.

In applying the GPA, South Korea does not stand out in any respect to other countries. Instead, an interesting feature of South Korean policy has been to open procurement markets using FTAs. This section will provide a brief outline of this issue. South Korea is currently attempting to open multiple government procurement markets with non-GPA members of the WTO using FTAs.

When it acceded to the GPA, South Korea enacted *The Act on Contracts in Which The State is a Party*. This Act is modelled after the GPA and limits South Korea’s flexibility in modifying the terms of the FTAs that it signs.

Yang (2010) has attempted to assess the degree of efficacy that South Korea’s FTAs have had in opening up procurement, in excess of what the GPA would have done. Yang summarises his finding thus:

*[w]hile there has been modest additional liberalization in the government procurement market through FTAs, this liberalization has been limited to goods and services procurement of the central government for the most part, and there has been no additional liberalization in the sub-central (regional) government and other government agencies. While the FTAs did open BOT concession markets for Korea, Chile, US and EU, it is not clear how significant these liberalizations actually were. In all, compared to the hopes placed early in Korea’s FTA negotiation history on using FTAs to open foreign government procurement markets, the results are disappointing.*

The author cites one reason the FTAs have failed to open public procurement markets significantly is that they are modelled after the GPA. There are many features of the GPA that are necessary for a plurilateral agreement, such as transparency and multiple governing and oversight bodies, that impose quite substantial inefficiencies in the case of a bilateral FTA. Moreover, as discussed in section 3, it is not clear that the GPA opens procurement markets substantially anyway.

Finally, Yang (2010) argues that there are considerable regulatory costs involved in modifying the FTAs requirements, and much of the time spent changing the content of the FTAs interferes with South Korea's commitments under the GPA through *The Act on Contracts in Which The State is a Party*.

So what can South Korea do and what could New Zealand learn from this situation? Yang (2010) offers the suggestion that South Korea could offer two types of agreements to potential trade partners: a standard GPA agreement with the typical provisions and thresholds, and a GPA-plus agreement.

The standard GPA agreement should be offered to non-GPA members and afford them the same status as GPA members. The GPA-plus agreement should contain the same provisions as the GPA but have non-negotiable thresholds and other terms, that way South Korea could offer these as a "take it or leave it" deal.

## 5.6 Australia

As an example of an important trading partner for New Zealand that has not acceded to the GPA, Australia is included here to form a counterfactual argument. Australia governs local government procurement using the Local Government Act 1989 (the Act).

### 5.6.1 Options for tender processes

Local Government Entities (LGEs) are to conduct public tenders. These are identical to the open competitive models prescribed by the EU, the USA, and Canada. However Section 186(6) provides that, whenever practicable, the LGE must give effective and substantial preference to contracts for the purchase of goods, machinery or material manufactured or produced in Australia and New Zealand.

Because Australia has not acceded to the WTO GPA it can provide, in the *Sustainable Procurement Practice Guidelines 2014*, for procuring entities to select tender candidates that meet sustainability requirements, and other similar requirements and accreditations. This is similar to the designated competitive tender process of Japan.

For central government procurements the same rules apply, except in the case where national security may be a concern.

In order to select a winner for procurement auctions the Guidelines prescribe whole of life costing is to be taken into consideration. Following the convention, we can describe Australia's winner selection process as comprehensive evaluation. It is more than just price concern and procuring entities are not obligated to accept the lowest price (The Act states this for LGEs).

### 5.6.2 Engaging with SMEs

Just as the above countries that acceded to the GPA ensure protection for SMEs, Australia affords protection to their SMEs without requiring exceptions and special subcontracting rules.

In order to ensure SMEs are included in government procurement, and to meet development goals, *the Sustainable Procurement Practice Guidelines* prescribe that the inclusion of SMEs should be a main goal.

For example, the Victorian Government Purchasing Board prescribes that for purchases between \$25,000 and \$150,000 three written quotes should be obtained as a minimum, and one quote of these quotes should be obtained from a small business, if it is appropriate.

Because it has not acceded to the GPA, Australia has no reason to require bid protesting mechanisms or supervising bodies for transactions under the GPA. Recourse is still available when a procuring entity has acted outside the commitments of the Act. This recourse is through the Courts and reviewed by the Auditor General.

On the surface Australia's arrangements function similarly to countries that have acceded to the GPA. The difference is that in not acceding, Australia has more discretion in prescribing domestic (or New Zealand) bias and more freedom to meet its obligations in FTAs with other countries (such as the USA). This works both ways however, and because Australia has not acceded Australian firms can be blocked from government procurement in other countries.<sup>7</sup>

## 5.7 International disputes settlement

Each country is required to set up its own disputes settlement mechanism by article XVIII of the revised GPA. This following discussion focuses on information that is published and publicly available and includes a description of the system in place for each country.

A Dispute Settlement Understanding exists under Article XX whereby a Dispute Settlement Body will handle disputes under the GPA. Article 2 of Annex 2 of the WTO agreement states:

*Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.*

The disputes settlement process embodies the philosophy of transparency and every dispute is catalogued on the WTO website. To date, there have been four disputes brought to the DSB under the GPA. An example of one that has been resolved and how it was resolved is:

### *Complaint by the European Communities*

*This request, dated 26 March 1997, is in respect of a procurement tender published by the Ministry of Transport (MoT) of Japan to purchase a multi-functional satellite for Air Traffic Management. The EC contends that the specifications in the tender were not neutral but referred explicitly to US specifications. This meant, the EC contends, that European bidders could effectively not participate in the tender. The EC alleges inconsistency of this tender with Annex 1 of Appendix 1 of Japan's commitments under the Government Procurement Agreement (GPA). The EC also alleges violations of Articles VI(3) and XII(2) of the GPA.*

### *Mutually agreed solution*

*On 31 July 1997, the EC notified the Secretariat that a mutually agreed solution had been reached with Japan in this dispute. On 19 February 1998, the two parties communicated the text of their agreement to the DSB.*

Sometimes disputes settlements are left to lapse; an example was a complaint brought by the European Communities on the USA. The EC contended that a law passed in 1995 that forbids Massachusetts from public procurement agreements with Myanmar was in breach of their commitments to the GPA.

---

<sup>7</sup> Ignoring the possibility of any FTAs Australia may have, and their commitments to government procurement.

This is the result:

*On 8 September 1998, the EC requested the establishment of a panel. At its meeting on 21 October 1998, the DSB established a panel. Japan reserved its third-party right. The DSB agreed that pursuant to Article 9.1 of the DSU, a single panel would examine this dispute together with WT/DS95. At the request of the complainants, dated 10 February 1999, the Panel agreed, pursuant to Article 12.12 of the DSU, to suspend the panel proceedings.*

*Withdrawal/termination*

*Since the panel was not requested to resume its work, pursuant to Article 12.12 of the DSU, the authority for establishment of the panel lapsed as of 11 February 2000.*

## 6 Implementation in New Zealand

This section of our literature review focuses on the approach taken in New Zealand to procurement, and how it differs or is the same as the countries that we have examined in the previous sections, namely the EU, the USA, the UK, Canada and Japan. We also discuss aspects of the approaches adopted by these countries that we could consider in New Zealand, or approaches that New Zealand takes that others could emulate.

### 6.1 Procurement approaches

Unlike the EU, Japan and Canada, New Zealand engages in only two approaches to procurement; direct procurement and open competitive procurement. Direct procurement is when a procuring entity approaches a single, preferred supplier while open procurement is, as the name suggests, an open competitive tendering process. The open competitive approach is preferred in the guidelines available to public entities.

Under open competitive procurement, the legislation allows for three options: Closed, Open and Multi Stage. Closed competitive procurement is similar to the designated competitive process of Japan: bidders are selected from a list of suitable suppliers. Open competitive is an invitation for all suppliers and interested parties. Multi Stage is a two-step process where first all interested suppliers compete in open competition and then a shortlist of suppliers are invited to provide a full tender.

When the direct approach is deemed appropriate the legislation also allows for three options: to buy directly from any suitable supplier, to buy from a pool of suppliers through a standing arrangement; and to buy selectively from a specific supplier. If the first option is chosen, the agency must demonstrate that the price is consistent with market rates. Further if the agency decides to buy from a specific supplier it needs to justify not using the open, competitive option for procuring.

New Zealand guidelines include provisions for an agency wishing to separate price from the procurement decision. Agencies are allowed to request two envelopes for each tender, one containing the price information and the other containing the response to the requirements.

Many different evaluation models are allowed for tenders. These range from the simplest form, lowest price, to a procedure called Brook's Law. This last procedure involves ranking the tender offers on quality only, then inviting the highest quality supplier to negotiate.

### 6.2 New Zealand Government Procurement Guidelines

Irrespective of whether the open or direct competitive approach is undertaken, the New Zealand Government has established five principles of government procurement and procurement guidelines for procuring goods or services by a public sector entity.<sup>8</sup> This is in recognition that government agencies buying goods and services from third-party suppliers and providers account for approximately 18 percent of New Zealand's GDP.<sup>9</sup> The guidelines also recognise that New Zealand has obligations as a signatory to the World Trade Organisation's Government Procurement Agreement and under our various Free Trade Agreements.

The five Principles of Government Procurement are: Plan and manage for great results; Be fair to all suppliers; Get the right supplier; Get the best deal for everyone; and Play by the rules.

---

<sup>8</sup>New Zealand Government procurement guidelines assist public entities covered by section 5 of the Public Audit Act 2001 with their procurement practises. These public entities include schools, State-Owned Enterprises, government departments, Crown Entities, and local authorities, as well as any subsidiaries or other controlled entities of the principal entity.

<sup>9</sup> MBIE. Government Rules of Sourcing. (<http://www.business.govt.nz/procurement/for-agencies/key-guidance-for-agencies/the-new-government-rules-of-sourcing/introduction>).

The New Zealand government procurement guidelines are focused on balanced decision-making that achieves the best value for money over the life of a good or service. In balanced decision-making all criteria in the evaluation are weighted equally and there is no preference. These weightings should be set before the decision-making takes place, and should be transparent to ensure balanced decision-making.

This technique is in contrast to a price approach, where the evaluation has a strong preference for price, and all other criteria sit below this in preference. As discussed earlier, Japan uses a price-only approach in procurement and Canada separates their evaluation of procurement bids into price and technical expertise. In Japan, Canada and the United States discussion is encouraged between the two parties throughout the procurement process.

In New Zealand, decision-making occurs within the procurement lifecycle, and the New Zealand government has identified eight stages within this lifecycle. These stages include: initiate project; identify needs and analyse the market; specify requirements; plan approach to market and evaluation; approach market and select supplier; negotiate and award contract; manage contract and relationships; and review.

This is where the New Zealand guidelines differ from those of the other countries examined in this literature review. In the guidelines, “Get the Best Deal for Everyone” emphasises getting the best value for money over the lifetime of the good or service but also considering the social, environmental and economic effects of this deal. These whole-of-life costs and effects include acquisition costs, cost of operation and maintenance, and disposal costs.<sup>10</sup> Best value for money therefore considers factors such as value for money, open and fair competition, accountability, risk management, and transparency.

### 6.2.1 Engaging with SMEs

The government procurement guidelines have a principle that procurement practise needs to “Be Fair to All Suppliers”, whereby New Zealand suppliers get a “full and fair” opportunity to compete, but the Government has to treat all suppliers equally, and make it easy for all suppliers to do business with the procurer, including small and large businesses.

As is common practice in government procurement in other countries, SMEs in New Zealand are somewhat protected by special allowances in the procurement guidelines. A procuring agency may split the procurement into chunks to allow SMEs to bid. An agency may also accept joint bids by SME suppliers.

### 6.2.2 Rule 22 subcontracting

The government procurement guidelines discuss how once a supplier has been awarded a contract, any subsequent subcontracting is not subject to the government rules of sourcing. This is different from the approach undertaken in the EU, the USA, the UK, Canada and Japan. We did not find any evidence of the application of this type of rule in these countries.

We would argue that the conditions for subcontracting, particularly if the procurement involves large subcontracts that could include local and international suppliers, should also be consistent with good procurement practice, as outlined in the Principles, Rules, or other procurement guidelines. The New Zealand government procurement guidelines should therefore consider this.

---

<sup>10</sup> Controller and Auditor-General. (2008). Procurement Guidance for Public Entities. Controller and Auditor-General: Wellington. ([www.oag.govt.nz/2008/procurement-guide](http://www.oag.govt.nz/2008/procurement-guide)).

### 6.2.3 Disputes resolution

Like the EU and the USA, New Zealand offers numerous avenues for a failed bidder to seek review. The Auditor General, State Services Commission and the Ombudsman can all conduct an investigation on behalf of the disgruntled supplier. Failing that, an independent review or investigation can be sought or the issue can be resolved in court.

## 6.3 Comparing other countries and New Zealand

### Options for tender processes

Different tender processes grant different degrees of flexibility to a procuring entity. A country needs to be careful in setting up tender procedures that they do not grant sufficient flexibility without due transparency or supervision. An example of this would be if an entity could, by choice of tender process as well as lack of supervision or checks and balances, choose to procure only from local suppliers. This may be the result of their own political views or corruption.

New Zealand guidelines permit two broad types of tender process: an open competitive approach and a direct approach. The USA and Canada also provide for two tender types which are broadly similar to New Zealand's arrangements. In contrast, Japan and the EU allow for many different tender processes and the potential candidates are chosen specifically. While these types of tender process can be useful, they are arguably the most open to abuse. Good procurement policy would include suitable checks and supervision over these processes. In Japan this is missing, while the EU achieves it through their PPO.

Recently, the literature on government procurement has begun to consider procurement as a driving force in innovation. The EU guidelines for government procurement allow for what they call an innovation partnership where prospective suppliers place bids to enter into an agreement with an entity to develop a new product or service.

This process is open to abuse where the costing information can be gamed at the *ex ante* bidding stage; however, if the focus is on quality this is outweighed by the gains in innovation for the public. This is an area where New Zealand could improve its procurement rules. So long as there is sufficient supervision and transparency in this process, this process could be beneficial to New Zealand without subverting the spirit or rules of the GPA.

### Evaluation techniques

As with many international trade issues, evaluation methods and transparency are a prisoner's dilemma type situation where it is always best for a country to not be transparent but if both countries could contract to be transparent both would be better off.

There is a balance to be struck between guiding entities to procure at the highest quality, as well as the benefits of the rigid, but transparent, price-only evaluation. Japan prefers to use a price-only method for all goods and services with the exception of public works, while the EU, Canada, the USA, and New Zealand all have varying degrees of a more nuanced evaluation model available.

The more nuanced evaluation model is also where the New Zealand government procurement guidelines differ from those of the other countries examined in this literature review. Our procurement rules focus on balanced decision-making with an emphasis on social, environmental and economic considerations. In the guidelines, "Get the Best Deal for Everyone" emphasises getting the best value for money over the lifetime of the good or service but also considering the social, environmental and economic effects of the deal. This is termed making balanced decisions.

Under the New Zealand government procurement guidelines there are rules that must be followed – these are compulsory and non-compliance is a breach of the Rules – and there are rules that should be followed – and these indicate good practice. Good practice is where the checks and balances of balance decision-making come into play in New Zealand.

New Zealand could therefore strengthen procurement rules in the area of evaluation techniques by specifying that if a method other than “lowest price” is to be used to evaluate bids, then an independent audit of the decision is to be carried out. This is in line with the transparency requirements of the GPA. Currently, the check on this process in New Zealand is done when a candidate elects to protest the bid through the Auditor General, Ombudsman, or the State Services Commission.

### **Bid-protesting or disputes**

Bid-protesting or disputes are at the heart of the issue of transparency, and are just as important as the avenues through which a disgruntled candidate can seek review or otherwise protest a bid. This process can be used in place of an overarching watchman or in conjunction with one. The USA and the EU provide for both a watchman (the EU’s PPO and the USA’s Inspector General) and a disputes process.

New Zealand’s policy on bid-protesting and other disputes is comprehensive and is, arguably, an area other countries could learn from. Though the State Services Commission takes on the role of watchman, New Zealand could create a body with the specific task of watching over procurement tenders and bidding processes if, somehow, the current provisions do not seem adequate.

In regards to government procurement rules, the supplier can complain to an agency if they believe the agency has not followed the Rules. This agency then must consider and respond promptly and impartially to the complaint. Suppliers also have the opportunity to be debriefed following a procurement, including unsuccessful suppliers.

### **Protecting and engaging SMEs**

An area of concern for any country in international trade is the politically sensitive topic of ensuring one’s local SMEs are not out-competed by large foreign companies. The most ideal trade agreements in the eyes of free trade purists would not contain provisions to protect any firm. However, each country provides essentially the same protection for their SMEs. This is the best New Zealand can currently do given the situation. If New Zealand does not protect its SMEs but its trading partners do, then we risk a poor deal.

### **Roadworks under GPA**

As mentioned, both Canada and the USA permit their provincial or state governments to exclude roadworks under their commitments to the GPA. To an economist it is best that as few barriers as possible are erected to trade. However, given that Canada and the USA exclude roadworks from their commitments under the GPA and New Zealand does not, this represents a potential area where New Zealand could be receiving a poor deal. The exclusion of roadworks seems a uniquely North American feature, this could be to protect themselves from each other given their geographical proximity.

## **6.4 Concluding thoughts**

In New Zealand the purchase of goods or services by public sector entities is approximately 18 percent of our national Gross Domestic Product (GDP). The government has therefore established guidelines regarding procurement to assist public sector entities in their decision-making. These rules focus on balanced decision-making.

In each of the countries we examined, open and restricted competition are principally used to identify suppliers and procure goods. Price and technical specifications also play a role in the selection process, and there is an emphasis within this process on transparency. These approaches are the same as in New Zealand.

Where differences exist it is in areas such as “Quality” or exemptions or exclusions. In Japan, a procuring entity can also consider the contributions that a supplier company makes to local events, charities and disasters as part of their decision-making. Also in Japan, and in the US, the procuring entity and the prospective supplier can engage in dialogue regarding specifications, costs and prices.

Interestingly, the USA also exempts some states from the WTO GPA, and Canada and the USA exclude roadworks from their GPA commitments. We are not aware of any exemptions or exclusions in New Zealand.

In Australia, government procurement is governed by the Local Government Act 1989. This procurement process is similar to the open competitive models prescribed by the EU, the USA, and Canada. However, whenever practicable this Act gives preference to supplier firms from Australia and New Zealand. This is in contrast to the New Zealand government guidelines that focus on “Be Fair to All Suppliers”, and the WTO GPA.

Government procurement in Australia also states that whole-of-life costings must be taken into consideration rather than lowest price. This is similar to the situation in New Zealand where our guidelines encourage “Get the Best Deal for Everyone”. In New Zealand, this guideline also focuses on the social, environmental and economic effects of the procurement decision, or balanced decision-making. However, the guidelines do not provide direction or guidance on how to perform balanced decision-making to get the best deal for everyone, just that it should be considered as part procurement and whole-of-life costings. Further, this emphasis on balanced decision-making is not as obvious in the other government procurement guidelines we have examined in this review.

What aspects of these countries approaches could be implemented in New Zealand to strengthen our procurement rules? Based on our readings, New Zealand could strengthen procurement rules in the area of evaluation techniques by specifying that if a method other than “lowest price” is to be used to evaluate bids, then an independent audit of the decision is to be carried out. This is in line with the transparency requirements of the GPA, although it is not a feature of any country’s policies. Currently, the check on this process is done when a candidate elects to protest the bid through the Auditor General, Ombudsman, or the State Services Commission.

New Zealand’s policy on bid-protesting and other disputes is comprehensive and is, arguably, an area other countries could learn from. Though the State Services Commission takes on the role of watchman, New Zealand could create a body with the specific task of watching over procurement tenders and bidding processes if, somehow, the current provisions do not seem adequate.

## Appendix A      References

- Anderson, R. D., Müller, A. C., Osei-Lah, K. P., De Leon, J., & Pelletier, P. (2011). Government procurement provisions in regional trade agreements. In S. Arrowsmith & R. D. Anderson (Eds.), *The WTO regime on government procurement* (pp. 561–656). Cambridge: Cambridge University Press.
- Anderson, R. D., Pelletier, P., Osei-Lah, K., & Müller, A. C. (2011). Assessing the value of future accessions to the WTO Agreement on Government Procurement (GPA): some new data sources, provisional estimates, and an evaluative framework for individual WTO members considering accession. *Provisional Estimates, and an Evaluative Framework for Individual WTO Members Considering Accession (October 6, 2011)*.
- Arrowsmith, S. (2003). Transparency in government procurement: The objectives of regulation and the boundaries of the World Trade Organization. *Journal of World Trade*, 37(2), 283-303.
- Arrowsmith, S., & Anderson, R. D. (Eds.). (2011). *The WTO regime on government procurement: challenge and reform*. Cambridge University Press.
- Branco, F. (1994). Favoring domestic firms in procurement contracts. *Journal of International Economics*, 37(1-2), 65-80.
- Breton, A., & Salmon, P. (1996). Are discriminatory procurement policies motivated by protectionism? *Kyklos*, 49(1), 47-68.
- Chen, Xiangqun (1995). 'Directing Government Procurement as an Incentive of Production.' *Journal of Economic Integration*, 10: 130-40.
- Collins, D. A. (2010). Revisiting Canada's Sub Central Coverage Under the WTO Agreement on Government Procurement. Available at SSRN 1629840.
- Controller and Auditor-General. (2008). Procurement Guidance for Public Entities. Controller and Auditor-General: Wellington. ([www.oag.govt.nz/2008/procurement-guide](http://www.oag.govt.nz/2008/procurement-guide)).
- Edler, J., & Georghiou, L. (2007). Public procurement and innovation—Resurrecting the demand side. *Research policy*, 36(7), 949-963
- Erridge, A., & Hennigan, S. (2006). Public procurement and social policy in Northern Ireland: the unemployment pilot project. G. Piga, G. and KV Thai (Eds.). *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing*, 280-303.
- Fujiwara, K., & Van Long, N. (2012). Welfare effects of reducing home bias in government procurements: A dynamic contest model. *Review of Development Economics*, 16(1), 137-147.
- Hufbauer, G. C., & Schott, J. J. (2009). Buy American: bad for jobs, worse for reputation. Peter G. Peterson Institute for International Economics.
- Treasury, H. M. S. (2007). Transforming government procurement. London: HM Treasury
- Kang, S. W. (2001). "Government Procurement Agreements and Telecommunication Business." *Journal of International Economic Studies*, 5 (2): 195-227.
- Kusunoki, S. (2006). Japan's Government Procurement Regimes for Public Works: A Comparative Introduction. *Brook. J. Int'l L.*, 32, 523.
- Laffont, J. J., & Tirole, J. (1991). Auction design and favouritism. *International Journal of Industrial Organization*, 9(1), 9-42.

Lamy, P. (2009). Overview of developments in the international trading environment. Annual report by the WTO Director-General. WT/TPR/OV/12 18 November 2009.

Lember, V., Kattel, R., & Kalvet, T. (2013). How Governments Support Innovation through Public Procurement. *Comparing Evidence from 11 Countries*.

LOCAL GOVERNMENT PROCUREMENT BEST PRACTICE GUIDELINE August 2008 Local Government Victoria Department of Planning and Community Development GPO Box 2392 MELBOURNE VIC 3001

McCrudden, C., & Gross, S. G. (2006). WTO government procurement rules and the local dynamics of procurement policies: a Malaysian case study. *European Journal of International Law*, 17(1), 151-185.

Ministry of Business Innovation and Employment. (2015). *World Trade Organization Agreement on Government Procurement: National Interest Analysis*. New Zealand.

Ministry of Business Innovation and Employment (2011) Mastering procurement A structured approach to strategic procurement. New Zealand.

Ministry of Business Innovation and Employment. (2015). *Guide to supplier feedback and complaints*. New Zealand.

Ministry of Business Innovation and Employment. (2015). Government Rules of Sourcing. (<http://www.business.govt.nz/procurement/for-agencies/key-guidance-for-agencies/the-new-government-rules-of-sourcing/introduction>).

Pereira, R. (2008). Withholding Taxes: Too Taxing on Government Procurement. *Pub. Cont. LJ*, 38, 451.

Rickard, S. J., & Kono, D. Y. (2014). Think globally, buy locally: International agreements and government procurement. *The Review of International Organizations*, 9(3), 333-352.

Rickard, S. J., & Kono, D. Y. (2014). Think globally, buy locally: International agreements and government procurement. *The Review of International Organizations*, 9(3), 333-352.

SEC, E. (2011). Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation.

Shingal, A. (2010). Services procurement under the WTO's Agreement on Government Procurement: Whither market access?

Trionfetti, F. (2000). Discriminatory public procurement and international trade. *The World Economy*, 23(1), 57-76.

Weichenrieder, A. J. (2001). Public procurement in the presence of capital taxation. *Regional Science and Urban Economics*, 31(2), 339-353.

World Trade Organization Agreement on Government Procurement: National Interest Analysis.

Yang, J. (2010). Korean free trade agreement negotiations in government procurement: results and policy suggestions. *Journal of Public Procurement*, 10(3), 335.