

When Legal Certainty matters less than a Deal: Procurement in International Administrations

Outline

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I. INTRODUCTION

Because of the legal status of the parties involved, public procurement is, from a legal perspective, a very unequal business. Yet, in many States, public procurement has been over time extensively regulated.

One of the effects of this regulation has been to restore a certain legal balance between the bidder or the supplier on the one hand (generally a private entity) and the public entity calling for tender. This has been achieved through more detailed requirements to ensure equal treatment and objectivity in the management of calls for tender and more effective means of appeal for bidders and contractors against decisions of the public authority.

This is probably not really the case in procurement by international organizations. International organization do not have the power of coercion of a State, but they seem to have an equally powerful instrument: their supra-nationality, their immunities of jurisdiction and execution and the inviolability of their premises and movable properties, which often means that they set the rules. This leads to the question whether bidders or international organizations are ready to forego a certain degree of legal certainty in order to strike a deal.

Many of you may be familiar with procurement and I must admit that our experience at the WTO in this field is much less extensive than that of my colleagues of WHO, UNHCR, UNDP or the European Space Agency. However, in this contribution; I would like to share with you some considerations we developed in relation to the current restructuring of the WTO procurement norms and policies. Needless to say, they may not be new and the solutions proposed may prove ineffective in practice.

These considerations relate to:

- (a) the substantive norms applicable to procurement by international organizations; and
- (b) dispute resolution;

which seems to be two key aspects differentiating international organizations' procurement from other forms of public procurement. Indeed, one must not forget that, ultimately, procurement is about procuring goods or services of a given quality at an acceptable price (which may not always be the lowest price), something lawyers often forget in their never-ending quest for the perfect contract.

¹ The views expressed in this document are purely personal and may not be attributed to or represent the opinion of the WTO, its members or its Secretariat

II. SUBSTANTIVE NORMS

A. PRELIMINARY REMARKS: IRRELEVANCE OF THE WTO GOVERNMENT PROCUREMENT AGREEMENT AND OF DOMESTIC PROCUREMENT RULES FOR INTERNATIONAL ORGANIZATIONS' CALLS FOR TENDER PROCEDURES

We at the WTO Secretariat often hear that we should comply with our own rules, i.e. the WTO Agreement on Government Procurement (GPA). Legally, however, the GPA only applies to WTO Members, only to those Members who have accepted it and only to agencies which these Members had identified as subject to the requirements of the GPA. It does not bind the WTO as an international organization. At best it creates some moral obligation to manage procurement in a manner consistent with the principles contained in the GPA, which are commonly agreed principles.

The same applies to domestic (i.e. for the WTO: most Swiss) norms. Even though parties may agree that their contractual relations be interpreted by reference to domestic laws, international organizations are generally not among the entities bound to comply with domestic procurement rules.

One consequence is that international organizations' calls for tenders are regulated only by the rules they designed and probably each international organization has its own set of norms, or variations on a common set of norms.

B. TOO MUCH DISCRETION IN TENDER PROCEDURES AND OVERLY PROTECTIVE PROVISIONS IN CONTRACTS MAY BE COUNTERPRODUCTIVE...

International organizations need enough bids in return to their calls for tender in order to have a chance to get the best services and prices or generally have an idea of the market. Private companies are often ready to accept from international organizations conditions they would not accept from other commercial partners, perhaps for reasons of prestige, perhaps because they can charge higher prices. Yet, if tender procedures are perceived as overly arbitrary or if the provisions of general conditions and contracts are seen as overly favouring the organization (e.g. in terms of responsibilities) or too demanding on the bidder (e.g. in terms of information or guarantees), a number of potential bidders will not participate, because the cost of bidding, in terms of expenses, work and disclosure efforts will outweigh the advantage of obtaining a contract.

Also, the selection of bidders is not always transparent and reasons for rejection of a bidder are not systematically given. Most time, decisions cannot be appealed by unsuccessful bidders. Lack of transparency may lead to forms of distrust by bidders.

Ultimately, if the conditions imposed by international organization are overly demanding, those deciding to bid may not be the most efficient in terms of costs and quality of services.

C. ... BUT INTERNATIONAL ORGANIZATIONS ARE NOT ALWAYS IN A POSITION OF STRENGTH IN PUBLIC PROCUREMENT

Sometimes, contracts designed by international organizations appear as significantly one-sided or very demanding on bidders, but not all international organizations can impose such rules. Medium or small-size organizations may have to go by the general conditions of the suppliers, unless they can join some existing purchasing structures. In situations of quasi monopoly, such as in office informatics, international organizations will generally have to accept the terms and conditions of the supplier.

D. THE IMPACT OF PRIVILEGES AND IMMUNITIES ON PROCUREMENT

Put crudely, privileges and immunities could be a way for international organizations to simply exempt themselves from their obligations or, at least, from obligations which they believe were not foreseen by the contract. It is sometimes perceived like this by outside observers.

However, in practice, such a possibility is very limited, due to the obligations of international organizations under international law and headquarters agreements. Abusing privileges and immunities would ruin relations with the host State and would promptly deprive the organization of any suppliers.

In fact, it seems that privileges and immunities have a limited impact on the decision of private companies to conclude a contract with an international organization or not. It is nevertheless possible that they factor immunities in their cost structure and that, as a result, international organizations end up paying more than a private client. One explanation for this may be that suppliers are already often used to situations similar to immunities of international organizations to the extent that they also conclude contracts where the parties agree to use arbitration, and the obligation to use arbitration in dispute settlement is probably one of the most conspicuous aspects of the impact of privileges and immunities in contracts.

III. DISPUTE SETTLEMENT

A. A CENTRAL ISSUE

Dispute settlement should be one of the first aspects of the contractual relation between contractors and international organizations to be addressed so as to rebalance legal relations between parties in procurement of international organizations, primarily because of the international organization's privileges and immunities.

B. "FORGET ABOUT BINDING DISPUTE RESOLUTION!": THE LIMITS OF ARBITRATION

Yet, strangely enough, bidders or contractors seem to pay limited attention to dispute settlement clauses in the negotiation of contracts. If experience at the WTO is any indication, the usual (standard) clause combining consultations and arbitration based on PCA models is generally accepted by bidders without a word. Sometimes, contractors will express preference for UNCITRAL arbitration rules over other procedures available, but the practical legal consequences of such choices are quite limited.

In fact, in case of dispute over the extent of their respective obligations, parties will generally favour consultations or conciliation, two relatively inexpensive means of settling disputes which can sometimes be quite profitable for contractors. Indeed, international organizations often have more to lose than the contractor, particularly in terms of image in the host country, in case of dispute. In a dispute, the contractor will almost all the time be seen as the victim, because of the perceived unbalance between the parties and the confusion in the public between "immunity" and "impunity". This generally leads international organizations to find financial or other forms of settlements, even when, had the parties gone to court, they would have probably prevailed.

The role of the host country is not to be neglected either in case of disagreement between the parties. In Switzerland, contractors who cannot obtain payment of goods or services can bring the matter before the Swiss Mission to UNOG, who will then write to the organisation concerned. This seemingly innocuous intervention is actually quite an effective procedure. Even though the

international organization is merely invited in diplomatic terms to solve the issue, it will generally be keen not to disrupt its good relations with the host State or be seen as an "ungrateful guest" or a "mauvais payeur" and will seek to solve the matter in a manner that may ultimately be more advantageous to the contractor than what it could have achieved through direct consultations or arbitration.

Contractors and international organizations also favour the inclusion in contracts of automatic or quasi-automatic sanctions which can be unilaterally triggered by one party or the other without the involvement of a third party, such as penalties or pre quantified damages applying in clearly defined circumstances and sometimes implemented through the non payment of invoices, or clauses allowing the discretionary imposition of monetary sanctions, such as bank guaranties.

In such a context, arbitration, with its often complex procedures, heavy appointment process and, mostly, its very high costs, appears largely redundant.

This said, arbitration seems to be currently the only generally accepted adjudicatory alternative to the recognition of the competence of domestic courts.² So, when drafting a procurement contract with an arbitration clause, two approaches may be followed:

(i) either the parties may decide to make arbitration so burdensome and costly that it will merely be an incentive for them to always settle through consultations. Three-persons arbitration clauses, clauses providing for prestigious appointing authorities such as the Chair of the ICJ or the Secretary-General of the Permanent Court of Arbitration, etc. raise the cost of arbitrations to such a level that they may be actually used only in very big contracts, where their cost will still be deemed proportionally acceptable; or

(ii) parties may try to lower the cost of arbitration to make its potential use more credible. This can be achieved, *inter alia*, through the choice of less prestigious appointing authorities and through the appointment of a single arbitrator. The single arbitrator approach is, however, more risky in terms of predictability of the outcome of the arbitration, since a single arbitrator may be more prone to procedural or factual errors and this approach lacks the moderating effect of a three person arbitration body on the content of awards.

The fact is, however, that for contracts below 100.000 CHF, the effect of an arbitration clause will be largely inexistent as the cost of any arbitration procedure would probably exceed the total value of the contract. This does not prevent the inclusion of arbitration clauses in most contracts, even when the total value of the deal does not exceed a few thousand francs. One explanation is the systematic use of general conditions by international organizations or contractors, which apply irrespective of the value of the contract. Another explanation could be the obligation often found in headquarters agreements with Switzerland that international organizations put in place a system of dispute resolution for disputes between the organization and private parties. An arbitration clause, even if it is *de facto* non operational, formally does the job for contract-related dispute.

This situation is unsatisfactory in light of the evolution of public opinions *vis-à-vis* international organizations and in light of the right to effective adjudication embodied in an increasing number of international texts, such as the European Convention on Human Rights, already regularly referred to in employment disputes.

C. TOWARDS AN INTERNATIONAL PROCUREMENT TRIBUNAL?

² It is not a complete alternative though, since it is generally recognized that arbitration may be contested in some specific circumstances before domestic courts.

The WTO Secretariat, some years ago, engaged in a reflection on the development of an adjudicatory system that would be outside the Swiss judicial system but would provide most of the advantages of a domestic court. The biggest challenge was to set up a structure that would not only be actually independent from the WTO but would also be perceived as independent by contractors and other private persons likely to use it against the WTO. It was found that such a system, even if it could be put in place as evidenced by internal administrative tribunals at the world Bank, the IMF or OECD, would be too expensive for a structure like the WTO. But it would have provided a pre-established adjudicative structure available at any time, which would avoid that private complaints against the organization be treated in a crisis mode, on an *ad hoc* basis. Such a structure could be shared by international organizations in Switzerland to reduce individual costs.

Another option could be to take advantage of an already existing and experienced jurisdiction, the ILO Administrative Tribunal which, pursuant to Article II.4 of its Statute, has competence to review disputes on contracts concluded by the ILO providing for its competence. Just as the jurisdiction of the Tribunal was extended from the ILO to other international organizations in staff matters, the same may be considered for contracts. It would, however, require an amendment of the Statute of the Tribunal as well as additional resources, but significant amounts of money could be saved by transferring competence for contract disputes to a single tribunal offering guarantees of independence and legal expertise.³

Extending the competence of the ILOAT to the review of contracts on supply of goods and services could also have a positive impact on individuals contracting with international organization for the supply of services, such as consultants, who often have limited means of seeking adjudication under existing services contracts.

IV. NO CONCLUSION, BUT SOME SUGGESTIONS

Balanced legal relations in procurement may be difficult to achieve without certain changes in the application or the perception of privileges and immunities and the creation of an international procurement jurisdiction.

However, some approaches have already been put in place which have gone a long way, such as increasing transparency in procurement procedures (e.g., publication of standard procedures by international organizations, providing reasons to rejected bidders, application of ethics rules to procurement officers).

Another possibility would be for international organizations to generally agree to follow accepted business practices whenever possible.

The regular acceptance to apply the law of the host state in "ordinary" procurements, provided the domestic legislation is sufficiently detailed and balanced, could also be an option.

Finally, international organizations may, in certain circumstances, accept to waive their immunities in procurement sectors which are clearly not linked to the core activities of these organizations. Such a move should be carefully planned and monitored as it could set a dangerous precedent for international organizations, but it could assist them in preserving their privileges and immunities where they really need them, in countries where such a special treatment is increasingly found archaic and faces many criticisms and legal challenges.

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³ Although it is not clear whether the availability of an appeal before the ILOAT would not lead to an increase in litigations.