CONVERGENCE AND OPPORTUNITY: THE WTO GOVERNMENT PROCUREMENT AGREEMENT AND U.S. PROCUREMENT REFORM

Christopher F. Corr
Kristina Zissis

Follow this and additional works at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law

Part of the Law Commons

Recommended Citation
Available at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol18/iss3/1

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of International and Comparative Law by an authorized editor of DigitalCommons@NYLS.
CONVERGENCE AND OPPORTUNITY: THE WTO GOVERNMENT PROCUREMENT AGREEMENT AND U.S. PROCUREMENT REFORM

Christopher F. Corr*
Kristina Zissis**

* Partner, White & Case, Washington, D.C.
** Associate, White & Case, Washington, D.C.

303
CONTENTS

I. INTRODUCTION ................................................................. 306

II. PROCUREMENT RULES UNDER UNITED STATES LAW ................. 308
   A. Overview ................................................................. 308
      1. Statutory Framework ............................................ 308
      2. Contract Formation and Performance ......................... 309
      3. Challenge Procedures .......................................... 311
   B. Major Reforms ....................................................... 314
      1. The Need for Reform ........................................... 314
      2. Reform Legislation ............................................ 314
      3. Effect of Reforms ............................................ 318
   C. Discriminatory Restrictions in the U.S. Procurement System .... 319
      1. Buy American Act ............................................... 319
         a. Federal Buy American Act Preferences .................... 320
         b. State Buy American Act Preferences ....................... 321
         c. Title VII Provisions ......................................... 322
         d. Limitations to Buy American Act .......................... 324
      2. Other Laws Bearing on Procurement ......................... 329

III. PROCUREMENT RULES UNDER THE WORLD TRADE ORGANIZATION GOVERNMENT PROCUREMENT AGREEMENT ................................................. 333
    A. Overview ............................................................... 334
       1. Entity Coverage ................................................ 335
       2. Services ......................................................... 336
       3. Thresholds ....................................................... 337
       4. General Disciplines ........................................... 339
       5. Procedures ....................................................... 340
       6. Binding Enforcement .......................................... 341
       7. Institutions .................................................... 343
       8. Appendices ...................................................... 344
       9. The Future ...................................................... 344
    B. U.S. Implementation and Practice ................................ 345
       1. Federal Level .................................................. 345
       2. State Level ..................................................... 347
       3. Implications of GPA for Buy American Act ................ 348
IV. EXPANDING OPPORTUNITIES IN THE U.S. PROCUREMENT MARKET ........................................ 349
   A. Notice of Market Entry Opportunities ................................................................. 349
      1. Obtaining Solicitation Information ................................................................. 349
      2. Reviewing Past Government Contracts for Opportunity Leads .......................... 351
   B. Marketing ................................................................................................................. 351
   C. Understanding New and Evolving Reforms ......................................................... 352
   D. Remedies for Discrimination .................................................................................... 353
      1. U.S. Remedies ......................................................................................................... 353
      2. WTO Remedies ...................................................................................................... 354

V. CONCLUSION .............................................................................................................. 355
I. INTRODUCTION

United States ("U.S.") government procurement provides an enormous and lucrative market for suppliers of goods and services. The market is highly specialized, however, and traditionally difficult to enter. Suppliers have been required to conform to complex, onerous procedural requirements, and must often supply customized products.\(^1\) Although the complex regulatory framework of the procurement market was designed to protect taxpayer funds,\(^2\) in practice the framework caused red tape and waste, as illustrated by periodic reports regarding past government purchases at outlandish prices.\(^3\) Market entry has been particularly difficult for multinational suppliers of non-domestic products and services\(^4\) because the system traditionally has discriminated against these firms.\(^5\)

The magnitude of the federal procurement market, and the effect of the impediments on multinational suppliers, are illustrated in the following chart:

<table>
<thead>
<tr>
<th>U.S. Federal Government Procurement(^6)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Procurement</td>
</tr>
<tr>
<td>Overseas-based Suppliers</td>
</tr>
<tr>
<td>Percentage Share</td>
</tr>
</tbody>
</table>

4. For purposes of this article, the term "multinational supplier" includes U.S.–and overseas–based entities seeking to supply non-domestic goods and services.
These numbers reflect only federal procurement and suppliers based overseas. The fifty U.S. states spend even more procurement dollars than the federal government. Procurement by states is approximately $281,807,807,000.

Two recent major reforms in the procurement process will open the procurement market to multinational suppliers like never before. The reforms will enable the government to purchase an array of goods and services more easily and at a low cost to taxpayers. The first reform concerns the overhaul and streamlining of the federal procurement system to permit the purchase of non-specialized commercial products on market terms in a simplified manner. The second reform concerns U.S. implementation of the World Trade Organization Government Procurement Agreement ("WTO GPA"), which liberalizes state and federal provisions that formerly discriminated against multinational suppliers. The convergence of these reforms will foster savings and administrative convenience for the government, and new opportunities for multinational suppliers.

The first part of the article reviews the legal and regulatory system governing U.S. government procurement. The first part also describes the recent U.S. efforts to reform the system. It then describes the discriminatory restrictions faced by multinational suppliers under U.S. law. The second part of the article reviews the WTO GPA and the changes that it has introduced to U.S. law in order to reform or eliminate the discriminatory restrictions on multinational suppliers under U.S. law. Finally, the discussion provides recommendations for entering the U.S. procurement market in order for multinational suppliers to benefit from the expanding opportunities created by the convergence of reforms to the U.S. system.

7. See id. U.S. based entities seeking to supply non-domestic goods and services are not included in the chart above.


10. Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter "WTO Agreement"], Annex 4, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 31 [hereinafter "WTO GPA" or "GPA"].

11. See infra notes 177–90 and accompanying text.
II. PROCUREMENT RULES UNDER UNITED STATES LAW

A. Overview

The section below provides an overview of the statutory framework, and the rules governing formation, performance and enforcement of U.S. government contracts. It also provides an overview of procedures for challenging disputes that arise during the government procurement process. This review of U.S. contract procedures provides a helpful background for discussing new opportunities resulting from U.S. procurement reforms and the WTO GPA.

1. Statutory Framework

U.S. government procurement is governed by two statutes. The first, the Armed Services Procurement Act,12 governs defense procurements and authorizes the Department of Defense ("DOD"), the military services (Army, Navy, and Air Force), the Coast Guard and the National Aeronautics and Space Administration ("NASA") to acquire goods and services.13 The second statute, the Federal Property and Administrative Services Act of 1949,14 governs acquisitions by all other civilian agencies.15

Under authority granted by this procurement legislation, the executive agencies have promulgated the Federal Acquisition Regulations ("FAR"), which comprise a single, detailed body of rules governing acquisitions by all U.S. government agencies.16 The DOD and most civilian agencies publish supplements to the FAR that implement and expand the FAR as deemed appropriate for the specific needs of the particular agency.17

13. This statute is codified in various sections of the U.S. Code, but is set forth largely at 10 U.S.C. § 2302 (1994).
14. This Act is also codified in various sections of the U.S. Code, but is set forth primarily at 41 U.S.C. § 251 (1994).
15. See id.
16. These rules are set forth in Title 48 of the Code of Federal Regulations. They are issued, and periodically supplemented by the interagency Federal Acquisition Regulatory Council, which includes the General Services Administration, the DOD, NASA, and the Office of Federal Procurement Policy. At the working level, separate civilian and defense interagency councils are involved in drafting and revising regulations.
17. For example, the DOD supplement, which is the most significant and voluminous, is published in 48 C.F.R. §§ 201–253 (1997). It is the most detailed, reflecting its role as the paramount procuring agency. The Department of Health and Human Services
2. Contract Formation and Performance

The rules for contracting with the U.S. government may vary depending on the contractor, and the size and nature of the transaction involved. The first transaction in government contracting is bidding. Under the Competition in Contracting Act of 1984, the U.S. government must utilize competitive procedures in selecting products and services. This ensures that the government conducts procurement on a competitive basis in an economical and reasonable manner. In the past, this was mainly done through the issuance of detailed, complex specifications. In keeping with the competitive objectives inherent in the process, the government must adequately publicize the solicitation. This generally is accomplished through a pre-solicitation notice in the Commerce Business Daily ("CBD").

U.S. government agencies normally award contracts on a competitive basis using two procedures. The first process, termed "sealed bidding," involves an "invitation for bids" ("IFB") whereby the government issues a written solicitation, and private contractors submit bids by the deadline specified in the IFB. In the second procedure, termed "competitive negotiation," the government issues a detailed "request for proposals" ("RFP"). The government then engages in "competitive negotiation" with selected responding companies, eventually requesting revised "best and final offers."


23. 10 U.S.C. § 2305 (1994); 41 U.S.C. § 253 (1994); 48 C.F.R. § 14 (1997). The bid is awarded to the qualified bidder with the lowest price. This more traditional approach is used where price is the critical factor and there is more than one bid.


In extraordinary circumstances, such as when only one source will satisfy agency requirements, the government may purchase merchandise without opening the contract to competition.\(^{26}\) Where there is no competition in the bidding process, or in certain cases of contract modification, negotiated contracts above a $500,000 threshold are subject to the Truth in Negotiations Act.\(^{27}\) There are certain special, simplified procedures for meeting the competition requirement. One procedure, multiple awards through the Federal Supply Schedule ("FSS"), allows agencies to award multiple contracts for commonly used supplies and services. This is done by pre-selecting suppliers on a competitive basis for a given length of time, thereby avoiding time-consuming, formal competition before each purchase of basic supplies.\(^{28}\) Under another procedure, if a contract amount is sufficiently small (less than $25,000), the government is exempted from following formal procedures for opening the transaction to full competition, and instead may use simplified, more "commercial" procedures.\(^{29}\)

There are also rules regarding the performance of contracts with the government. The government enters into two common types of contracts. Under the first, most common type—fixed price contracts—the contractor is paid a set price for performance.\(^{30}\) Under the other—cost reimbursement or cost plus contracts—the contractor is reimbursed for allowable expenses incurred during performance and receives a set fee.\(^{31}\) Before entering a

\(^{26}\) 41 U.S.C. § 253(c) (1994). For example, this is done where disclosure of solicitation information could compromise national security, or where there is an urgent need for expeditious procurement.

\(^{27}\) Truth in Negotiations Act § 2306(a), 10 U.S.C. § 2306(a) (1994). Under this act the contractor must disclose detailed cost and pricing data to the government, so that the government will be in an "equal" bargaining position, given the lack of price competition.

\(^{28}\) The FSS lists acceptable products and suppliers already chosen on a competitive basis. 48 C.F.R. § 38 (1997). Although the purpose of the schedule is to afford agencies simplified access to commercial products, it limits access by requiring that agencies purchase from the schedule rather than purchasing commercially available products on the open market.


\(^{31}\) The government also uses hybrids of the common types of contracts, such as "incentive contracts" under which the government agrees to assume some of the risks, but conditions profit on contractor performance, or "requirements contracts" under which the government commits to purchase what it needs during a given period. See 48 C.F.R. § 16.4-.5 (1997).
contract with a proposed seller (the "contractor"), the government has discretion to examine whether the contractor is "qualified" or "responsible." In certain cases, the government also may examine whether doing business with the contractor will promote various social and economic goals or standards. The Small Business Act establishes a number of preferences for small or minority-owned businesses.

There are several issues to keep in mind with respect to contract performance. First, contracts are awarded and directly administered by the contracting officer at the procuring agency who serves as the nexus between the contractor and the U.S. government. The contracting officer is the focal point for dealing with the government in all agency procurement transactions. Second, government contracts, unlike those in normal commercial contracts, may include clauses and certification requirements that impose conditions. Finally, the government has broad authority to audit or inspect contractors at all places and times to enforce strict compliance with contract specifications. Thus, the contractor can be subject to enforcement mechanisms that it would not encounter in commercial contracts. This can result in delay, costly adjustments and penalties.

3. Challenge Procedures

Given the detailed rules covering the bidding and performance phases of procurement, and the strict compliance required, there are many

35. The contracting officer is the primary official with authority to obligate the government and enter into contracts. 48 C.F.R. § 1.602-2 (1997). Unlike normal commercial contracts, the government, through the contracting officer, has authority to reject merchandise or performance that is not in exact compliance with the specifications set forth in the contract. Id.
36. Id.
37. For example, most government contracts include a "changes clause," which explicitly permits the government to unilaterally order changes in the contract during the course of performance. 48 C.F.R. §§ 43.201-.205, 52.243 (1997). The government also may add a contract clause which allows it to terminate, not only for nonperformance, but also for "convenience." 48 C.F.R. §§ 49.2-5, 52.249-1, 52.249-2 (1997).
38. 48 C.F.R. §§ 46.000-.806 (1997).
39. Id.
occasions for disagreement during the contracting process. Unsuccessful competitors commonly challenge contract awards and a victorious bidder might face unforeseen delays as a consequence. Therefore, in protesting federal procurement decisions, the contractor should bear in mind that, just as government procurements are governed by specialized rules, related litigation also can involve unique jurisdictional and procedural requirements. Procedures for challenging government procurement decisions may be divided between those at the bidding phase and those arising during contract performance.

Four main fora exist for prospective bidders or other parties who believe they have been treated improperly in the pre-award procurement process to pursue protests: (1) informally, with the agency; (2) with the General Accounting Office ("GAO"); (3) with the U.S. Court of Federal Claims ("U.S. Claims Court"); and (4) with the U.S. federal district courts. While the jurisdiction of these fora overlap to a large extent, there are certain differences, and not all fora are available for all types of protests. For example, the U.S. Claims Court has jurisdiction over the Tennessee Valley Authority, and other fora are limited to contracts involving executive agencies. The timing of protests is important. Bidding protests must be filed with the U.S. Claims Court before the contract to which the claim relates is awarded. Protests with the GAO usually must be filed prior to the bid opening or within 10 days of the date the controversy arises. Generally, the district courts are held to have jurisdiction over contract award disputes pursued after an award.

The overlap of jurisdictions allows the protestor to select the forum best suited to its needs depending on the standard of review, the remedies available, and applicable precedent. Standards of review and avenues of

40. See infra notes 50–52 and accompanying text.
41. See infra notes 50–56 and accompanying text.
45. See id. § 3553(d)(4).
46. See id. § 3556.
appeal vary depending on the forum chosen for the protest.\textsuperscript{47} District court decisions may be appealed to the applicable circuit court.\textsuperscript{48} U.S. Claims Court decisions must be appealed to the Court of Appeals for the Federal Circuit.\textsuperscript{49} GAO decisions generally are appealed to the U.S. Claims Court or district courts.\textsuperscript{50}

The principal remedy sought in protests is usually the award of the contract, although such relief is rarely granted.\textsuperscript{51} More often, the remedy is to delay the award of a contract pending determination as to the rights of the disputing parties, directions to recompete the contract, or monetary relief exclusive of lost profits.\textsuperscript{52}

In order to challenge U.S. government performance under a contract, contractors generally begin by filing a claim with the U.S. government contracting officer responsible for the contract.\textsuperscript{53} If the claim is not resolved with the contracting officer, under the Contract Disputes Act of 1978,\textsuperscript{54} an aggrieved contractor who meets certain jurisdictional prerequisites may bring a breach of contract action in the U.S. Claims Court.\textsuperscript{55} Alternatively, a contractor may pursue relief before the Agency Board of Contract Appeals responsible for the contract.\textsuperscript{56} Appeals from both fora must be filed with the U.S. Court of Appeals for the Federal Circuit.\textsuperscript{57}

\textsuperscript{47} For example, the standard for the U.S. Claims Court is whether the Government decision was arbitrary and capricious. For the District Court, the standard is whether the Government had a rational basis for its action, and for the GAO, it is whether the Government’s actions violated a statute or regulation. \textit{See id.} §§ 3552-3554; 40 U.S.C. § 759(a) (1994).


\textsuperscript{49} 41 U.S.C. § 607(g) (1994).

\textsuperscript{50} \textit{Id.}


\textsuperscript{52} \textit{See} id.

\textsuperscript{53} 41 U.S.C. § 605 (1994). The contractor is given 90 days from receipt of the contracting officer’s final decision to appeal to the Agency Board, and 12 months from that date to file an appeal with the Claims Court. \textit{See id.} § 606; 41 U.S.C. § 609(a)(3) (1994).


\textsuperscript{55} \textit{See} id. § 609. While subcontractors do not have the right to file a direct appeal against the Government due to a lack of “privity of contract”, the contractor may bring a claim on the subcontractors behalf, or may permit the subcontractor to bring a claim in the contractor’s name. 48 C.F.R. § 44.203(c) (1997).

\textsuperscript{56} 41 U.S.C. § 607 (1994). There are twelve Agency Boards of Contract Appeals, the largest of which is the Armed Services Board of Contract Appeals.

\textsuperscript{57} \textit{See} id. § 607(c).
B. Major Reforms

1. The Need for Reform

Historically, U.S. government procurement transactions were highly regulated, requiring the prospective seller to adhere strictly to complex, specialized procedures for bidding on and performing contracts with the U.S. government. An egregious example of the unintended consequence of this needless complexity is the government specifications for a fruitcake, which were in excess of 18 pages. As a result of this complexity, government purchases can take over three times longer than purchases in the private sector.

The purpose of the exacting procurement requirements was to prevent the government from paying too much and to ensure that it received a quality product. Congress and the regulatory drafters were preoccupied with establishing detailed procedures aimed at enhancing competition and avoiding waste of taxpayer money and fraud. Despite these laudable goals, the regulations in their totality constituted an exceedingly complex system that too often ignored market principles and mandated delay, expense, and risk. For non-domestic suppliers, this system operated like a non-tariff barrier. The problems related to the over regulation of the procurement process led to reform efforts aimed at cutting red tape in government purchases, and at permitting the government to purchase normal commercial products at prevailing market rates at considerable savings to taxpayers.

2. Reform Legislation

The reform efforts began in early 1993 with the issuance of the results of a report by the “Section 800” panel recommending broad changes in

60. See Reinventing Federal Procurement, supra note 3, at PROC08 (noting that federal purchases of information systems took thirty-nine months on average, while in the commercial market they took only thirteen months on average).
61. See supra notes 1–2 and accompanying text.
62. See supra notes 1–2 and accompanying text.
63. See supra note 3 and accompanying text.
64. See infra notes 64–86 and accompanying text.
Defense Department procurement practices. Shortly thereafter, Vice President Gore's National Performance Review issued a report recommending the complete rewrite of the Federal Acquisition Regulations. In 1994, Congress passed the Federal Acquisition Streamlining Act ("FASA"), which reformed federal government procurement policy. The main thrust of the Act was to open the procurement system to private sector goods and services, to simplify the process, and to curtail the purchase of government-unique customized items.

A paramount objective of FASA was to encourage the use of "commercial" and other "non-developmental" items and to simplify the process for purchasing these items by acquiring them in a manner similar to that used by the commercial business sector. The FASA established a preference for commercial products and created government-wide, broad definitions of "commercial item" and other off-the-shelf merchandise.

In order to streamline government purchases of commercial products, the new law authorizes contracting officers to purchase products directly from the market, if available, and of a higher quality or at more competitive prices than those offered on the multiple award schedules ("MAS") under

65. See Jeff Erlich, DOD Seeks to Simplify Trade: Legislation Could Bolster International Cooperation, DEFENSE NEWS, Feb. 19, 1996, at 14 ("[defense procurement] legislation was put forth in 1993 by the Acquisition Law Advisory panel, commonly called the Section 800 panel").


68. Id.

69. See generally 2 GOVT. CONT. L. MONITOR, 1 (Spring 1995).

70. The FAR rules regarding commercial items are implemented in 48 C.F.R. § 12 (1997). Although some services are included, Part 12 focuses primarily on commercial supply items. Commercial items are defined as "any item, other than real property, that is of a type customarily used for nongovernmental purposes" and "non developmental items" are defined as those previously developed that currently are being produced, or require only minor modification of the type normally available in the commercial marketplace. 41 U.S.C. § 403 (1994); 48 C.F.R. § 2.101 (1997). The FAR rules implementing FASA provide contracting officers with broad discretion to conduct a procurement in a manner consistent with customary commercial practice. This allows the officer to use common sense and prior experience, rather than to rely exclusively on strict application of numerous complex rules, regulations and lists.
the Federal Supply Schedule.71 At the same time, the reforms also have rendered the MAS more accessible. The use of MAS opens procurement opportunities and creates incentives for agencies to expand both the use and the range of products and services available on the schedules.72 FASA also exempts suppliers of commercial products from laws that impose burdens and risks unique to government procurement.73 These changes release vendors of off-the-shelf commercial items from significant expense, delay and risk, and removes a barrier to commercial vendors' entrance into the government procurement market.

Other changes seek to rationalize the solicitation and competitive bidding process by requiring agencies to explicitly note the importance of factors and subfactors in solicitations. This is so that prospective sellers may make informed proposals and the government can insure purchase of the most appropriate products.74 FASA also requires that simplified, fixed-price contracts be used for purchases of commercial items, and reduces the number of contract clauses required for commercial items.75 Since the

---

72. The reform legislation created procurement opportunities through use of the MAS, as follows: (1) rendering the MAS more user-friendly through electronic listing of products and prices, and implementation of electronic ordering; (2) reducing contractors' disclosure obligations when they sell commercial items on General Services Administration ("GSA") schedules; (3) permitting state and local governments to purchase through the schedules; (4) replacing Maximum Order Limitations that previously capped sales from schedules with more flexible thresholds; and (5) allowing Blanket Purchase Agreements, which permit the negotiation of discounts, for filling anticipated repetitive needs. See David Metzger et al., The Risk of MAS Appeal: Expansion of the Multiple Award Schedules Lays Pitfalls for Federal Contractors, LEGAL TIMES, June 23, 1997, at S45 (identifying the increased procurement opportunities from using the MAS due to the reform measures and the associated legal risks for federal contractors).
73. For example, commercial merchandise is exempt from the cost and pricing data submission requirements of the Truth in Negotiations Act, as well as the attendant liability and audit risks. 48 C.F.R. § 12.503(c)(2) (1997). Other statutes from which commercial items are exempted include the Anti-kickback Act 48 C.F.R. § 3.502 (1997), 41 U.S.C. §§ 57(a), 58 (1994); Drug-free Work Place Act § 23.501, 41 U.S.C. § 701 (1994); Clean Air Act § 23.105, 42 U.S.C. § 7606 (1994) and the Contract Work Hours and Safety Standards Act § 22.305, 40 U.S.C. § 327 (1994). For procurements involving "non-commercial" items otherwise subject to the Truth in Negotiations Act, the contract value threshold after which cost and price data must be submitted was raised to $500,000 for both defense and civilian procurement. 10 U.S.C. § 2306(a) (1994); 41 U.S.C. § 254(b) (1994). See also GOVT. CONT. L. MONITOR, supra note 68.
passage of FASA, federal officials\(^{76}\) and Congress\(^{77}\) have continued to introduce new measures that simplify and streamline government procurement.\(^{78}\) Two significant Congressional initiatives are discussed below.

In order to further simplify the rules and reduce the costs associated with the federal procurement process, in 1996 Congress passed the Clinger-Cohen Act, also known as the Federal Acquisition Reform Act ("FARA") and the Information Technology Management Reform Act ("ITMRA").\(^{79}\)

A summary of key implementing provisions for both laws is provided below.

Recent FARA implementing provisions provide that:

- Simplified acquisition procedures, including oral solicitations, may be used for commercial acquisition items up to $100,000, and, in certain circumstances for acquisitions up to $5 million in value;\(^{80}\)

- The formal application of Cost Accounting Standards to purchases of commercial items is "nonmandatory,"\(^{81}\)

---

76. Since the passage of FASA, the use of government-wide agency contracts ("GWACS") has become popular. Under FASA, with its emphasis on streamlined procedures for obtaining goods and services under multiple award contracts, agencies can order from a GWAC without conducting a competition. However, some federal agencies have resorted to designating a contact holder as a "preferred source" for multiple award contracts. Recently, the Office of Management and Budget ("OMB") called on federal agencies to cease this practice because it discourages competition and the related efficiencies intended by the FASA. OMB also requested a revision to the FAR to mandate this change. *Government Contracts: OMB Clamps Down on Preferred Vendor Designation, Says It Inhibits Competition, Daily Rep. for Executives, May 8, 1998, at d55.*

77. Congress continues to consider passing other measures in the spirit of procurement reform, such as the Federal Activities Inventory Reform Act § 314. At the time of this writing, the Senate has passed, and the House is expected to pass, this bill which would require federal agencies to publish lists or "inventories" of commercial-type activities currently performed by federal government employees that could be contracted out to the private sector. *Government Contracts: Contractors Hopeful on Passage of Bill Requiring Agencies to List Available Work, Daily Rep. For Executives, Aug. 25, 1998, at A3.*

78. See infra notes 79–86 and accompanying text.


Suppliers of commercial items are exempted from the requirement to submit cost or price data; 82

The procurement integrity certification requirements are eliminated. 83

The ITMRA eliminates the exclusive authority of General Services Administration ("GSA") to acquire computer resources for the entire federal government. 84 Instead, the ITMRA assigns to the Director of OMB the overall responsibility for the acquisition and management of information technology ("IT") in the federal government. 85 It also gives authority to acquire IT resources to the head of each executive agency and makes them responsible for managing their IT investments. 86 In addition to giving IT procurement authority back to the agencies as part of its effort to streamline IT acquisitions, the ITMRA provides for the following:

- encouraging the acquisition of commercial off-the-shelf ("COTS") IT products; and
- permitting the Administrator for Federal Procurement Policy to conduct pilot programs in federal agencies to test alternative approaches for acquisition of IT resources. 87

3. Effect of Reforms

The reform legislation will permit the government to purchase an enormous variety of goods and services in the free market, in a simple

84. This exclusive authority derived from Section III of the Federal Property and Administrative Services Act of 1949, also referred to as the "Brooks Act." 40 U.S.C. 759 (1994), repealed by Information Technology Management Reform Act, Pub. L. 104-106, Div. E, Title LI § 5105(96) 110 Stat. 680 (1996). The ITMRA also ended the authority of the General Services Board of Contract Appeals ("GSBCA") to hear bid protests on IT contracts and moved this authority to the General Accounting Office ("GAO").
86. Id. at § 5113(b)(2).
87. Id. at § 5301.
manner, just as any other private sector buyer. The results will be lower costs, more expeditious attainment of government objectives, and less waste of bureaucratic effort and taxpayer funds.88

Another result is that suppliers, who were previously unaware of or intimidated by the complex and onerous procurement requirements, or who were not in the business of supplying customized products, may now service the government as if it were another customer in the market — a very big customer. The opportunities created by this reform legislation are unprecedented. Government agencies as well as suppliers of U.S. and non-domestic goods now must learn how to benefit from these opportunities.89

C. Discriminatory Restrictions in the U.S. Procurement System

Despite the reforms to the federal procurement process, multinational suppliers still face legal restrictions on their participation in this market. These restrictions are discussed below. The WTO GPA that limits these restrictions is then discussed in the subsequent section.

1. Buy American Act

The most significant barrier to non-domestic sales to the U.S. government is the Buy American Act.90 As its name implies, the Act directs the federal government of the United States to "buy American."91 However, it is subject to substantial limitations both from its own provisions, and from the Trade Agreements Act of 1979,92 which implemented the Tokyo Round Government Procurement Agreement and the WTO GPA. The discussion below separately examines the Buy

88. See supra notes 69-70 and accompanying text.
89. See Timothy Sullivan, Procuring a New System, LEGAL TIMES, June 23, 1997, at S35-37 (noting that some government procurement officials and suppliers have continued doing business as usual rather than taking advantage of the reforms). Of course, a thoroughly "commercialized" procurement process is not possible because the government will continue to use its purchasing power to achieve certain socioeconomic goals, and, because government purchases are made with public funds which requires adherence to the Competition in Contracting Act of 1984. Id. at S36. Nevertheless, there are significant incentives for government agencies and suppliers to change past procurement practices in order to streamline the procurement process and save taxpayer funds.
91. Id.
American restrictions, and the substantial exceptions and waivers to these restrictions.

a. Federal Buy American Act Preferences

Under the Buy American Act ("BAA"), the U.S. government may procure "articles, materials, and supplies" only if they are manufactured, mined, or produced in the United States "substantially" from U.S. articles, materials, or supplies. This rule applies unless the head of a federal agency determines that: (1) such restrictions would be "inconsistent with the public interest"; (2) the cost would be "unreasonable"; or (3) the U.S. end products or components are not reasonably available in commercial quantities and of satisfactory quality. Bidders and contractors must certify that the goods they will supply to the U.S. government will satisfy the BAA requirements. Moreover, the contractor must be careful that its certification is accurate, since penalties for false certification can be severe.

The President implemented the provisions of the BAA by establishing a presumption that bids by suppliers of U.S. goods exceeding bids by suppliers of non-domestic goods by more than prescribed differentials

93. 41 U.S.C. § 10(a) (1994). The BAA applies specifically to the acquisition of "articles, materials, and supplies" for public use in the United States. Acquisition of supplies or services to be used or performed outside of the United States are governed by the Balance of Payments Program. See 48 C.F.R. § 25.300 (1997). The BAA has separate restrictions for materials used in the United States for construction, repair, or alteration of any public building or public work. No non-domestic materials can be used for such purposes unless the procuring agency has determined that domestic materials would be "unreasonably costly" or "impractical." 41 U.S.C. § 10(b) (1994); 48 C.F.R. § 25.203, § 25.204(b) (1997).


95. Under the BAA, a domestic article is one with greater than fifty percent U.S. value content. 48 C.F.R. § 25.101 (1997). Determinations regarding the origin of all products supplied can be complex and onerous, requiring an analysis of non-domestic value added, particularly in the case of large contracts involving numerous products not entirely comprised of U.S. parts. See Specialty Plastic Products and Accusonic Systems Corp., 95-2 B.C.A (CCH) 27,895 (1995) (non-domestic assembly of a helmet communication kit for $75 did not violate the Buy American Act where U.S. component cost ranging from $182 to $206 exceeded the 50 percent cost of all components).

96. While contractor self-certification regarding BAA compliance generally are not challenged by agency officials, they may be challenged by unsuccessful bidders, which then requires the agency to inquire into the certifications. See Compuadd Corp. v. Dept. of Air-Force, 93-3 B.C.A. (CCH) 26. 123 (1993). ICS Systems Integration Div., 93-1 COMP. GEN. 417 (1993).
would be deemed both "unreasonably costly" and "not in the public interest," thus qualifying for a waiver of the general procurement ban. 97 Consequently, in practice, the BAA has been construed not as a procurement ban, but as a mandated preference for domestic articles, because it requires that a price differential be added to all contract offers involving a non-domestic product for the purpose of evaluation. 98 The differential is basically six to twelve percent for non-defense-related procurement. 99

b. State Buy American Act Preferences

In addition to the Federal rules discussed above, roughly thirty-five states maintain some form of "buy American" or "buy local" restrictions on their procurement. 100 Given the large value of state and local procurements in the United States, 101 these restrictions can prevent significant market opportunities. The constitutionality of these state restrictions is in question to some degree. A "buy local" act was struck down by the Seventh U.S. Circuit Court of Appeals in 1984. 102 In a more recent decision, the Third Circuit upheld another "buy local" law in 1991. 103 Moreover, with the internationalization of production, it is often difficult for states and localities to enforce these provisions. 104 For a number of years, the United States Trade Representative ("USTR") has

---

98. Id.
99. Id.
100. An example is the New Jersey local public contracts law. N.J. STAT. ANN. § 40A:11-18 (West 1982).
101. See Kenneth J. Cooper, To Compel or Encourage: Seeking Compliance With International Trade Agreements at the State Level, 2 MINN. J. GLOBAL TRADE 143, 170 (1993).
102. See W.C.M. Window Co. v. Bernadi, 730 F.2d 486 (7th Cir. 1984) (striking down an Illinois statute requiring that public works contractors must hire local workers).
103. See Trojan Tech. Inc. v. Commonwealth of Pennsylvania, 742 F.Supp. 903 (M.D. Pa. 1990) (upholding a Pennsylvania statute prohibiting the purchase of products with components made of non-domestic steel, on the basis that the state was "no more than a market participant" and "did not create a barrier to the free flow of non-domestic steel into the state"), aff'd 916 F.2d 903 (3d Cir. 1990), cert. denied 111 S. Ct. 2814 (1991).
104. For example, in the procurement of an earth mover by the town of Greece, New York, the town discovered that a rejected "Japanese" mover was actually produced in the United States, while the "American" item selected was in fact produced in Japan. Town's Efforts to Buy American Equipment Backfires, CHI. TRIB., Jan. 25, 1992, at 1.
sought to persuade the various states to rescind their local preferences with respect to the bids of contractors from reciprocating countries. As discussed below, during the negotiation of the WTO GPA, USTR succeeded in opening procurement of thirty-seven states to certain GPA members.

c. Title VII Provisions

If a bidder is able to overcome the preferential price differentials, the BAA normally permits some access by suppliers of non-domestic goods to the procurement market. The Buy American Act of 1988, in connection with the enforcement provisions of the 1979 Trade Agreements Act, amended the original BAA by adding provisions that flatly prohibit procurement of products from countries identified as discriminating against U.S. products or contractors. This ban, known as the Title VII provision, lists countries as “discriminatory” and allows them to sell to the U.S. government only if the President or head of a federal agency decides that a waiver of the ban is in the national interest, is necessary to avoid a monopoly or to assure sufficient qualified bidders at competitive prices. This normally is decided prior to contract award.

Under Title VII, the USTR must submit to Congress an annual report summarizing “the extent to which foreign countries discriminate against United States products in making government procurement.” The USTR

105. See supra note 96 and accompanying text.


107. 41 U.S.C. § 10(b)-1(c) (1994). Requests for a waiver generally must be made prior to contract award, except where the original award was improper. See C. Sanchez & Son, Inc. v. United States, 6 F.3d 1539 (Fed. Cir. 1993); Dash Engineering Inc., 93-1 COMP. GEN. 363 (1993).

108. 19 U.S.C. § 2515(d)(1) (1994). In that report, the USTR must identify specifically countries that: (1) are GPA signatories not complying with the GPA; (2) are GPA signatories complying with the GPA but which discriminate against U.S. products and services not covered by the GPA “which results in identifiable harm to United States business,” where such products are acquired in significant amounts by the United States government; or (3) are not GPA signatories and have discriminatory practices harming U.S. businesses. Various factors relating to the nature and significance of the “discrimination” must be taken into account in making these determinations. See id. § 2515(d)(3).

As an example, on April 30, 1993, the USTR announced that Japan’s bidding system for publicly funded construction projects “routinely excludes” U.S. firms, and that its
must begin negotiation regarding the elimination of practices with countries named in the report. If the dispute cannot be resolved within a set time frame, it may impose strict procurement sanctions. Under the WTO's Dispute Settlement Understanding ("DSU"), unilateral sanctions in areas covered by the DSU are prohibited. As the exclusive vehicle for dispute settlement, the DSU requires Dispute Settlement Body ("DSB") panel proceedings. In addition, a key change in the DSU from prior General Agreement on Tariffs and Trade ("GATT") dispute settlement is that a losing party can no longer block adoption of an adverse panel report. Thus, under the GATT, the United States is potentially vulnerable to an effective WTO challenge to Title VII.

administrative processes were not transparent. Because the dispute did not involve a Code violation (construction services were not covered under the GATT Code), the USTR had sixty days to resolve the dispute with the Japanese before imposing sanctions under Title VII of the 1988 Act. See id. § 2515(g). Under 41 U.S.C. § 10b-1 (1994), sanctions against a Code signatory for a non-Code violation would include a ban on procurement of non-Code covered products only. The USTR cited a "significant and persistent pattern or practice of discrimination against U.S. products or services that result in identifiable harm to U.S. businesses." The USTR delayed sanctions, however, and reached an agreement with the Japanese Government to "open" contracts in excess of 700 million yen. Under the 1994 U.S.-Japan Public Works Agreement, Japan agreed to utilize "open and competitive" procurement procedures when making construction-related procurement at or above the WTO GPA thresholds.

109. The timing of sanctions depends upon whether the dispute involves a GPA-covered product. If the country involved is a WTO GPA signatory and the discrimination violates the GPA, formal GPA dispute settlement procedures must be initiated within sixty days of the report. 19 U.S.C. § 2515(f)(1) (1994). One year is given to resolve the problem after which the country will be designated as "not in good standing" and may be subject to the sanctions of the BAA, including a ban on procurement. See id. § 2515(f)(3)(B). If the country is not a GPA signatory, or the discrimination does not involve a GPA violation such as a non-GPA covered products or services, the President may impose sanctions under the BAA, more swiftly, without recourse to dispute settlement procedures.

110. WTO GPA art. XXII.

111. Id.

112. See discussion infra Part II.A.6.

113. WTO GPA art. XXII.

114. The Title VII provision expired on April 30, 1996. 19 U.S.C. § 2515 (1994). Attempts to renew Title VII by executive order have been opposed by Justice Department officials. USTR is attempting to address the Justice Department’s concerns and renew Title VII by executive order within the next few months. If this attempt fails, the Administration will consider renewing Title VII by legislation.
d. Limitations to Buy American Act

The Buy American Act has several limitations. As noted above, the actual impact of the BAA restrictions on non-U.S. suppliers is limited, largely because of specific exceptions and also because of waivers under both trade and defense agreements. Three types of waivers are specifically exempted. The first class of waivers to BAA restrictions are Nonavailability Waivers, which are available if articles "are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality."\(^{115}\) Individual federal agencies have compiled lists of materials for which the BAA is waived.\(^{116}\) A second class of waivers are the Public Interest Waivers. Under Executive Order 10582,\(^{117}\) "public interest" and "reasonable cost" waivers of the BAA are to be applied through application of the price differential preferences established in that order.\(^{118}\) Nevertheless, agency heads have the authority, on a case-by-case basis, to waive application of the preference on the ground that it would not be in the public interest.\(^{119}\) The third class of waivers are for federal government procurement for retail in commissaries. Procurement for resale at military commissaries of basic non-domestic goods is largely excluded from the BAA restrictions.\(^{120}\)

Another exemption exists for defense waivers. An Agency head may waive BAA procurement restrictions based on a determination that, after balancing competing Buy American and U.S. foreign policy interests, the application of the restrictions would be "inconsistent with the public interest."\(^{121}\) These blanket DOD public interest waivers rely on a

\(^{115}\) 41 U.S.C. § 10(a) (1994). See In the Matter of Maremont Corporation, 76-2 COMP. GEN. 181 (1976) (denying the protest of a U.S. company against the award of a contract to supply the Army with non-domestic MAG 58 machine guns instead of the American-made M60E2, and finding the BAA not to apply, because the U.S. gun was not considered to be of "sufficient quality" to meet the government's minimum needs).

\(^{116}\) An illustrative list of these exempted articles is provided in 48 C.F.R. § 25.108 (1997). Higher quality or technologically superior non-domestic products may be procured by an agency, even if they are higher priced. See ASOMA Instruments, Inc., 93-1 COMP. GEN. 317 (1993); SDT Research Corp., 93-1 COMP. GEN. 406 (1993).

\(^{117}\) See supra note 96.

\(^{118}\) Id.


\(^{120}\) See 48 C.F.R. § 25.102(a)(5) (1997).

\(^{121}\) 41 U.S.C. § 10(a) (1994). The public interest waiver authority has been used by the DOD to issue "blanket", rather than case-by-case, waivers of the BAA restrictions covering
“Determination and Finding” ("D&F") issued by the Secretary of Defense, and incorporated into a bilateral agreement.\(^{122}\)

The agreements themselves may include the following:

- Cooperative project arrangements (under which the U.S. agrees to purchase military products or to engage in joint research or production with NATO allies);

- Foreign Military Sales (FMS)/Offset Arrangements (under which DOD acts as middleman for a foreign country seeking U.S. defense items, and in certain cases agrees to purchase a certain quantity of products from the foreign country as an offset via a BAA-waiver); and

- Memoranda of Understanding (MOUs) or defense cooperation programs (under which defense products of another country may be purchased through BAA waivers).\(^{123}\)

Countries that are parties to any of these arrangements are termed "qualifying" countries, and procurement of articles from these countries is exempted from the BAA and Balance of Payments Program price differentials, which could otherwise add 50 percent to the bid value.\(^{124}\)

For certain countries, the United States provides more generous benefits under Title III of the 1979 Trade Agreements Act ("TAA") than those set out in the WTO GPA.\(^{125}\) Currently there are special BAA waivers prospective DOD purchases of non-domestic goods from specified countries.

\(^{122}\) The "D&F" generally states that it would be "inconsistent with the public interest" to impose non-domestic procurement restrictions on items sourced from a specific party to the bilateral agreement. 48 C.F.R. § 225.872 (1997).


\(^{124}\) The blanket defense waivers of the BAA have opened vast areas of U.S. procurement to multinational suppliers. These waivers, however, are limited to items specified in the relevant bilateral agreements. In certain circumstances, the DOD must inform Congress of its exercise of blanket waiver authority, and may rescind waivers in circumstances where the foreign country is deemed to discriminate against U.S. producers. See 10 U.S.C. § 2504 (1994). Practically speaking, access to blanket waivers depends entirely on the political feasibility of entering into a bilateral agreement with the DOD, and every agreement in effect has been concluded with a close military ally of the United States, including Japan.

\(^{125}\) Compare 19 U.S.C. §§ 2501–2582 (1994) and WTO GPA.
provided with regard to: (1) Products of Caribbean Basin Economic Recovery Act Countries; (2) NAFTA country (Canadian and Mexican) end-use products; and (3) Israeli end products.\textsuperscript{126} The first BAA waiver pertains to countries covered by the Caribbean Basin Initiative ("CBI"). For CBI countries, specified products are treated as those of domestic origin to avoid BAA preferences.\textsuperscript{127} Countries eligible for such waivers were designated under Title III by the USTR on February 27, 1986.\textsuperscript{128}

In addition, under the North American Free Trade Agreement ("NAFTA") and U.S.-Israel Free Trade Area Agreement ("FTAA") member countries receive special waivers, which essentially extend the waivers provided to all signatories of the WTO GPA even further.\textsuperscript{129} The NAFTA exempts from the Buy American Act contracts valued at $50,000 or more for Mexican goods, and $25,000 or more for Canadian goods.\textsuperscript{130} It also waives Buy American restrictions for service contracts above $50,000 with Mexican and Canadian companies.\textsuperscript{131} Special, higher minimum threshold levels of $6.5 million apply for NAFTA construction service contracts, and $250,000 for NAFTA goods and $8 million for NAFTA construction services on purchases by federal government-owned enterprises.\textsuperscript{132} The waivers under NAFTA are subject to a number of exceptions, including purchases pursuant to small or minority business set-aside programs, certain national security interests, Agriculture Department and Agency for International Development procurements, as well as procurements by state and local governments.\textsuperscript{133}

\textsuperscript{127} See id. § 2702.  
\textsuperscript{129} 48 C.F.R. § 25.402 (1997).  
The NAFTA standard for what qualifies in a supply or construction contract as a Mexican or Canadian end product is different from the BAA rule for U.S. end products, which requires that the cost of U.S. components must exceed fifty percent of the total cost.\(^{134}\) NAFTA adopted the "substantial transformation" standard, a rule of origin borrowed from the U.S. Customs Service.\(^{135}\) Under this standard, the origin is determined by where goods are produced or "substantially transformed" into a new or different article of commerce.

As a result of the 1985 FTAA, the United States must waive Buy American restrictions on Israeli suppliers in government procurement contracts valued at $50,000 or more with respect to products and services reciprocally covered under the WTO GPA.\(^{136}\) The NAFTA and FTAA minimum contract value thresholds for waiving BAA preferences are lower than the WTO GPA thresholds.\(^{137}\) There is, however, a limitation on these special preferences. Although an offer from a NAFTA contractor above the applicable threshold amount is exempt from BAA restrictions, it may not be considered a "domestic" offer entitled to preferences against offers from other non-NAFTA countries.\(^{138}\) Thus, while NAFTA and FTAA goods are entitled to national treatment relative to U.S. goods, they are not entitled to price preferences over non-NAFTA or non-Israeli goods where no bidder is offering to supply U.S. goods.

For countries that are signatories to the Agreement on Trade in Civil Aircraft, Title III also provides an express waiver to the BAA restrictions for procurement of "civil aircraft and related articles."\(^{139}\) As with waivers of the BAA for GPA signatories under Title III, the USTR, by delegated authority, is authorized to determine whether a country is party and covered by the Civil Aircraft Agreement.\(^{140}\) At the end of 1996, twenty-three

\(^{134}\) See supra note 94.


\(^{137}\) See infra notes 198–201 and accompanying text.

\(^{138}\) See 48 C.F.R. § 225.105-70 (1997). See also Canadian Commercial Corp./Canada Cordage Inc., 92-1 COMP. GEN. 652 (1992) (ruling that, where there were two offers to supply rope, one from the Philippines, a non-qualifying country, and one from Canada, a qualifying country, but there was no offer of U.S. rope, the Canadian rope was not entitled to the BAA preference for "domestic" items (which would have made it the "low" bid), and that instead all offers must be evaluated without the preference factor).

\(^{139}\) 19 U.S.C. § 2513 (1994). "Civil aircraft and related articles" are defined to include all complete aircraft other than those purchased by the DOD or the U.S. Coast Guard, as well as engines, parts and components, and flight simulators. See id. § 2518(2).

countries were signatories to the Civil Aircraft Code, and another three countries, China, the Russian Federation, and Chinese Taipei, had "observer status."\textsuperscript{141}

The WTO GPA,\textsuperscript{142} provides a major exception to the BAA for goods and services supplied by contractors from GPA signatory countries.\textsuperscript{143} Under Title III of the TAA, the USTR is authorized to waive the BAA procurement restrictions for all contracts covered by the GPA such as contracts of sufficient value and contracts involving covered products, agencies, and countries.\textsuperscript{144} The U.S. law and regulations set out the "designated" GPA countries that are eligible for this BAA waiver.\textsuperscript{145} Non-signatories, such as less developed countries and others offering reciprocal benefits, may be added to the list at the discretion of USTR.\textsuperscript{146}

To qualify as a product from a signatory country, the product must either be wholly produced or manufactured in that country, or have been "substantially transformed" into a new and different article with a distinct name, character or use in that country.\textsuperscript{147} The TAA waiver provisions open

\textsuperscript{141}. See USTR 1997 Trade Pol'y Agenda and 1996 Ann. Rep. of the U.S. President on the Trade Agreements Program at 73–74.

\textsuperscript{142}. See discussion infra Part II.

\textsuperscript{143}. WTO GPA art. XXIII.

\textsuperscript{144}. 19 U.S.C. § 2511 (1994). If an award is made, the supplier is bound to perform as promised to supply conforming goods, and thus GPA goods at time of award must be GPA goods at time of performance. In a case applying this principle, a U.S. company protested when a supplier was awarded a bid to supply a product made in Japan at the time of award, but which was subsequently manufactured in Taiwan. The supplier claimed that, prior to performance of the contract, it intended to start production of the product again in Japan in order to supply conforming goods under the contract. The protests of the U.S. company were denied, and the supplier was permitted to proceed to supply conforming goods. See Protests of Automated Business Systems and Services, Inc., 88-1 B.C.A. (CCH) 20,405 (1987).

\textsuperscript{145}. 19 U.S.C. § 2511(b) (1994); the list of these "designated countries" is provided at 48 C.F.R. § 25.401 (1997). See Matter of: TLT-Babcock, Inc., 91-2 Comp. Gen. 242 (1991) (upholding an award because Japan was a designated country under the TAA and the value threshold requirement for the contract was met).

\textsuperscript{146}. WTO GPA art. V.

\textsuperscript{147}. This "substantial transformation" origin test for GPA signatories is the same as for NAFTA countries, and is different than the fifty percent value added test applicable to U.S. products under the BAA. When evidence indicates that designated country end products are substantially transformed in non-designated countries, they will not be eligible for a TAA exemption. See Hung Myung (USA), 91-2 Comp. Gen. 434 (1991) (designated country (German) products processed and assembled in a non-designated country (Poland) were not eligible for TAA exemption because they were substantially transformed in Poland and thus were of Polish origin).
an enormous amount of procurement activity to contractors from GPA-member countries on a non-discriminatory basis.\textsuperscript{148} The TAA waivers themselves, however, are subject to explicit and significant exceptions, which may be summarized as follows:

- The waivers are available only to GPA signatories that are "designated" under 19 U.S.C. § 2511(a);
- The waivers apply only to procurements made by those U.S. government agencies listed in the Regulations;
- The waivers apply only to purchases of a value exceeding SDR 130,000 ($US 190,000 in 1996); and
- The waivers do not apply to purchases under small business and minority set-aside programs;\textsuperscript{149}

In addition to the Buy American Act, a number of U.S. laws have been used to restrict multinational suppliers from procurement in the U.S. market. These laws are discussed in the next section.

2. Other Laws Bearing on Procurement

Notwithstanding BAA provisions and related waivers, defense procurement remains subject to additional restrictions or prohibitions on non-domestic purchases imposed for national security reasons, or in annual appropriations restrictions. The Berry Amendment is an example of a defense-related annual appropriations restriction on procurement, and has been included in the DOD Appropriations Act every year since 1941.\textsuperscript{150} It generally limits DOD from spending funds appropriated by Congress on


\textsuperscript{149} See id. § 2511(a); 48 C.F.R. § 25.403(b) (1997). A solicitation clause that instructs a procuring agency to resolve equal or tie offers in favor of small business concerns does not establish a preference program which would remove the procurement from application of the TAA for such concerns. Rather, such a clause establishes a procedure by which agencies are to choose among potential suppliers when there are offers for similar goods at the same price. See Tic-La-Dex Business Systems, Inc., 89-2 Comp. Gen. 323 (1989).

specified non-domestic articles and items. The Berry Amendment itself is subject to waivers and restrictions, such as for sole source situations. In addition, it does not recognize a substantial transformation standard for certain listed products, so that items such as textiles containing any non-domestic fiber are barred from DOD procurement.

The U.S. antidumping laws may also be used to effectively prevent procurement of non-domestic goods, particularly in sensitive areas. In an antidumping case, the Japanese company NEC alleged that the U.S. government used the antidumping laws to block the procurement of a Japanese supercomputer by a government-related entity in violation of the WTO GPA. After the Commerce decision was announced, the NSF

151. The prohibition generally has included a requirement that clothing and food products purchased by DOD must be American goods. See 10 U.S.C. § 2241 note (1994). For example, in one case, the Defense Logistics Agency ("DLA"), based on the Berry Amendment, rejected the offer of a Canadian manufacturer to provide fireman's boots produced in Canada for Navy shipboard firefighters and fuel handlers in response to an RFP. See Acton Rubber Limited, 93-2 COMP. GEN. 186 (1993). The Canadian bidder's protest, claiming that the boots met an exception for "chemical protective warfare clothing" was denied on the basis that the boots did not qualify under the exception; they were not manufactured in accordance with the appropriate criteria and were not intended for a chemical warfare purpose. Id.

152. 10 U.S.C. § 2304(c)(1) (1994); Acton Rubber Limited, 93-2 COMP. GEN. 186.

153. Id.

154. On May 20, 1996 a federal weather laboratory in Colorado, funded by the National Science Foundation ("NSF") and the University for Corporate Research ("UCAR"), announced that it planned to award a supercomputer contract to the Japanese supplier, NEC, rather than to a U.S. company, Cray Research, Inc. On the day of UCAR's announcement, a Department of Commerce ("DOC") official sent to the Director of the NSF: (1) a letter warning that NEC could be found guilty of dumping; and (2) a Predecisional Memorandum estimating that NEC's dumping margin would be between 190 and 280 percent. On August 20, 1996, in response to a petition by Cray, DOC initiated the antidumping case. Initiation of Antidumping Duty Investigation: Vector Supercomputers from Japan, 61 Fed. Reg. 43,527 (1996). In October 1996, NEC filed suit with the Court of International Trade ("CIT") to enjoin continuation of the case alleging that, contrary to U.S. law, DOC was biased and had prejudged the dumping allegation, and that "Commerce determined as a matter of institutional policy to block UCAR's procurement of NEC supercomputers, and thereafter engaged in a systematic and coordinated effort to implement this policy through misuse of the antidumping laws." NEC Corp. v. United States, 958 F.Supp. 624, 627 (Ct. Int'l Trade 1997). In February 1997, the CIT rejected NEC's bid to have the dumping suit dropped. Id. The U.S. Court of Appeals for the Federal Circuit upheld the CIT's finding that the result of the antidumping case was not predetermined. NEC Corp. v. United States, No. 98-1020 U.S. App. Lexis 18627 (Fed. Cir. 1998). See generally Vector Supercomputers from Japan, 61 Fed. Reg. 43,527 (1996); Free Foreign Supercomputers, J. OF COMM. Sept. 3, 1997, at 8A; John Maggs, Japan Supercomputers Realities Set, J. OF COMM., April 1, 1997, at 1A.
decided not to approve procurement by UCAR of NEC's supercomputers. \(^{155}\)

Ironically, the DOC results appear to have born out NEC’s allegations—the high rate in effect prevented purchase of the NEC computer. This highly controversial case presents a situation in which the U.S. government, in spite of the WTO GPA, evidently utilized other laws to block procurement of non-domestic merchandise in a strategic area. \(^{156}\)

In addition, sanctions provisions in the U.S. export control laws penalize parties who violate the laws by limiting access to the U.S. government procurement market. \(^{157}\) Therefore, U.S. export control and foreign policy sanctions laws affect procurement rights by banning persons found to have violated these provisions from selling to the government. \(^{158}\) These laws include the standard export controls under the Export Administration Act implemented by the Commerce Department, as well as foreign policy-based controls implemented by the Treasury Department, such as the Iran and Libya Sanctions Act. \(^{159}\) The U.S. also has enacted


158. Id.

159. On August 5, 1996, the United States enacted the Iran and Libya Sanctions Act, Pub. L. No. 104-172, 110 Stat. 1541 (1996). The law represents a unilateral attempt by the United States, using as one tool a prohibition on access to the U.S. procurement market, to compel foreign persons and companies to observe aspects of the U.S. embargoes against Iran and Libya. Id. § 6(5), 110 Stat. 1545. There were pre-existing controls on U.S. trade and investment with respect to Iran and Libya; the novelty of the Act is that it imposes restrictions on non-domestic persons and companies. Id. § 14(7), 110 Stat. 1549. Under the Act, foreign persons could be subject to U.S. sanctions if, after August 5, 1996, they: (1) invest over $40 million in the petroleum industries of Iran or Libya; or (2) sell products to Libya that are subject to UN resolution. Id. § 5, 110 Stat. 1543. The Act requires the President to apply at least two of six possible sanctions in response to an investment or trade
prospective sanctions that prohibit non-domestic entities found violating multinational export controls from the U.S. procurement market.\textsuperscript{160}

In recent years, U.S. state and local governments have introduced sanctions laws that impinge on procurement.\textsuperscript{161} Generally, these laws are not discriminatory because they apply equally to U.S. and overseas-based companies. Nevertheless, they force companies to act in accordance with U.S. foreign policy directives and embargoes or risk foreclosing their access to the U.S. procurement market and other penalties. For example, in 1996, the state of Massachusetts, which is covered in GPA Annex 2 for the U.S., passed a selective purchasing law to protest human rights violations by the military government in Burma.\textsuperscript{162} In addition, a number of other states, counties and cities have passed or have pending legislation implementing selective purchasing laws against companies that do business with countries such as Burma, Tibet, Cuba, Nigeria and Switzerland.\textsuperscript{163}

\textsuperscript{160} In the Omnibus Trade and Competitiveness Act of 1988, the U.S. Congress included a provision imposing mandatory procurement sanctions against Toshiba Corp., the innocent parent of Toshiba Machine Company, for the subsidiary’s diversion of Kongsberg Trading Company advanced milling machinery to the Soviet Union in violation of Coordinating Committee (“CoCom”) regulations related to export controls. 50 U.S.C. § 2410(1)(a) note (1994). The law was blatantly extraterritorial and an unconstitutional \textit{ex post facto} law. Nevertheless, it shows use of procurement sanctions to impose U.S. export control policy on non-domestic companies. In addition, the law included a prospective provision still in effect imposing a prohibition on procurement with any foreign persons found guilty of future multinational export control violations. \textit{See id.} § 2410(h).

\textsuperscript{161} Kenneth J. Cooper, \textit{To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level}, 2 MINN. J. GLOBAL TRADE, 143, 161–65.

\textsuperscript{162} The law discourages companies that do business in Burma from entering into procurement contracts with state agencies by adding a ten percent premium on their bids and by prohibiting those companies from purchasing or leasing state-owned property. \textit{EU Warns that Massachusetts Burma Sanctions Law Violates WTO}, INSIDE U.S. TRADE, Jan. 31, 1997, at 10.

\textsuperscript{163} In addition to the state of Massachusetts, the following local governments have passed Burma sanctions: Alameda County, Berkeley, Oakland, Palo Alto, San Francisco, Santa Cruz, Santa Monica and West Hollywood, California; Boulder, Colorado; Takoma Park, Maryland; Brookline, Cambridge, Newton, Quincy, and Somerville, Massachusetts; Ann Arbor, Michigan; Carrboro and Chapel Hill, North Carolina; New York, New York; and Madison, Wisconsin. Local municipalities that have sanctions against Nigeria include: Alameda County, Berkeley and Oakland, California; and Amherst, Massachusetts. In addition, Berkeley, California enacted a selective purchasing law against Tibet, and Dade County, Florida passed a selective purchasing and investment law against Cuba. USAEngage Website (visited Aug. 26, 1998) \texttt{<http:www.usaengage.org/news/status.}
The EC filed a complaint with the WTO on June 20, 1997 regarding the Massachusetts law. In addition, the National Foreign Trade Council Inc. ("NFTC") filed a suit in the U.S. District Court for Massachusetts challenging the constitutional validity of the Massachusetts Burma sanctions law. The state and local Burma sanctions laws point out two features of government procurement in the U.S. Unlike the EU, the U.S. can only bind the states in trade matters by recourse to the courts. In addition, the Burma sanctions laws reflect the willingness at all levels of government to use procurement sanctions to assert foreign policy objectives.

III. PROCUREMENT RULES UNDER THE WORLD TRADE ORGANIZATION GOVERNMENT PROCUREMENT AGREEMENT

The WTO GPA as implemented into U.S. law by the TAA, limits the effect of restrictions such as the Buy American Act by opening unprecedented procurement opportunities in the U.S. market to multinational suppliers. A description of the WTO GPA and its effect are discussed below.

As of February 1999, Los Angeles, California and the State of New York are the only state and local governments that still have sanctions bills pending against Burma. States and municipalities with sanctions laws pending against Switzerland include Chicago, Illinois; New Jersey, New York and Pennsylvania. USAEngage Website (visited Feb. 4, 1999) <http:www.usaengage.org/news/status.html>.

164. The EC contends that, as Massachusetts is a state covered under the U.S. schedule to the GPA, the Massachusetts Act violates Articles VIII(B), X and XIII of the GPA. The EC also contends that the measure nullifies benefits accruing to it under the GPA, and impedes the attainment of the objectives of the GPA, including that of maintaining a balance of rights and obligations. Japan also filed a complaint on July 18, 1997 in which it raised the same issues as the EC with respect to the Massachusetts law. Consultations are pending between the U.S. and these parties regarding the complaints. WTO website (visited Feb. 4, 1999) <http://www.wto.org/wto/dispute/bulletin.htm>.

165. See Plaintiff’s Opposition to the Commonwealth’s Motion for Summary Judgment and Reply in Support of Its Motion for Summary Judgment, NFTC v. Baker, 26 F.Supp. 2d 287 (D. Mass. Aug. 13, 1998) No. 98-CV-10757 (1998). In its motion, the NFTC states why it has standing to bring the suit, and reiterates its three bases for challenging the Burma sanctions law. These are that: (1) the state law unconstitutionally regulates foreign affairs, which is within the exclusive authority of the federal government; (2) the law violates the foreign commerce clause, which forbids state laws discriminating or burdening foreign commerce; and (3) the law stands in conflict with federal sanctions aimed at encouraging political change in Burma. Id.

166. Id.

167. See supra notes 161–65 and accompanying text.
A. Overview

In negotiations that paralleled the Uruguay Round of Multilateral Trade Negotiations, a number of countries agreed to sign the Agreement on Government Procurement ("WTO GPA" or "GPA").\(^{168}\) As discussed below, the GPA is distinct from and more liberal than its predecessor, the 1979 Tokyo Round Government Procurement Agreement ("GATT Code") in several important respects.\(^{169}\)

The participating parties signed the GPA on April 15, 1994.\(^{170}\) The GPA entered into force for the U.S. on January 1, 1996.\(^{171}\) Unlike the "multilateral" trade agreements of the WTO, which apply on an "MFN" basis to all WTO member states, the GPA is one of four "plurilateral" trade agreements that applies only among the GPA members that agree to adhere to particular GPA commitments on a reciprocal basis.\(^{172}\) Indeed, within the GPA, members selectively offer concessions to certain GPA members only, depending on reciprocal commitments.\(^{173}\) The GPA currently has the following twenty-six Members: Canada, the fifteen members of the European Union (EU), Hong Kong, Israel, Japan, Liechtenstein, South Korea, Dutch Aruba, Norway, Singapore, Switzerland and the United States.\(^{174}\)

The GPA expands the scope and coverage of the GATT Code and imposes stricter procedural disciplines on its signatories.\(^{175}\) With its increased coverage, the GPA opens an estimated $350 billion annually in government procurement contracts to international bidding, which is

---


170. See supra note 167, at 607 n.7.

171. Id.

172. Id. at 607 n.10.

173. Id. at 608 nn.17–21.

174. This represents an increase of five new members from the previous GATT Code. These five members are: South Korea, which joined during the original WTO negotiations, Hong Kong, Dutch Aruba, Singapore and Liechtenstein. WTO GPA observer countries include: Argentina, Australia, Bulgaria, Chile, Colombia, Iceland, Latvia, Lithuania, Poland, and Turkey. Chinese Taipei and Panama also have observer status, but are in the process of negotiating accession to the WTO GPA. WTO website (visited Aug. 26, 1998) <http://www.wto.org/wto/govt/memobs.htm>.

175. See supra note 167, at 607 n.11.
approximately a tenfold increase over the contracts subject to the GATT Code. The main text of the WTO GPA applies to "the laws and entities specified in Appendix I." For each signatory party, Appendix I sets out five annexes: (1) Annex 1 contains covered central government entities; (2) Annex 2 contains covered sub-central government entities; (3) Annex 3 contains all other entities that must procure in accordance with the provisions of the Agreement; (4) Annex 4 specifies services covered by or excluded from this Agreement; and (5) Annex 5 specifies covered construction services.  

1. Entity Coverage

As with the GATT Code, each signatory applies the WTO GPA to central government entities.  Annex I for the United States lists the federal government agencies and entities that procure in accordance with the provisions of the Agreement.  For the U.S., the WTO GPA applies to almost all U.S. executive branch agencies but not to Congress or the Judiciary.  However, the U.S. still maintains exceptions to executive branch coverage that relate to the reciprocal nature of the GPA.  Unlike the prior GATT Code, the WTO GPA for the first time covers sub-central entities.  It also covers government-related entities such as utilities.  The signatories negotiated the coverage of these entities on the basis of reciprocity.  Annex 2 of the WTO GPA lists the thirty-seven U.S. states that specifically have identified coverage of certain state entities

176. Id. at 607 n.12.
177. WTO GPA arts. XX, XXII, XIX.
179. WTO GPA annex I.
180. The WTO GPA expands coverage to several government agencies not subject to the prior GATT Code, including: the Department of Energy, the Department of Transportation, the Army Corps of Engineers and the Bureau of Reclamation of the Department of the Interior.
181. For instance, the U.S. did not cover the Federal Aviation Administration because other signatories did not extend comprehensive coverage to the purchase of air traffic control equipment. WTO GPA U.S. annex I. Further, the U.S. did not apply WTO GPA rules to NASA for bids by Japanese firms in light of Japan's refusal to cover its National Development Agency. See WTO GPA U.S. General Notes.
182. WTO GPA arts. XX, XXII, XIX.
183. Id.
184. Id.
by any reciprocal agreement.  In addition to the limitations of bilateral reciprocity and the identification of only certain state entities for coverage, the U.S. has specified a number of other exceptions regarding sub-federal coverage in Annex 2. First, for certain states, the WTO GPA does not apply to procurement of construction-grade steel, motor vehicles and coal. Second, the WTO GPA does not apply to state preferences or restrictions associated with programs promoting the development of distressed areas and businesses owned by minorities, disabled veterans, and women. Third, the WTO GPA does not prevent any state entity from applying restrictions that promote the state's general "environmental quality," provided however, that the restrictions are not deemed to be disguised trade barriers. Fourth, the WTO GPA does not apply to any procurement made by one of the specified state entities covered by the GPA on behalf of non-covered entities. Finally, the WTO GPA does not apply to restrictions attached to Federal funds for state mass transit and highway projects.

2. Services

Unlike the prior GATT Code, the GPA covers not only the procurement of goods but, it also covers the procurement of services for the first time. Due to disagreements among the WTO GPA signatories over the common services that should be covered, services covered by the GPA vary by country and are limited. Each signatory, with the exception of

186. Id.
188. Id.
189. Id.
190. Id.
191. Id.
192. WTO GPA art. I and n.1.
193. See WTO GPA annex 4 (a review of annex 4 for GPA signatories indicates the limited scope of services covered).
the United States, developed a "positive" list of services they opened to GPA disciplines.\textsuperscript{194} The U.S., on the other hand, set forth in its Annex 4 of the GPA a "negative" listing of services that it excluded from coverage.\textsuperscript{195} These excluded services are:

- all transportation services, including launching services;
- dredging;
- all services purchased in support of military forces located overseas;
- management and operation contracts of certain government or privately-owned facilities used for government purposes, including federally-funded research and development centers;
- public utilities services, including telecommunications and computer-related telecommunications services except enhanced (i.e., value added) telecommunications services;
- research and development; and
- printing services (for sub-central entities).\textsuperscript{196}

In Annex 5, the United States specified the construction services that are covered under the GPA.\textsuperscript{197} However, even as to non-excluded services, the U.S. will open procurement to GPA disciplines only when both the government of the procuring entity and the government of the supplier have agreed to cover a particular service.\textsuperscript{198} While these exclusions and reservations limit the coverage of services, the GPA nevertheless opens for the first time the vast area of services procurement, and creates a precedent for future negotiation of broader coverage.

\textsuperscript{194} Id.

\textsuperscript{195} According to U.S. Annex 4, except for the services specifically excluded, the U.S. agrees to cover all other services listed in the "Universal List of Services" contained in document MTN.GNS/W/120.

\textsuperscript{196} WTO GPA U.S. annex 5.

\textsuperscript{197} Id. According to U.S. Annex 5, a construction services contract is a contract "which has as its objective the realization by whatever means of civil or building works."

\textsuperscript{198} WTO GPA annex 5, general notes.
3. Thresholds

Similar to the GATT Code, the GPA applies to the procurement of covered entities where the value of a procurement exceeds a threshold amount, expressed in terms of Special Drawing Rights ("SDRs"). Relevant thresholds are set out in each Party's Annexes. For the signatory Parties, these SDR threshold amounts are summarized as follows:

Central Government Purchases

- 130,000 SDRs ($190,000) for goods and services.
- 5 million SDRs ($7,311,000) for construction services.

Subcentral Government Purchases

- 200,000 SDRs for goods and services, except U.S. and Canada, which apply a threshold of 355,000 SDRs.
- 5 million SDRs for construction services, except Japan and Korea, which apply a threshold of 15 million SDRs.

Purchases by Government-Owned Enterprises

- 400,000 SDRs for goods and services, except the U.S., which applies a threshold of $250,000 for federally-owned utilities.
- 5 million SDRs for construction services, except for Japan and Korea, which apply a threshold of 15 million SDRs.

---

199. Special Drawing Rights are the International Monetary Fund's international reserve unit of account and are based on the currencies of a basket of countries. Currently, one SDR is equal to approximately $1.46.

200. See, e.g., WTO GPA Australia annex 1, 2; Canada annex 1, 2, 3; EC annex 2, 3; Finland annex 1, 2, 3; Hong Kong annex 1, 2, 3.

201. President's Message to Congress Transmitting The Uruguay Round Table Agreements, Text of Agreements, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 316, 103RD CONG., 656, 1037, 1039 (2d. Sess. 1994) [hereinafter "SAA"].
Procurement contracts below these threshold amounts are not subject to the WTO GPA.202

4. General Disciplines

As set forth in Article I, the WTO GPA applies to “any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in each signatory’s Annexes contained in Appendix I.”203 Article III of the GPA requires members to accord national treatment to other signatories, which prescribes that non-domestic goods, services and bidders be treated no less favorably than their domestic counterparts for procurement purposes.204 Obligations are based on reciprocity, except foreign-owned local entities, which are accorded unconditional national treatment.205 Unlike the GATT Code, article XVI of the GPA prohibits signatories from requiring “offsets” as a condition of procurement, such as domestic content, domestic investment, or technology transfer requirements.206

202. Under U.S. law, the entire value of the contract is used to satisfy a threshold when dealing with designated countries. Where multiple contracts are involved, the value used for determining whether it satisfies the threshold amount under the TAA is found by reference to separate contracts awarded to more than one offeror, or an initial contract to an offeror that has follow-on contracts awarded to the same offeror. For example, a U.S. company protested that the TAA did not apply to a procurement because the threshold had not been met based on the potential value of an individual contract. See Matter of: Tic-La-Dex Business Systems, Inc., 89-2 COMP. GEN. 323 (1989). The protest was denied because, whether the dollar threshold for applying the TAA properly has been met is determined by reference to the estimated value of the entire acquisition, not the potential value of an offeror’s individual contract. Id. In addition, when a bid from a designated country supplier is below the TAA threshold, the Buy American Act differential is applied up to, but not higher than, the threshold. The price of the multinational supplier cannot be increased by the differential above the threshold amount. For example, where a bid was under the TAA threshold, the BAA differential was applied only up to threshold, and the contract was rescinded and awarded to the supplier of products of Japanese origin. See Matter of: Leland Limited, Inc., 86-2 COMP. GEN. 713 (1986).

203. WTO GPA art. I(1).
204. WTO GPA art. III(1).
205. WTO GPA art. III(2)(a), (2)(b).
206. WTO GPA art. XVI (1).
5. Procedures

Articles VI through XV of the GPA require the use of fair and transparent procedures for covered procurements.207 These provisions cover the following:

— technical specifications for procurements (Article VI — technical specifications cannot be written or used to create obstacles to international trade);

— tendering procedures (Article VII — tendering procedures must be non-discriminatory, and information cannot be provided to any supplier so as to limit competition);

— the process of qualifying suppliers (Article VIII — qualification procedures must be non-discriminatory);

— publication of invitations to participate for procurements (Article IX — invitation must be published and contain listed information);

— procedures for selecting suppliers (Article X — procedures must invite maximum number of tenders and be non-discriminatory);

— time limits for tendering and delivery (Article XI — deadlines for open and selective procedures);

— tender documentation (Article XII — documentation must include listed information);

— the submission, receipt and opening of tenders and awarding of contracts (Article XIII — setting out form and process);

— contract negotiation (Article XIV — negotiations must be used to identify strengths and weaknesses in tender); and

— limited tendering (Article XV — Articles VII–XIV need not apply if limited tendering does not unduly limit competition and is non-discriminatory).

---

207. WTO GPA arts. VI–VIII, IX, X, XI, XII, XIII, XIV, XV.
In addition, Article XX requires each signatory to establish a domestic bid challenge system for covered procurement. There are several other procedural changes from the GATT Code to accommodate new areas of coverage and to enhance efficiency in procurement.

6. Binding Enforcement

The GPA incorporates the dispute resolution mechanism of the WTO Multilateral Agreements, the Understanding on Rules and Procedures Governing the Settlement of Disputes ("WTO DSU" or "DSU"). The most important feature of the WTO DSU, and a key change from the GATT, is the binding nature of panel decisions. In addition to the EC's challenge to the Massachusetts Burma sanctions law, two complaints concerning procurement have been filed to date under the WTO. The first of these cases, brought by the EC against Japan, already has been mutually resolved between the parties. The other case, brought by the EC against

208. WTO GPA art. XX(2).
209. For example, GPA art. XIX(5) provides that the notice and publication procedures for sub-central entities and government-owned enterprises are less rigorous than those for central government entities. See WTO GPA art. XIX(5).
210. See WTO GPA art. XXII (stating that "[t]he provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes Under the WTO Agreement . . . shall be applicable except as otherwise specifically provided below").
211. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 1226 (1994) [hereinafter DSU]. Article 16(4) states that a "report shall be adopted . . . unless the DSB decides by consensus not to adopt the report." DSU art 16(4). Unlike the GATT system, which entitled representatives of the disputing parties to block consensus and adoption of a panel decision, the DSU makes it virtually impossible to block a panel decision because the losing party in a dispute can block adoption only if it persuades every other WTO member to block adoption.
212. See supra notes 160–64.
213. See infra notes 213–14.
214. On March 24, 1997 the EC filed a complaint challenging a procurement tender published by the Ministry of Transport (MoT) of Japan to purchase a multi-functional satellite for Air Traffic Management. "Japan—Procurement of a Navigation Satellite" WT/DS73/1. The EC claimed this tender violated Annex I of Appendix I of Japan's commitments under the GPA because it referred explicitly to U.S. specifications and, as a result, was not open to European bidders. The EC also claimed that the tender violated GPA Article VI(3), which proscribes the use of particular designs in specifications, and article XII(2), requiring tenders which permit a response. On July 31, 1997, the EC notified the Secretariat that a mutually agreed solution had been reached with Japan in this dispute, and,
Korea, also has been resolved by the parties.\textsuperscript{215} Only three disputes in total were brought under the GATT Procurement Code. The first case, in which the U.S. challenged the EC, involved a technical interpretation issue.\textsuperscript{216} The second case, brought by the U.S. against Norway, concerned discrimination in the award of a procurement against other potential suppliers.\textsuperscript{217} In the third case, the EC challenged the application of the Buy American Act to a procurement.\textsuperscript{218}

---

on February 19, 1998, the parties provided the text of this agreement to the DSB. \textit{See} WTO website (visited Aug. 26, 1998) \langle http://www.wto.org/wto/dispute/bulletin.htm \rangle.


\textsuperscript{216} In 1984, the U.S. filed a complaint against the EC regarding the latter's method of calculating the threshold value of contracts to determine if they were GPA eligible because the EC excluded the value-added tax ("VAT") from the contract, which lowered the contract amount, making it less likely to pass the threshold. \textit{See} Dispute Panel Report on Value-Added Tax and Threshold, May 16, 1984 GATT B.I.S.D. (31st Supp.) at 247 (1995) (finding the EC's practice of excluding VAT to be inconsistent with its interpretation of the term "contract value" in Art. I:1(b) to be the full cost, including all elements that normally would enter into the final price, and would therefore include any VAT payable unless the entity was exempted from paying VAT). This interpretation makes it more likely that government contracts will be deemed above the minimum threshold and thus be open to GPA signatories.

\textsuperscript{217} In 1991, the U.S. filed a complaint against Norway regarding the latter's procurement procedures for awarding a contract relating to electronic toll collection equipment for a toll system around the city of Trondheim. GATT Dispute Panel Report on Norway—Procurement of Toll Collection Equipment for the City of Trondheim, May 13, 1992, GATT B.I.S.D. (40th Supp.) at 319 (1995). The Norwegian Public Roads Administration awarded the contract to a Norwegian company after single tendering the procurement with that company. Norway maintained that single tendering was justified because the contract was for research and development of prototypes, as permitted by GATT Code art. V:16. The U.S. maintained that the objective of the contract was not research and development, but the procurement of toll collection equipment and that, in conducting such procurement, Norway failed to respect its obligations under the GATT Code to accord the same treatment to non-domestic suppliers as domestic suppliers. The Committee on Government Procurement panel ruled against Norway finding that the single tendering procedure used was not permitted because Norway failed to demonstrate that the procurement was principally for research and development purposes. This decision makes it more likely that government contracts will be deemed covered by the procurement code.

\textsuperscript{218} In 1991, the EC filed a complaint against the U.S. regarding the purchase of a sonar mapping system under the terms of Article 397 of the 1990 Emergency Appropriation Act by the National Science Foundation, an entity covered by the GATT Code. The Act included Buy American provisions. In April 1992, the GATT panel reviewing the
The DSU requires that the final panel report be adopted within 60 days of its circulation unless a party to the dispute formally issues notification that it will appeal or there is a DSB consensus decision not to adopt the report.\footnote{219} The GPA provides for several departures from standard DSU procedures:

- shortening the panel review period by at least two months;
- allowing only GPA signatories to participate in the DSB proceeding involving GPA disputes;
- requiring panels to include persons qualified in government procurement; and
- prohibiting cross-retaliation outside the procurement sector.\footnote{220}

7. Institutions

Article XXI of the GPA establishes a Committee on Government Procurement composed of representatives from each of the signatories.\footnote{221} The Committee must meet at least once a year to afford parties the opportunity to consult on any matters relating to the operation or objectives of the GPA.\footnote{222} The Committee began meeting in early 1996, and to date has focused on implementation issues, such as modifications to the Annexes attached to the GPA to reflect further liberalization and technical changes.\footnote{223}

procurement rejected the U.S. claims that the system was acquired as part of a “services contract” and that the purchase, therefore, was not subject to the GATT Code. The panel ruled that the GATT Code applied to the sonar mapping system procurement and issued a recommendation urging the U.S. to abide by its terms. The U.S. blocked the report from adoption. This case epitomizes one of the key drawbacks of the prior GATT Code for parties seeking redress, that is, the parties to the dispute could block unfavorable reports.

\footnote{219} D.S.U. art. 16(4).

\footnote{220} See WTO GPA arts. XXII(1), XXII(3), XXII(5), XXI(7).

\footnote{221} See WTO GPA art. XXI(1).

\footnote{222} See id.

\footnote{223} The Committee also has adopted a decision on procedures for accession to the GPA, and has overseen the accession of the GPA’s newest members. The Committee currently is organizing a system for maintaining correct annexes of the various signatories, which it expects to make available on the Internet. See WTO website (visited Aug. 26, 1998) <http://www.wto.org/wto/govt/repgp.htm>.
8. Appendices

Appendix I of the GPA includes the five Annexes for each member country. Appendix II contains publications utilized by parties regarding notices of intended procurements. The U.S. lists the Commerce Business Daily ("CBD") for federal procurement, and for state entities, it lists state journals. Appendix III lists publications that provide information on permanent lists of qualified suppliers in the case of selective tendering procedures. Finally, Appendix IV includes, for each member country, the sources for laws, regulations, judicial decisions, and administrative rulings of general application and any procedure regarding government procurement covered by the GPA.

9. The Future

Article XXIV(7) provides for negotiations within three years to enhance the GPA. Future negotiations will focus on eliminating remaining discriminatory measures and practices in government procurement, and tailoring procedures to take into account electronic bidding. The Committee on Government Procurement intends to focus on expanding GPA membership.

224. See discussion supra Parts II.A.1-2.
225. See WTO GPA app. II.
226. See id.
227. The U.S. lists the CBD for federal procurement, and for state entities, indicates that information may be provided directly to interested suppliers through contacts listed in invitations to participate. WTO GPA app. II.
228. The U.S. identifies the Federal Acquisition Regulations as the source of law for federal government procurement. For sources of procurement law for state and government-related entities, the U.S. refers to relevant state and local publications, and to the listed entities themselves. WTO GPA app. IV.
229. See WTO GPA art. XXIV(7)(b).
230. See WTO GPA art. XXIV(7)(b),(c).
231. At the 1997 meeting in Singapore, the United States encouraged the Committee to consider transitional mechanisms for increasing transparency and competition in non-signatory procurement markets, such as developing countries, to prepare such markets for eventual GPA membership. The Committee established a working group on transparency in government procurement. The group held meetings in May, July, and November 1997. See WTO Website (visited Aug. 26, 1998) <http://www.wto.org/wto/govt/working.htm>.
As a member of the GATT Code, implementing the GPA required the U.S. to make few changes to its laws.\textsuperscript{232} The key U.S. legal changes required by the WTO are in areas where the GPA expanded the prior GATT Code, in particular, the addition of services and the inclusion of sub-central entities.\textsuperscript{233} The changes necessary for implementation of the GPA, as well as the effect of the GPA on U.S. procurement practices, are discussed below.

1. Federal Level

U.S. law at the central or federal government level required few changes to implement the GPA.\textsuperscript{234} Procurement by all executive branch agencies already is subject to the procurement provisions of the Federal Acquisition Regulations, which are consistent with the WTO GPA.\textsuperscript{235} Accordingly, the GPA did not require any changes in executive branch procedures. As a drafter of the GPA, the U.S. added provisions regarding transparency in procurement procedures that it based on pre-existing U.S. procedures aimed at countries without such procedures.\textsuperscript{236}

At the federal government level, a number of technical or conforming changes, or other miscellaneous provisions required implementation into U.S. law.\textsuperscript{237} U.S. law also needed to be changed to include several government-controlled enterprises not subject to the GATT Code.\textsuperscript{238} The 130,000 SDR threshold for federal government entity procurement, which

\textsuperscript{232.} See WTO GPA app. I, annexes 2, 4; 48 C.F.R. §§ 1.000-.102 (1997); For example, Sections 341(a) and (b) of the Uruguay Round Agreements Act ("URAA") make conforming technical changes to reflect new time limits adopted in the DSU. 19 U.S.C. § 2515(f)(2), (3) (1994). Further, § 341(c) requires the President, in the annual report on foreign discrimination in government procurement given to Congress, to identify countries that are not signatories to the GPA that fail to maintain transparent procurement procedures or that fail to maintain and enforce effective prohibitions against bribery in government procurement. See id. § 2515(d)(2); 48 C.F.R. §§ 25.400(b), 25.402(a)(1) (1997).

\textsuperscript{233.} See WTO GPA app. I, annexes 2, 4.

\textsuperscript{234.} See supra note 231.

\textsuperscript{235.} 48 C.F.R. §§ 1.000-.102 (1997).

\textsuperscript{236.} See WTO GPA art. XVII.

\textsuperscript{237.} See supra note 231.

\textsuperscript{238.} These enterprises include: the Tennessee Valley Authority, the St. Lawrence Seaway Development Corporation, and the five power marketing administrations of the Department of Energy. 48 C.F.R. § 25.400(b) (1997). As these entities followed procedures similar to those in the FAR, their rules did not require any modifications.
remains unchanged from the GATT Code, required a change to the FAR in order to cover goods and services.239

Notwithstanding the liberalizations of the GPA implementing law, discrimination in practice persists against multinational suppliers in the United States. The Buy American Act continues to be a source of preferential treatment for domestic suppliers due to specific exemptions for agencies, products and services not covered by the GPA, as well as small procurements below the minimum threshold amount.240 The U.S. also specifically excluded the following from coverage under the WTO GPA241:

- purchases under small or minority-owned business preference programs;
- procurement for national security purposes and certain items purchased by the Department of Defense, including those subject to “Berry Amendment”-type restrictions;
- purchases by the Department of Agriculture for farm support programs and human feeding programs;
- purchases by the Agency for International Development (“AID”) for the purpose of providing foreign assistance (purchases not for the direct benefit or use of AID);
- procurement by the General Services Administration of Federal Supply Groups 51 and 52 (hand tools and measuring tools) and Federal Supply Class 7340 (cutlery and flatware); and
- procurement with funds not appropriated by Congress, such as procurement by employee associations.

In addition, under U.S. federal law, suppliers from non-GPA signatories face significant barriers.242 To encourage countries to join the GPA, the TAA specifically bans procurement of GPA-eligible products

239. As of March 1997, the current threshold in dollar terms is $190,000 for supply and services contracts and $7,311,000 for construction contracts. See 48 C.F.R. § 25.402(a)(1).
241. SAA, supra note 200 at 371.
from any country that is not "designated" by the USTR.\textsuperscript{243} This ban goes beyond the mere domestic price preferences set forth in the BAA, and essentially prohibits procurement of GPA-covered products from non-designated countries.\textsuperscript{244} Non-GPA covered products from non-eligible countries remain subject to the BAA.\textsuperscript{245}

2. State Level

One of the significant changes from the GATT Code is coverage of sub-central entities and government-owned enterprises. In the U.S. schedule to the GPA, the U.S. offered to open purchases by specified government entities in thirty-seven states and purchases by several sub-central utilities including the Port Authority of New York and New Jersey, the Port of Baltimore, and the New York Power Authority to GPA members.\textsuperscript{246} The U.S. schedule to the GPA, however, excludes Buy American restrictions applied to procurement by state and local governments made with Federal grants pursuant to the Federal Transit Act,\textsuperscript{247} the Federal Highway Act\textsuperscript{248} and the Airport Improvements Act from coverage.\textsuperscript{249} U.S. federal law cannot implement state law commitments.\textsuperscript{250} Each individual state must implement the GPA obligations as to those state entities covered in GPA Annex 2. State implementation of the GPA and other WTO commitments generally is coordinated through the National Governors' Association.\textsuperscript{251}

\textsuperscript{243} Id.

\textsuperscript{244} Id. This ban is subject to two "national interest" waivers. The first may be applied on a case-by-case basis by any agency head who deems such a waiver to be in the "national interest." See id. § 2512(b)(2). The second may be approved the Secretary of Defense pursuant to a reciprocal procurement agreement with the Defense Department ("DOD"). See id. § 2512(b)(3).

\textsuperscript{245} See id. § 2512(c)(2).

\textsuperscript{246} WTO GPA U.S. annex 3.


\textsuperscript{250} Federal law, however, requires the President to consult with the states for the purpose of achieving conformity of state laws and practices with the WTO GPA, and to keep the states informed on matters that potentially impact them under the GPA. 19 U.S.C. § 3512 (1994).

\textsuperscript{251} U.S. government trade officials claim all thirty-seven states have implemented their GPA obligations. However, it is uncertain whether, in fact, all states fully have done so.
The GPA presently covers purchases by thirty-seven U.S. states. The inclusion of these sub-federal entities is one of the GPA's most significant changes from the GATT Code. In practice, however, the eligibility of a multinational supplier from a GPA country to compete on an equal basis for contracts of a particular state depends on whether the U.S. has agreed bilaterally on coverage of sub-central entities with that country and whether the relevant U.S. state government both is covered by the GPA and has changed its laws to conform to the GPA. As discussed above, state and local laws continue to include Buy American and buy local provisions that, like the BAA, provide preferential treatment to domestic and local production of goods and services.

3. Implications of GPA for Buy American Act

In several significant respects, the WTO GPA affects the application of the Buy American Act, the traditional barrier to non-domestic sales to the U.S. government. For signatory countries, the GPA provides limitations to the Buy American Act beyond its own exception provisions and the GATT Code. The WTO GPA further restricts the BAA by opening procurement to signatory countries that the BAA previously protected, in terms of: (1) newly-covered federal agencies, (2) sub-federal entities, and (3) services.

For countries that are not signatories to the GPA, however, the implications in terms of exclusion from the U.S. government procurement market are severe. First, because they have not signed the GPA, these countries are harmed not only by application of the BAA, but also by the TAA ban on products from non-signatory countries that are eligible from Code signatories. As discussed above, this ban prohibits procurement of GPA-covered products from non-signatories even if they are offered at the lowest price after application of the BAA price differential. In spite of

The federal government has authority under the Commerce and Foreign Relations clauses of the U.S. Constitution to sue states if they fail to adhere to U.S. international obligations. See id. § 3512(b)(2)(A). It has not had to take such legal action under the GPA but, as discussed in the case study section, it is considering legal action in connection with the Burma sanctions law.

252. WTO GPA, U.S. annex 2.
254. See supra notes 99–101 and accompanying text.
255. WTO GPA, U.S. annex 2.
256. See supra notes 143–48 and accompanying text.
the restrictions on the BAA introduced by the GPA, signatories still are subject to U.S. unilateral action under Title VII, which has lapsed, but likely will be renewed. 257 Under these Title VII BAA amendments, if a country is deemed to discriminate against U.S. products or contractors, the U.S. can retaliate by prohibiting procurement of products from that country. 258

IV. EXPANDING OPPORTUNITIES IN THE U.S. PROCUREMENT MARKET

Due to both multilateral liberalization and U.S. internal reforms, the current opportunities for entering the U.S. government procurement market are unprecedented. The WTO GPA expanded procurement opportunities for multinational suppliers by opening to GPA sources acquisitions by additional federal entities, as well as procurement of services, and procurement by sub-federal and government-related entities. 259 Further, suppliers have a new means of enforcing these rights under the binding WTO DSU dispute settlement process. 260 Recent U.S. reforms also open new areas of U.S. government procurement — the commercial market — to suppliers of non-specialized products. 261 Several recommendations for entering the U.S. government procurement market are discussed below.

A. Notice of Market Entry Opportunities

As in other business sectors, obtaining information on potential new business is crucial to enter the government procurement market and expand market share.

1. Obtaining Solicitation Information

A first step in pursuing government procurement opportunities is to monitor the CBD. CBD, issued every business day, is the “public notification media by which U.S. Government agencies identify proposed contract actions and contract awards.” 262 Monitoring the CBD is essential

257. See supra notes 108–09 and accompanying text.
258. See supra notes 108–09 and accompanying text.
259. See WTO GPA U.S. annex I–V.
260. See supra note 109 and accompanying text.
261. See supra notes 68–72 and accompanying text.
262. 48 C.F.R. § 5.101 (1997). The CBD can be accessed on the Internet at the
in order to stay informed of opportunities, but it is not the only way to
obtain timely information and may not provide advance notice sufficient
to place a company in a good position to win a government contract if used
alone.263 Another means of identifying procurement opportunities is to
secure inclusion on a government agency’s mailing list.264 Potential
suppliers can be included on a mailing list by two means: (1) Central
Contractor Registration, an Internet registration system; or (2) by filing a
“Bidder’s Mailing List Application.”265 Other sources of information
include advertisements through newspapers and trade associations as well
as insider information shared within an industry. An understanding of an
agency’s budget and need for services and goods is useful. Prospective
contractors can utilize consultants to assist in this regard.

Procurements by the U.S. states covered by the GPA also must comply
with the GPA requirement that bidding procedures be transparent, and
effective procedures for protests be made available.266 The GPA requires
that the various states issue a public notice of upcoming contracts and
contracting procedures through local procurement entities and State
journals.267 To access the sub-federal procurement market, multinational
suppliers should focus on the states covered by the GPA and, more
particularly, on the entities covered within such states.268

2. Reviewing Past Government Contracts for Opportunity Leads

There are several publications that provide historical information
regarding previous government contract awards. They can be useful for

---

263. 48 C.F.R. Title 1 (1997).
265. The Internet address for Central Contractor Registration is:
<http://ccr.edi.disa.mil/ccr/>. A Bidder’s Mailing List Application is filed on Standard
Form 129. See 48 C.F.R. § 14.205-1(d) (1997). Although a company’s presence on a
mailing list will not guarantee that it will receive solicitations or information about a
particular procurement in which the company may be interested, it is an additional way to
gain access to information.
266. WTO GPA arts. XVII, XX.
267. WTO GPA art. XVII.
268. Given the large number of GPA-covered states, it may be best for multinational
suppliers to economize their efforts by focusing on states with large procurements budgets,
such as California and Texas, as well as states with which the company has a pre-existing
relationship, such as states in which the company has a subsidiary. See GENERAL SERVICES
ADMIN., supra note 6 at 20.
identifying agencies of special interest and preparing for future bid solicitations. The Federal Procurement Report is a document prepared by the GSA on an annual basis.\(^{269}\) It provides "snapshot" statistics of over 60 agencies.\(^{270}\) It includes information for federal agencies and federal procurement for the U.S. states.\(^{271}\) This information identifies the solicitation procedure, the type of contract and contractor, including non-domestic contractors, the amount awarded and, in broad terms, the product or service.\(^{272}\) The Government Contracts and Subcontract Leads Directory is a report prepared by Government Data Publications on an annual basis. It describes contracts in the prior year by product category, the specific product awarded, the awardees, the date, and the amount of the contract.\(^{273}\)

**B. Marketing**

A marketing strategy should be developed in order to maximize government procurement opportunities. Marketing in the context of government procurement means keeping track of and monitoring proposed or potential procurements in sectors of interest as they develop. This starts prior to the budget process and continues through selection and award. As in other business sectors, it is important to make promotional efforts to ensure that a company's name, products, and accomplishments are in the minds of the officials within the procuring agency. Another marketing step, which can be more difficult for multinational suppliers, is developing contacts within procuring agencies which can lead to information about solicitations.

Companies can pursue so-called teaming arrangements with other companies in advance in order to enhance their chances of securing a government contract.\(^{274}\) For certain procurements where a number of companies will be included, teaming arrangements allow the team to bid collectively in an area of expertise or capability required by the Government

---

\(^{269}\) Id.

\(^{270}\) Id. at iii, 76–202.

\(^{271}\) Id. at 22–74.

\(^{272}\) See generally, GENERAL SERVICES ADMIN., supra note 6.

\(^{273}\) The directory is for prime contractors to identify active agencies, prices, competitors and new products for bidding. In addition, subcontractors can use it to identify active prime contractors.

which one member of the team alone does not possess. In addition, new market entrants can team with companies that have significant government contracting experience in order to learn the system. This can be especially advantageous for overseas-based companies, which can team with U.S. companies that have more substantial experience selling to the government. Teaming arrangements with U.S. companies also may be effective in sensitive areas such as defense. Further, teaming can be used to expand opportunities in areas other than general federal contracting, including securing a role as a subcontractor in major procurement projects, and state procurement with local contractors.

C. Understanding New and Evolving Reforms

In order to maximize procurement opportunities, multinational suppliers should familiarize themselves with the recent reforms under FASA, FARA, and ITMRA. This new and evolving system opens commercial product acquisition via implementation of more streamlined, market-oriented procedures. Companies without significant experience in the government procurement market can devote their energies to this commercial sector. The companies will no doubt find this more availing because they can offer their normal products and services without the need to supply customized products or to conform to arcane and complex specifications requiring specialized knowledge of the procurement process. This emerging commercial sector offers unique opportunities because it has fewer obstacles to entry, is easier to learn and adjust to, and presently is too new to have dominant suppliers.

276. Id.
277. See supra note 9.
278. See supra note 16.
279. See supra note 78.
281. See supra notes 70–73 and accompanying text.
D. Remedies for Discrimination

1. U.S. Remedies

The WTO GPA requires that each member establish "non-discriminatory, timely, transparent and effective procedures" that allow private bidders to launch a complaint directly against a procuring entity in a member country. Through this means, aggrieved bidders can challenge procurement bidding procedures or decisions and obtain redress where these actions are in breach of the GPA. The United States has a variety of procedures for enforcing contractor rights, both at the agency level and in the courts.

A critical prerequisite to obtaining relief is for the contractor to know its rights. Under the TAA exception to the BAA implementing the U.S. GPA obligations, GPA members have the right to have their goods, services, and suppliers compete on equal terms in GPA covered procurements. In other words, multinational suppliers have the right to offer their goods and services for acquisitions valued above a set dollar threshold amount on a non-discriminatory basis to various designated federal agencies, as well as in procurements by designated entities in the various U.S. states covered by the GPA. A multinational supplier that is cognizant of its GPA rights as implemented under U.S. law thereby will be informed of the contracts on which it may bid on equal terms and, just as important, it will know that when equal treatment is denied it may pursue relief through various U.S. remedial procedures. The most common U.S. legal procedures will be those related to bid protest because discrimination is most likely to occur at the outset of a contract award. Discrimination against the supply of non-domestic origin goods during the contract performance phase, in contrast, would involve the contract claims procedures.

282. WTO GPA art. XX.
283. Id.
284. See supra notes 39–49 and accompanying text.
285. See supra notes 141–48 and accompanying text.
286. See supra notes 141–43 and accompanying text.
287. See supra notes 147–48 and accompanying text.
288. See supra notes 39–56 and accompanying text.
289. See supra notes 39–51 and accompanying text.
290. See supra notes 52–56 and accompanying text.
2. WTO Remedies

As an alternative, WTO dispute resolution procedures\textsuperscript{291} provide an additional remedy to the domestic legal procedures for aggrieved bidders or contractors from GPA member countries. Referring disputes to the WTO has certain advantages and disadvantages relative to a domestic proceeding. Bringing a WTO challenge against a national procurement decision before a DSU panel in Geneva is a formal, high profile act, which will bring international attention to the allegedly discriminatory action, law, or rule. A challenge in the domestic legal system, in contrast, is more on the order of a technical contract procedure, unlikely to generate significant public attention or controversy.

A WTO complaint challenging a discriminatory procurement law or decision before a DSU panel is the better way to effect fundamental reform through changes to domestic law or regulations. A successful domestic challenge, by contrast, likely will reverse a procurement decision relating to a specific contract, without necessarily affecting the underlying laws or procedures which may apply to other GPA member bidders in the future. Another advantage of a WTO panel is that it may be a more impartial decision maker in a dispute involving a non-domestic bidder complaining against a government agency or a domestic competitor. Panel members rendering the decision will not be from the United States.\textsuperscript{292} An additional advantage of a WTO DSU challenge is that, unlike prior GATT panels, a WTO panel decision will be binding on the United States.\textsuperscript{293}

However, a WTO action is not advantageous in many other respects. In particular, the WTO forum may be too far removed and a favorable decision may be difficult to implement in time to provide effective relief on a particular disputed contract to a specific bidder. Relief in WTO dispute resolution actions tends to be prospective and general in nature. A WTO panel will be unlikely to call for the award of damages to a complainant or for the rebidding of a specific contract that already has been awarded. A WTO panel has no injunctive power. A U.S. action, in contrast, may offer a swift way for a contractor to obtain specific relief — such as the rebidding or award of a contract, or the injunction of contract performance until a challenge is considered.\textsuperscript{294} Of course, U.S. actions appealed to federal court can take a long time to resolve. Further, U.S. procedures also allow

\begin{footnotes}
\footnotetext[291]{See supra notes 209–19 and accompanying text.}
\footnotetext[292]{See WTO DSU art. 8(3).}
\footnotetext[293]{See supra note 109 and accompanying text.}
\footnotetext[294]{31 U.S.C. § 3554 (1994).}
\end{footnotes}
contractors to challenge actions that are contrary to U.S. law or regulatory requirements, but do not constitute violations of the GPA. Another disadvantage is that WTO dispute procedures are available only to sovereign governments on behalf of their nationals. An aggrieved bidder, therefore, must convince its government to act on its behalf. Unlike a domestic legal action, a private company is not empowered to pursue WTO relief directly, and therefore cannot control the action. Moreover, bidders from countries that are not GPA signatories, and U.S. bidders offering non-domestic products have no right to a remedy under the GPA.

Given the above advantages and disadvantages, for most government contract disputes, it will be best for aggrieved multinational suppliers to challenge discriminatory national procurement actions through the domestic claims procedures. This is the only real option for U.S. bidders offering non-domestic products. The domestic procedures generally will provide more direct relief to the complainant on a contract-specific basis. If a challenge in the national forum is unsuccessful, then a bidder may consider a complaint to the WTO, in coordination with representatives from its trade ministry. A WTO challenge also may be appropriate when a particular domestic law or action, as opposed to a discretionary agency contract decision, is discriminatory on its face and is seemingly inconsistent with GPA or other WTO obligations.

V. CONCLUSION

The U.S. procurement market remains complex, and still discriminates against multinational suppliers in important respects. Nevertheless, this market is vast and rich. The recent convergence of binding non-discriminatory commitments under the WTO GPA, and the significant

295. See WTO DSU, art. I (indicating that the DSU applies to the settlement of disputes between “Members”).
296. See id.
297. WTO GPA art. XXII.
298. We note, however, that the general trend in the U.S., according to statistics at the contract appeals boards and the General Accounting Office, has been a decrease in bid protests. (attributing this decline, anecdotally, to three factors: see Timothy Sullivan, Procuring a New System, LEGAL TIMES, June 23, 1997, at S37 (“(1) Contractors have come to think that it’s not very smart to sue their customer, (2) the chances for success are slim, and (3) they can spend their money on better things than attorney’s fees”).
299. For example, procurement sanctions imposed pursuant to the Title VII amendment to the Buy American Act, or bid denials under the Berry Amendment, discussed supra, may be more vulnerable to challenge at the WTO than through U.S. fora.
domestic legal reforms for the procurement of commercial products, roll
back many entry barriers and open domestic procurement to free
competition like never before. This convergence creates unprecedented
opportunities for well-informed multinational suppliers to enter and expand
their presence in the domestic procurement market and, in the process,
ensures that the government can choose from a wide array of quality
products and services from the global marketplace at competitive market
rates.