

## **Are discussions around GPA missing the real issue? 28 August 2010.**

by Gilbert Van Kerckhove

Gilbert is chairman of the Public Procurement Working Group of the EUCCC (European Chamber). The views expressed here are his own but have been submitted to the EUCCC.

### ***Good news?***

On 17 August 2010 China added 15 government departments under the State Council's ministries into its latest offer to join the Government Procurement Agreement (GPA) of the World Trade Organization (WTO). Chinese and foreign experts point out that SOEs (state-owned enterprises) are not included.

This seems to indicate some misunderstanding on the definition of "government projects" and "government procurement" in China. Some even claim there is no regulation in place for SOE to this effect.

The current negotiations for China to join the GPA could prove to be pointless unless the real stumble block is removed - the duality of the Government Procurement Law (GPL) and the China Bidding Law (CBL). To fight for GPA only might be the wrong battle.

### ***Tempers are flaring***

China's possible accession to GPA is generating hot debates. Foreign chambers and the governments of the EU and USA press China for more concessions in its proposal. At the same time, Chinese media counterattack Western governments and media, that are demanding more open markets and allege the business environment is deteriorating. As a proof, Chinese media articles point at growing FDI figures and the apparent satisfaction of American business as shown in recent surveys published by Amcham.

The Chinese government, at its highest level, continues to reassure the foreign business community that foreign-funded companies operating in China are to be regarded as "domestic companies" and that their products and services will not be discriminated against. The "indigenous innovation registration" launched by the Chinese Government in 2009 unleashed strong opposition from the foreign business community. The Chinese side - as for now - has largely backpedaled on the issue.

But both sides are increasingly nervous about trade protectionism and market access.

The foreign side complains about unfair practices in market access, weak and biased implementation of laws related to environmental protection, IPR and public tendering. China criticizes the growing trade barriers in EU and USA related to acquisitions of foreign companies, anti-dumping complaints and punitive import duties.

*"Trade protectionism is obviously intensifying, with some countries using self-innovation, government procurement and the yuan's exchange rate to exert pressure on China. China has become the biggest victim of global trade protectionism, suffering 38 trade remedy investigations in the first half of this year," Zhang Ping, minister of the National Development and Reform Commission in a report delivered to the National People's Congress Standing Committee on 26 August 2010.*

### ***The wrong debate***

The GPA discussions do not address real market access for foreign companies. If China becomes a GPA member sometimes after five years from now, it could be a hollow victory. Indeed, the USA and EU fail to understand how so-called government projects are submitted to public bidding in China. Requiring to include more “government entities and SOE” in the GPA misses the whole point. The SOEs as a matter of fact have nothing to do with GPA as for now, and thus do not belong in the GPA.

Foreign countries should request China to merge the two bidding markets, one regulated by the GPL and the other one by the CBL as to achieve a single legal framework for “public projects” as it is currently the case in the EU.

Unless this single legal framework is implemented and once China is part of the GPA, Chinese companies will have free access to public bidding in the EU while EU companies will continue to face a myriad of market access restrictions, e.g. in the field of construction, engineering, architecture, services, power generation and transmission, just to name a few.

Chinese companies will be able to bid for large-scale projects in the EU but EU will often face a closed door. There will be no genuine reciprocity but instead it will be rather a one-way highway from China to the EU.

### ***The legal duality - what Government Procurement in China really is***

We need to look at the present parallel markets and laws regulating public bidding in China. In China “Government Procurement” (GP) basically refers to the purchasing of goods and services through the Ministry of Finance and the regional bureaus of finance. The applicable law is GPL.

The official value announced for GP in 2009 was 700 billion RMB.

Detailed figures for 2009 are not available yet but if we extrapolate data from previous years to analyze the year 2008 (all approximate figures), for the total of 600 billion RMB:

- goods: 255 billion RMB, 14% from the central authorities and 86% from local authorities
- construction: 300 billion RMB, 12% from central authorities and 88% from local authorities
- other services: 45 billion RMB, 15% from central authorities and 85% from local authorities

The above breakdown explains Western requests to include local entities and not only central government entities.

But... what are actually talking about? Not much actually. GP is related to construction and maintenance of buildings and purchases of services as well as office equipment and stationeries for ministerial buildings and non-commercial government entities (not SOE); other purchases are related to relief work, emergencies, geological and other surveys; cars and other vehicles for the mentioned entities; police, medical and other emergency equipment and supplies; combat of droughts and desertification; irrigation; and so on.

In other words not exactly the focus of EU companies, except maybe for vehicles. Projects of real interest are regulated by the CBL.

## ***The bulk of the projects of interest fall under CBL***

The CBL Article 3 states:

The following construction projects in the territory of the People's Republic of China, including surveying and prospecting, design, engineering and supervision of such projects as well as the procurement of major equipment and materials related to the construction of such projects, must be subject to tenders:

1. projects such as large-scale infrastructure facilities and public utilities involving the social and public interests and public safety;
2. projects which are, completely or partly, invested by the State-owned funds or funded through State financing; and
3. projects using loans or aid funds from international organizations or foreign governments.

Practically speaking this covers all projects undertaken by SOE or any project where government money is used in part - this is also the case for a JV where the Chinese partner is a SOE or related. It was also the case for all major Olympic stadium projects - partly because some government funding was involved or simply because they were considered "large-scale infrastructure facilities and public utilities involving the social and public interests".

Projects covered are massive in scope and value. It is not possible to have a good estimate of the total value. However, fixed asset investment is an area where the vast majority of investments should be subject to public bidding, as it mostly refers to infrastructure and utility projects such as energy, sewage treatment, water supply, environmental protection and public transportation. According to the National Bureau of Statistics, China's fixed asset investment reached 22,485 billion RMB in 2009. Compare this to the 700 billion RMB for GP in 2009.

I witnessed a public confirmation of the fact that all major SOE have to observe the CBL in "The Second China Tendering & Bidding Forum", held on 10 October 2009 in the Diaoyutai State Guesthouse. The Forum also celebrated the 10<sup>th</sup> anniversary the China Bidding Law. Major participants on stage, most of them delivering a speech, were:

- Mr. Li Keqiang, Vice Premier
- Mr. Zhang Ping, Chairman of NDRC
- Mr. Miao Wei, Vice Minister MIIT (Industry and Information Technology)
- Mr. Guo Yunchong, Vice Minister MOHURD (Housing and Urban-Rural Development)
- Mr. Feng Zhenglin, Vice Minister of MOT (Transport)
- Mr. Lu Chunfang, Vice Minister of MOR (Railways)
- Mr. Jiao Yong, Vice Minister of MWR (Water Resources)
- Mr. Ye Qing, President of China Tendering & Bidding Association (CTBA)

The leaders urged all government ministries to strictly abide by the CBL for all projects under their supervision and to implement a fair, transparent and clean bidding & tendering process. Projects covered are related to energy, power generation and transmission, railways and subways, water treatment, roads and other infrastructure, to only name a few.

So, when foreign experts lament the absence of SOE in the GPA proposal or even ignore there is a legal framework for SOE, they could not be more wrong.

The coverage is somehow close to the EU Directive 2004/17/EC that covers procurement procedures of entities operating in the water, energy, transport and postal sectors. So we can safely assume that the EU directive (and other similar ones) cover the same areas as targeted by the CBL - plus the areas defined by GPL.

It is mostly in the coverage through the CBL that foreign companies complain of restrictions and limited market access through many diverse regulations that bar foreign players. Market access for construction companies, architecture & engineering firms and many service companies is often seriously restricted or simply denied.

While the GP area has at least some general clarification of what is the required local content (50%), projects under the CBL do not have a general rule. Each ministry or entity sets its own requirements in terms of forced technology transfer or level of localization (mostly 70%).

### **Conclusion**

Once China joins the GPA little could change for foreign companies who are interested in projects regulated by the CBL. On the other hand, Chinese companies will be able to enjoy the EU Directive 2004/17/EC and other related laws.

Integrating the GPL and CBL tendering areas is the only option but China is currently not willing to open its own markets according to the spirit of the GPA and WTO and is thus reluctant to even consider this legal requirement.

If foreign governments stick to their present negotiation strategy for the GPA and ignore the CBL projects they may discover their mistake five years later from now or later. Too late.