CHAPTER-V
INTERNATIONAL PERSPECTIVES

5.1 Introduction

The international developments with reference to government contracts worldwide have been dynamic especially in the present era of privatization, liberalization and globalization. The government contracts with reference to various other countries are very important and vital for the purpose of analysis and the fruits of comparative study will benefit anti-corrupt practices in government procurement. The various international organizations also played a vital role in suggesting measures to redefine the procedures and principle relating to government procurement’s for public use. The sensitivity in these contracts is very important and pertinent to ascertain that these procurements are corruption free and all aspects of fairness have been applied in the contract. The world trade organization and United Nations have been constantly working on these aspects for the purpose of attaining fairness in government contracts.

5.2 Turkey

Government’s contract concluded under private law subject to liability of private law. On other hand, contracts governing public services and activities are subjected to administrative law principles and case-law and administrative liability comes to an issue. In administrative contracts, in case government causes damage via misconduct or negligence against other party, it is obliged to compensate damages. Administrative party of the contract may be obliged to perform obligations which are not predicted in course of contractual conclusion. In case that these additional obligations stemming from contract are performed for purpose of contribution to the government, administration may be subjected to compensation for recovery of
contribution. These compensations are stemming from unjustified enrichment. Administrative liability of contract might be seen in two possible case:

1. In case other party’s obligations become complicated due to the administrative conducts and acts new conditions force other party to compensate more unforeseen expenses. If administrative conducts and transactions shall effect the contract directly, the damage arises from these facts must be compensated by administration.

2. This is well accepted principle that if administration is not party of the contract, it can’t be held liable for conducts and transactions. Predictability is an important factor for determination of other party’s compensation. In case other party still provides the services stemming from the contract due to the facts of war, economic crisis, other party must certainly have right to demand compensation for this conduct.

In some cases, administration is fully liable of its conducts whether it has no any negligence or mistake.

Hazardous activities are considered in this concept such as nuclear tests, military exercises, management of mental hospitals or medical and chemical usage. As can be seen risky activities of government have wider liability regarding compensation of damages.

In these situations, negligence cannot be an issue for purpose of administrative defense in judicial procedure. Public Risks are also considered in same category. Terrorist activities are major risk factor in Turkey and person who is damaged by terrorist act must be compensated without discussion of administration’s negligence or mistake. Because administration’s first priority must be to secure people’s right of life including Turkish citizens or foreigners. Therefore, intelligence of administration
must be properly working for prevention of this case. Accordingly, damages stem from terror incidents are subject to compensation.

In addition, in this type of judicial cases must be seen in Administrative Courts of Turkey. This judicial procedure is not the same as the civil court procedure. Hearings are not compulsory for administrative cases, if the court finds it necessary it can decide to set a hearing. In ordinary circumstances, administrative judicial process does not require any hearing. The procedure is governing with petitions and counter petitions.

5.3 Government Contracts in USA

In American Constitutional law, the doctrine of sovereign immunity bars suits against the government in most circumstances. Early American colonial experience included a strong commitment to legislative adjudication of public law and legal obligation, where citizens made popular assemblies the forum that resolved monetary claims against the government by balancing public and private ends. Gillian Hadfield has noted that “[politically, by honoring its contracts, government has reinforced its democratic legitimacy as a government subject to the rule of contract.” The Tucker Act, initially enacted in 1887, added to the jurisdiction of the Court of Claims by formally waiving the government’s sovereign immunity for claims “founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States.” Formerly, under the so-called “disputes clause” found in most government contracts, a contractor was required to exhaust administrative remedies, by appeal to the agency board of contract appeals, before he could file suit in the Court of Claims for a very

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3 28 U.S.C. § 1491 (a) (1); see also 28 U.S.C. § 1346 (a) (2). The district courts were given concurrent jurisdiction of claims not exceeding $1,000 (presently increased to $10,000). 28 U.S.C. § 1346(a)(2)
limited judicial review of the administrative decision. The CDC has given an aggrieved contractor vastly improved choice of remedies – appeal to a judicially-enhanced agency board14 or “direct access” to suit in the Court of Claims4. In Burr vs FHA,5 the Supreme Court also recognized congressional authority to create agencies capable of acting as private litigants in contract disputes. Such “sue-and-be-sued” clauses – rendering federal agencies amenable to suit – waive immunity only as to existing causes of action and only with regard to the specific activities enumerated in the statute.

In Seaboard Lumber Co. vs United States,6 the Claims Court explained: It is undisputed that the law to be applied in cases related to federal contracts is federal and not state law. The federal law applied in breach of contract claims is not, however, created by statute but rather for the most part has been developed by the Court of Appeals for the Federal Circuit and the Court of Claims, with the Claims Court, or the Boards of Contract Appeals applying the law in the first instance. This federal contract law also reflects the various contract clauses developed over time for the benefit of both the sovereign and the contractor through the practice of agencies and the bargaining leverage of contractors. It has drawn as well upon traditional private contract law for analogies and concepts. However, it is a separate and distinct body of law. In Federal Crop Ins. Corp vs Merrill,7 for example, a corporate agency of the Department of Agriculture insured a crop of reseeded wheat with a clause incorporating regulations published in the Federal Register – regulations that forbade such insurance. Cognizant that a private insurance company would be liable under similar circumstances, the Court held that since the regulation was equivalent to statute, the contract was unlawful and incapable of supporting a suit. As a result of the

4 41 U.S.C. § 605(b). An appeal must be taken within 90 days or a suit within 12 months
5 309 U.S. 242 (1940)
6 15 Cl. Ct. 366 (1988), aff’d, 903 F.2d 1560 (Fed. Cir. 1990)
7 332 U.S. 380 (1947)
special character of the federal government, such an agent cannot effectively act beyond his limited authority, even when he and the contracting party are unaware of the limitation. In *G.L. Christian vs United States*, the Court of Claims held that a clause required by regulation to appear in the relevant sort of contract (permitting termination for convenience by the government under certain conditions) was present in the contract and binding upon the contractor despite being absence in fact from the contract and not incorporated by reference. The contractor’s damages were accordingly limited to the formula in the absent clause.

In another case the supreme court of the United States in *United States vs Winstar Corp.*, dealt with Congressional obligation not to enact legislation contrary to the terms of a contract entered into by a federal agency. The case involved an effort by the Federal Home Loan Bank Board to encourage healthy thrifts and outside investors to take over failing thrifts during the savings and loan crisis of the 1980’s, by means of “express agreements” guaranteeing capital credits toward reserve requirements. Subsequent action by Congress, however, forbade thrifts from counting capital credits in computing the required reserves, causing many participating S & Ls to fall out of compliance and making them subject to seizure.

The plaintiffs in Winstar sued the government for damages arising from breach of contract. Interpreting the contract not as constraining sovereignty – but instead only requiring damages in the event of sovereign action contrary to contract provisions (essentially constituting a promise to assume the risk that such legislation would be enacted) – the Court held the government liable in damages for Congress’s violation of the restriction. While the Bank Board had legitimate delegated authority to enter into such a contract, the motive of Congress in enacting the offending

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8 312 F.2d 418 (Ct. Cl 1963)
9 518 US 839
legislation was to abrogate the contracts, such that its action was properly attributed to the government-as-contractor rather than the government.

In yet another recent case\textsuperscript{10} the supreme court reversed a decision by the U.S. Court of Appeals for the Federal Circuit, which had applied principles of equitable estoppel against the government in order to award a claimant monetary payment not otherwise permitted by law. Seemingly motivated by the burden of estoppel claims as a “drain on the public fisc,” the Court refused to award damages to a retired federal government employee who was temporarily deprived of disability annuity benefits because he had detrimentally relied on erroneous oral and written advice provided in government explanation of his policy. Relying on the principle that “payments from the Federal Treasury are limited to those authorized by statute,” the Court ruled that appellee’s claim was not covered under any Tucker Act category, maintaining “the impossibility of an estoppel claim for money in violation of a statute.” Despite occasional exceptions, an important difference between government contract and privately law is the (normal) unavailability of the doctrine of equitable estoppel to overcome lack of authorization by statute or equivalent regulation. In \textit{Sutton vs United States},\textsuperscript{11} a contractor engaged in dredging at unit rates had, through the mistake of the government contracting officer, been allowed to continue work in such volume as would require an excess of the amount appropriated for the work. Rejecting any sort of recovery based upon reliance on the contracting officer’s record of completed work, or upon unjust enrichment, the Supreme Court held that the Secretary of War was without power to make a contract which would bind the government to pay such an un-appropriated amount.

Jurisdiction under the Tucker Act of claims founded upon a contract, express or implied, has been held to include claims that are implied in fact, but not those that

\textsuperscript{10} \textit{Office of Personnel Management vs Richmond}, 496 U.S. 414 (1990)
\textsuperscript{11} 256 U.S. 575 (1921)
may be regarded as implied in law – often called quasi-contracts. In *Hercules, Inc. vs United States*,\(^{12}\) the Supreme Court confirmed that jurisdiction “extends only to contracts either express or implied in fact, and not to claims on contracts implied in law,” and formulated a restrictive understanding of what constitutes an implied in fact contract under the Tucker Act.

In *Hercules*, chemical manufacturers producing Agent Orange for the government during the Vietnam War were subsequently sued by veterans and their families alleging health problems relating to exposure to the chemical agent. After settling these claims, the manufacturers sought indemnification from the government by bringing a contract claim under the Tucker Act. Since the relevant contracts did not contain express indemnification provisions, they argued that there was an implied agreement by the government to reimburse them for liabilities, given detailed specifications and even seizure of certain production facilities. The Court, however, held that such circumstances did not establish that the government, in fact, had agreed to provide indemnification – questioning whether a government contracting officer would even have the authority to enter into such an open-ended indemnification agreement – and denied the claim.

In *Meritt vs United States*\(^{13}\) the supreme court held that there is no right of action against the United States in those cases “where, if the transaction were between private parties, recovery could be had upon a contract implied in law. In *Severin vs United States*,\(^{14}\) Severin doctrine was propounded, whereby a contractor may not recover on behalf of a subcontractor unless the contractor has reimbursed the subcontractor or is legally bound to do so. A subcontractor is therefore limited to an indirect remedy against the government, available only by an assignment, by third-

\(^{12}\) 516 U.S. 417 (1996)
\(^{13}\) 267 U.S. 338, 341 (1925)
\(^{14}\) 99 Ct. Cl 435 (1943), cert. denied, 322 U.S. 733 (1944)
party beneficiary principles, or – most often – by a suit brought on his behalf by a contractor. A final product of the premise of sovereign immunity to suit in the absence of consent is the principle that payment of interest is not required on claims or on judgments against the United States in the absence of express provision of payment, in contract or statute. While the Torts Claims Act expressly negates any liability of the federal government “for interest prior to judgment,” however, the Contract Disputes Act of 1978 provides that interest is payable on claims under contracts subject to the Act – contracts entered into after March 1, 1979 for which the claimant elects coverage by the Act.

The judicial tort claim Act in USA is a federal statute that allows any private person to sue the government of USA for torts committed by persons acting on authority of the state. The enactment of this statute paved the way for a change from the earlier or prevailing situation where the state was always protected from any act which is generally referred as sovereign immunity. The federal tort claim Act made the United States Government liable like any other individual persons for the torts committed by government officials.

In Fores vs United States the court propounded the so called fores doctrine. The important relevance of the doctrine states that the Unites States military will have very limited liability for the torts committed by their officials. Hence the Federal Torts Claim Act will have very limited application on military officials for military purposes.

The reason for citing the Fores case is to draw analogy with regard to liability of states in USA for breach of torts and contracts by United States officials.

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15 United States vs Thayer West Point Hotel, 329 U.S. 585 (1947)
16 28 U.S.C. § 2674; see Carlson vs Green, 446 U.S. 14 (1980)
17 Fores vs United States, 340 US 135 (1950)
Government procurement in the United States is the process by which the Federal Government of the United States acquires goods, services (notably construction), and interests in real property. Contracts for Government procurement usually involve appropriated funds spent on supplies, services, and interests in real property by and for the use of the Federal Government through purchase or lease, whether the supplies, services, or interests are already in existence or must be created, developed, demonstrated, and evaluated. Federal Government contracting has the same legal elements as contracting between private parties: a lawful purpose, competent contracting parties, an offer, an acceptance that complies with the terms of the offer, mutuality of obligation, and consideration. However, Federal contracts are much more heavily regulated, subject to volumes of statutes dealing with Federal contracts and the Federal contracting process, mostly in Titles 10, 31, 40, and 41 of the United States Code.

Private parties entering into a contract with one another (i.e., commercial contracts) are much freer to establish a broad range of contract terms by mutual consent than a private party entering into a contract with the Federal Government. Each private party represents its own interests and can obligate itself in any lawful manner. Federal Government contracts allow for the creation of contract terms by mutual consent of the parties, but many areas addressed by mutual consent in commercial contracts are controlled by law in Federal contracts and legally require use of prescribed provisions and clauses. In commercial contracting, where one or both parties may be represented by agents whose authority is controlled by the law of agency, the agent is usually allowed to form a contract only with reference to accepted notions of commercial reasonableness and perhaps a few unique statutes that apply. In Federal Government contracting, specific regulatory authority is required for the Government's agent to enter into the contract, and that agent's bargaining authority
is strictly controlled by statutes and regulations reflecting national policy choices and prudential limitations on the right of Federal employees to obligate Federal funds. By contrast, in commercial contracting, the law allows each side to rely on the other's authority to make a binding contract on mutually agreeable terms. Of course, there are many nuances to commercial contracting, but, generally speaking, the law favors the creation of commercial contracts by a variety of agents in order to facilitate business.

The authority of a Contracting Officer (the Government's agent) to contract on behalf of the Government is set forth in public documents (a warrant) that a person dealing with the Contracting Officer can review. The Contracting Officer has no authority to act outside of his or her warrant or to deviate from the laws and regulations controlling Federal Government contracts. The private contracting party is held to know the limitations of the Contracting Officer's authority, even if the Contracting Officer does not. This makes contracting with the United States a very structured and restricted process. As a result, unlike in the commercial arena, where the parties have great freedom, a contract with the U.S. Government must comply with the laws and regulations that permit it, and must be made by a Contracting Officer with actual authority to execute the contract.

Law

The Federal Government's authority to enter into contracts derives from the U.S. Constitution, which defines its powers. The Federal Government acts through legislation, treaties, implementing regulations, and the exercise of those authorities. The Federal Government's power to contract is not set forth expressly and specifically in the U.S. Constitution. However, the U.S. Constitution appears to assume the continued vitality "Engagements" entered into under the Articles of Confederation. U.S. Const., Art. VI. Moreover, the power to contract was and is regarded at law as necessarily incidental to the Federal Government's execution of its other powers. An
early Supreme Court case, *United States vs Tingey*,\(^{18}\) recognized that the United States Government has a right to enter into a contract. It is an incident to the general right of sovereignty, and the United States, may, within the sphere of the constitutional powers conferred to it and through the instrumentality of the proper department to which those powers are conferred, enter into contracts not prohibited by law and appropriate to the just exercise of those powers. Scores of statutes now also expressly authorize departments and agencies to enter into contracts. The U.S. Congress passes legislation that defines the process and additional legislation that provides the funds. Executive branch agencies enter into the contracts and expend the funds to achieve their Congressionally defined missions. When disputes arise, administrative processes within the agencies may resolve them, or the contractor can appeal to the courts.

The procurement process for executive branch agencies (as distinguished from legislative or judicial bodies) is governed primarily by the Armed Services Procurement Act and the Federal Property and Administrative Services Act. To address the many rules imposed by Congress and the courts, a body of administrative law has been developed through the Federal Acquisition Regulation. This 53-part regulation defines the procurement process including special preference programs, and includes the specific language of many clauses in Government contracts. Most agencies also have supplemental regulatory coverage contained in what are known as FAR Supplements. These supplements appear within the Code of Federal Regulations (CFR) volumes of the respective agencies. For example, the Department of Defense (DOD) FAR Supplement can be found at 10 CFR.

Government contracts are governed by Federal common law, a body of law which is separate and distinct from the bodies of law applying to most businesses—

\(^{18}\) 30 US 5 PET 115 (1831)
the Uniform Commercial Code (UCC) and the general law of contracts. The UCC
applies to contracts for the purchase and sale of goods, and to contracts granting a
security interest in property other than land. The UCC is a body of law passed by the
U.S. state legislatures and is generally uniform among the states. The general law of
contracts, which applies when the UCC does not, is mostly common law, and is also
similar across the states, whose courts look to each other's decisions when there is no
in-state precedent.

Contracts directly between the Government and its contractors ("prime
contracts") are governed by the Federal common law. Contracts between the prime
contractor and its subcontractors are governed by the contract law of the respective
states. Differences between those legal frameworks can put pressure on a prime
contractor.

Ratifications

A ratification is the proper authorization by a contracting officer of an earlier
procurement by a Government employee who was not authorized to do it. A
ratification package has a legal memo that says an unauthorized commitment was
made, that the commitment could properly have been done by contracting officers,
and that funds were and are available for it. Other regulations and agency rules apply
too, such as those from the Army discussed below.

Ratifications as governed by FAR 1.602-3 (Ratification of Unauthorized
Commitment) which defines a ratification as the act of approving an unauthorized
commitment by an official who has the authority to do so. Unauthorized commitment
means an agreement that is not binding solely because the Government representative
who made it lacked the authority to enter into that agreement on behalf of the
Government. A ratifying official may ratify only when: (1) The Government has
received the goods or services; (2) The ratifying official has authority to obligate the
United States, and had that authority at the time of the unauthorized commitment; (3) The resulting contract would otherwise be proper, i.e., adequate funds are available, the contract is not prohibited by law, the ratification is in accordance with agency procedures, etc.; (4) The contracting officer determines that the price paid was fair and reasonable and recommends payment, and legal counsel concurs.

There are dollar limits to the authority to ratify unauthorized commitments. A Chief of Contracting Office can approve up to $10,000. A Principal Assistant Responsible for Contracting can approve up to $100,000. A Head of Contracting Authority can approve higher amounts.

Ratifications in the U.S. Army call for a signed statement describing the unauthorized commitment, the value of the procurement, and other documentation. Then a contracting officer is to study the case and recommend action. If the procurement is not ratified, the matter may be handled under FAR Part 50 and DFARS Part 250 (Public Law 85-804) as a GAO claim or some other way.

5.4 European Union

The Public Contracts Directives set out the legal framework for public procurement. This guidance note covers the new Public Contracts Directive which will apply when contracting authorities seek to acquire supplies, services, or works (e.g. civil engineering or building). Separate information will be provided to cover new directives on contracts awarded by utilities bodies (e.g. water companies) and concessions contracts. This note does not cover the procurement of contracts for defence and security requirements. The purpose of the EU procurement rules, underpinned by the Treaty principles, is to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU. In most cases they require competition. The EU rules reflect and reinforce the value for money and focus of the Government’s procurement policy. This requires that all
public procurement must be based on public money, defined as “the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought”, which should be achieved through competition, unless there are compelling reasons to the contrary.

The American doctrine of state sovereign immunity presents a sharp contrast to EC law. American states, absent their consent, ordinarily possess sovereign immunity shielding them from liability to private individuals for damages resulting from a violation of federal law. But this general principle is subject to a number of qualifications. First, while Congress ordinarily may not overcome state immunity so as to render states liable to private individuals, it does have that power when legislating under section 5 of the Fourteenth Amendment to enforce constitutional rights that are recognized in section 1 of that amendment (which include nearly all constitutional rights that individuals enjoy against the states). At first glance, state immunity from damages for constitutional violations may seem to be merely a default rule that Congress may (but in general has no matter how blatant the violation or serious the harm. A second limit of sovereign immunity arises from the oddity that it shields the states themselves but not their political subdivisions like cities and counties.19

Finally, the Anglo-American doctrine of sovereign immunity has always permitted private parties to sue government officials for specific relief and for damages (to be paid from the personal assets of the officials). Still, one should not exaggerate these similarities. EC state liability is far broader, applying to all organs of government.21 By contrast, in the United States, although legislative measures can be

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19 Mount Healthy City Sch. Dist. Bd. of Educ. vs Doyle, 429 U.S. 274, 280–281 (1977); Lincoln County vs Luning, 133 U.S. 529, 530 (1890)
20 Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV. L. REV. 1 (1963)
challenged (not only by defendants asserting their unconstitutionality but also by plaintiffs seeking affirmative relief), a state’s failure to legislate is viewed as a constitutionally protected aspect of state sovereignty that cannot be made a violation of federal law, while damages liability for illegal actions by a state court or its officials is virtually unheard of.

That the EC imposes member state liability more broadly than does the United States seems paradoxical. For the EU is “far narrower and weaker a federation than any extant national federation.” Daniel Elazar remarked that “the American federation has placed even greater emphasis on the liberty of individuals than on the liberties [of] its constituent polities,” while “confederations . . . . are primarily of polities which place greater emphasis on the liberties of the constituent polities.” Thus, the U.S. Supreme Court has described the relationship of American states to the federal government in terms that even the most ardent Europeanist would not apply to France or Germany: “All the rights of the states as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality.” Nonetheless, the “right” of a member state to freedom from liability for damages imposed by the federal government has been surrendered more fully in the EC than in the United States.

If these broad conceptions seem more consistent with state liability in the United States than in Europe, so, too, do key legal doctrines on which such liability would rest. The EC doctrines of direct effect and supremacy were considerable innovations, especially when the EC is viewed through the lens of international law. By contrast, the American Constitution clearly prescribes that federal law is supreme and has direct effect in the states. Finally, the founders clearly contemplated that a

\[22 Printz vs United States, 521 U.S. 898 (1997)\]
The federal Supreme Court would have the power to review judgments of the courts of the states. The Supreme Court has, in a limited respect, distinguished the obligations imposed by the supremacy clause on state judges from those imposed on state legislative or executive officials: the latter, unlike the former, cannot be “commandeered” by federal legislation to take specified action. But this restriction on an extraordinarily rare congressional technique, should not obscure the more fundamental point.

The Public Contracts Directives set out the legal framework for public procurement. The Public Contracts Directive sets out procedures which must be followed before awarding a contract to suppliers (i.e. providers of works, supplies or services) when its value exceeds set thresholds, unless it qualifies for a specific exclusion - e.g. on grounds of national security.

The EU procurement regime, based on the Treaty principles of transparency, non-discrimination, equal treatment and proportionality and described by the Public Contracts Directive and Regulations referred to in this guidance, is not static. It is subject to change, driven by evolving European and domestic case law, European Commission communications, new and revised Public Contracts Directives and amendments to the existing UK Regulations.

Public Contracts Directive 2004/18/EC on public procurement was implemented into national law in the UK by the Public Contract Regulations 2006 (with separate transposition in Scotland).

These Regulations came into force on 31 January 2006 and have been amended a number of times. New UK Regulations, which will supersede the 2006 Regulations, will implement the new procurement Directives. This guidance is based on the published text of the new Public Contracts Directive (2014/24/EU) which can be
viewed at The purpose of the EU procurement rules, underpinned by the Treaty principles, is to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU. In most cases they require competition. The EU rules reflect and reinforce the value for money (vfm) focus of the Government’s procurement policy. This requires that all public procurement must be based on vfm, defined as “the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought”, which should be achieved through competition, unless there are compelling reasons to the contrary.

**Reform of the EU rules – The 2014 Public Contracts Directives**

On 20 December 2011 the European Commission published proposals to revise and update the public sector and utilities procurement Directives (2004/18/EC and 2004/17/EC respectively) plus a proposed new directive on the award of concession contracts.

Following negotiations between Member States, the European Parliament and the Commission the texts of the Public Contracts Directives have been agreed and came into force on 17 April 2014. Member States must transpose the Public Contracts Directives into national law within 24 months of that date.

The new rules support UK Government priorities of economic growth and deficit reduction by making the public procurement process faster, less costly, and more effective for business and procurers alike. They represent an excellent outcome from the UK’s extensive negotiations in Brussels.

These changes provide a much more modern, flexible and commercial approach compared to the existing regime. Outdated and superfluous constraints have been removed, and many new features have been added to streamline and modernise public
procurement. For contracting authorities, this means being able to run procurement exercises faster, with less red tape, and more focus on getting the right supplier and the best tender. And for suppliers, the process of bidding for public contracts should be quicker, less costly, and less bureaucratic, enabling suppliers to compete more effectively.

The Minister for the Cabinet Office has asked the Crown Commercial Service to repare the transposition of the new rules earlier than the time allowed, to take advantage of the improvements in the rules as soon as possible.

A list of the key changes follows immediately below, with additional detail in the subsequent sections:

Contracting authorities will be able to reserve the award of certain services contracts to mutuals/social enterprises for a time--limited period

Although the thresholds of application of the rules will not change immediately, the Public Contracts Directive includes a binding commitment on the Commission to review the economic effects of the thresholds on the internal market. This review must be completed by 2019. Contracting authorities are encouraged to break contracts into lots to facilitate SME participation.

A turnover cap has been introduced to facilitate SME participation. Contracting authorities will not be able to set company turnover requirements at more than two times contract value except where there is a specific justification.

A central, on--line point called “E--certis” where suppliers can find out the type of documents, certificates etc which they may be asked to provide in any EU country, even before they decide to bid. This should help suppliers to bid cross--border, if they are unfamiliar with these requirements.
A much simpler process of assessing bidders’ credentials, involving greater use
of supplier self-declarations, and where only the winning bidder should have to
submit various certificates and documents to prove their status.

Poor performance under previous contracts is explicitly permitted as grounds for
exclusion.

Various improved safeguards from corruption Requirements on contracting
authorities to put in place appropriate safeguards against conflicts of interest. The
rules are not prescriptive on what the safeguards should be, but compliance could be
achieved, for example, through a common current practice amongst many UK
contracting authorities, where declarations are signed by procurement staff to confirm
they have no outside interests with bidders etc Time limits for the exclusion of
suppliers (not more than 3 or 5 years depending on the reason for the exclusion);
Suppliers who have been excluded from public procurement for bad practice can
have the exclusion ended if they effectively “self clean”.

Preliminary market consultations between contracting authorities and suppliers
are encouraged, which should facilitate better specifications, better outcomes and
shorter procurement times.

More freedom to negotiate. Constraints on using the competitive procedure with
negotiation have been relaxed, so that the procedure will generally be available for
any requirements that go beyond “off the shelf” purchasing.

The distinction between Part A and Part B Services has been removed, and a
new light-touch regime introduced for social and health and some other services.
There is an OJEU advertising requirement and other specific obligations for this new
light-touch regime, but a much higher threshold has been agreed (EUR 750,000).
A new procedure, the “Innovation Partnership” procedure, has been introduced. This is intended to allow scope for more innovative ideas. The supplier bids to enter into a partnership with the authority, to develop a new product or service.

The statutory minimum time limits by which suppliers have to respond to advertised procurements and submit tender documents have been reduced by about a third. This flexibility could be helpful for speeding up simpler or off-the-shelf procurements, but still permits longer timescales for requirements where suppliers will need more time to respond. Electronic versions of the procurement documentation must be available through an internet URL immediately on publication of the OJEU contract notice.

Full electronic communication (with some exceptions) will become mandatory for public contracts 4.5 years after the Public Contracts Directive comes into force (i.e. October 2018). For central purchasing bodies the deadline is three years (April 2017).

The rules on “Dynamic Purchasing Systems” (DPS) have been greatly simplified, with the removal of the onerous obligation to OJEU-advertise call-off contracts made under the DPS.

Electronic catalogues for public procurement are expressly permitted, removing any doubt as to their legality.

Improved rules on social and environmental aspects, making it clear that:
- social aspects can now also be taken into account in certain circumstances (in addition to environmental aspects which have previously been allowed);
- contracting authorities can require certification/labels or other equivalent evidence of social/environmental characteristics, further facilitating procurement of contracts.
with social/environmental objectives contracting authorities can refer to factors directly linked to the production process.

The full life-cycle costing can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements which might save money over the long term despite appearing on initial examination to be more costly.

Legal clarity that contracting authorities can take into account the relevant skills and experience of individuals at the award stage where relevant (e.g. for consultants, architects, etc).

Contracting authorities no longer have to submit detailed annual statistics on their procurement activities. The Commission will collect this information directly from the online system, thereby freeing up valuable time and resources for contracting authorities. Works concessions contracts are excluded from the Public Contracts Directive. The new Concessions Directive will apply to both works and services concessions when it is transposed into UK law.

The EU procurement rules are detailed and technical and to assist in their understanding the Crown Commercial Service has prepared a training package for contracting authorities (though its contents may also be of interest to suppliers, advisers and other interested parties). This document is a part of that package, which is being rolled out across the public sector.

This section of the guide describes briefly the provisions of the EU procurement regime and in particular the new Public Contracts Directive. Where the Public Contracts Directive introduces major changes to the current regime these are
In addition to the 28 EU Member States and the 3 states of the European Economic Area (Iceland, Liechtenstein and Norway) the benefits of the EU public procurement rules also continue to apply to suppliers from a number of other countries where the EU has entered into an agreement. The main agreement is the one negotiated through the World Trade Organisation (WTO) titled the Government Procurement Agreement (GPA)

Compliance with the EU rules ensures compliance with the GPA, where it applies, and suppliers from GPA countries have the same rights as EU suppliers. The non-EU countries who are signatories to the GPA are:

Armenia; Aruba; Canada; Hong Kong, China; Iceland; Israel; Japan; Liechtenstein; Montenegro, New Zealand; Norway; Republic of Korea; Singapore; Switzerland; Taipei; and the USA.

The EU has similar Free Trade Agreements with some other countries, and contracting authorities should check to see if any of these apply if they receive expressions of interest or bids from suppliers in other, non-GPA countries. A Commission list of such agreements can be found at:

Even when a tender process is not subject to the Public Contracts Directives, (for example because the estimated value of a contract falls below the relevant threshold), EU Treaty-based principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality apply. Where the authority considers that a contract is likely to attract cross-border interest it is obliged to publish a sufficiently accessible advertisement to ensure that suppliers in other Member States can have access to appropriate information before awarding the contract. This is in line with the UK objective of achieving value for money in all public procurement - not just those covered by the Public
Contracts Directives. Some degree of advertising, (appropriate to the scale of the contract), is likely to be necessary to achieve transparency where the contract is likely to attract cross-border interest.

The UK regulations will also include some specific UK rules to support growth by improving suppliers’ access to public contracts below the EU thresholds (“sub-threshold contracts”). These rules include requirements for advertising all public contracts below the EU thresholds, but over certain other threshold values, on Contracts Finder. They also include a requirement for contracting authorities to have regard to Crown Commercial Service guidance on the selection of suppliers and the award of contracts and to ensure that suppliers pay their sub-contractors within 30 days (as is already required of contracting authorities).

The Public Contracts Directive applies in principle to all contracts awarded by a contracting authority. However, there are some specific exclusions where there is a relevant defence or security dimension, 1. The Public Contracts Directive also exempts certain contracts between contracting authorities where they are effectively meeting genuine ‘in-house’ requirements within a number of contracting authorities. This could be through the form of a ‘vertical’ arrangement under shared control (so-called ‘Teckal bodies’ from the lead case in the European court, Case C---107/98). Or it might be through a ‘horizontal’ arrangement, where a number of contracting authorities genuinely co-operate with each other to meet a shared legal obligation (as in the Hamburg case in the European court, Case C---480/06).

In some cases contracts awarded by contracting authorities will contain elements that are covered under the rules in the new public sector regulations, the new utilities regulations, the new concessions regulations and/or the Defence and Security Public Contracts Regulations. These issues are complex and will be the subject of separate
guidance. See Annex A, Flowchart 2 for mixed procurements involving the new public sector regulations, the Defence and Security Public Contracts Regulations and/or Article 346 of the Treaty.

One of the UK priorities in the negotiations was to secure flexibility to enable fledgling public service mutuals to gain experience of delivering services before being exposed to EU-wide competition. The new Public Contracts Directive permits competition for certain contracts, listed by CPV code, mainly in the social and health sectors, to be “reserved” to organisations such as mutuals and social enterprises meeting certain limited criteria described in Article 77 of the Public Contracts Directive. The reservation works in practice by requiring an OJEU competition for those services using the ‘light touch regime’ referred to at paragraph 12.1 below but only allowing bids from organisations meeting the mutual or social enterprise criteria.

The reservation has time-based conditions to prevent misuse, so contracting authorities cannot reserve contracts for organisations that have been awarded contracts within the last 3 years, and contracts cannot be longer than 3 years.

The Public Contracts Directive also expands the scope of the existing reservation for sheltered workshops/employment programmes by allowing reservation of any contract for disadvantaged as well as disabled workers, and reducing the minimum proportion of those workers in the supplier’s workforce required for a supplier to be eligible to bid for a reserved contract. The reservation works in practice by requiring an OJEU competition for those services but only allowing bids from organisations meeting the criteria.

The ‘light touch regime’ for certain services under the 2006 Regulations there are different rules for so-called ‘Part A and Part B’ services. In the new Public Contracts Directive, the position for services contracts has changed significantly.
The main changes include: A new "light-touch regime" for a smaller number of categories of services contracts in the health and social service areas listed at Annex XIV to the Public Contracts Directive. Some contracts that were formerly “Part B” but are not listed in the Annex, will be subject to the full EU procurement rules; a significantly higher threshold than for supplies and for other services (EUR 750,000 for public sector authorities);

A new obligation on contracting authorities to publish a call for competition in the OJEU, as well as a contract award notice, for above-threshold contracts covered by the light-touch regime.

Member States have flexibility to design their light touch rules. To preserve as much of the existing flexibility as possible the UK rules will be much less stringent than the full EU rules regime. As well as the OJEU advertising requirements the UK rules will require compliance with the basic Treaty principles (transparency, equal treatment, non-discrimination) and publication in OJEU of contract award notices. Otherwise, there will be considerable flexibility for contracting authorities to use procedures, tools and techniques of their own choosing, whether analogous to those in the main rules or not. More detailed information will be released by the time the UK Regulations come into effect.

Where a single work involves more than one contract, the estimated value of all the contracts must be aggregated to decide whether the threshold is reached. Where the threshold is reached, each of the works contracts will be covered by the rules except small contracts (known as small lots) the value of which falls below the de minimis level provided for in the Public Contracts Directive.

In determining whether the threshold has been or is likely to be reached for public supplies or services contracts, the rules require aggregation: of the estimated
value of separate contracts for meeting a single requirement; and where a series of contracts or a renewable contract is entered into for supplies/services of the same type during a twelve month period.

Where an authority is divided into a number of separate operational units (SOUs) with authority to decide independently whether to enter into procurement contracts, then aggregation need only be applied to each unit. In other cases the authority as a whole must be considered for aggregation purposes. The Public Contracts Directive provides greater detail as to when aggregation can be carried out at the SOU level.

The Public Contracts Directive requires electronic submission of OJEU notices, electronic availability of procurement documents at the time of notice publication, and electronic communication and information exchange for all communication under the Public Contracts Directive, subject to specified exclusions. Contracting authorities must ensure that the tools and devices used for electronic communication meet certain requirements set out in the Public Contracts Directive. Contracting authorities must decide and apply to these communications, appropriate electronic security, guided by a high level framework in the Regulations.

The Public Contracts Directive reforms the DPS to remove the previously burdensome need for OJEU advertising of “call---off” contracts to be awarded using the system. Under the new rules, only the DPS itself will need to be OJEU--advertised, with call---off contracts being subject to much more straightforward procedures, similar to the established process for awarding call---off contracts under a framework agreement by mini---competition. A key advantage of a DPS compared to a framework, which it resembles, is that suppliers can be added at any time to a DPS provided that they pass the exclusion criteria and minimum capacity requirements.
This will greatly streamline the system and allow greater competition to be maintained.

The Public Contracts Directive also provides helpful confirmation that electronic catalogues can be used as a basis for tenders for contracts or frameworks. Some safeguards are required where contracting authorities intend to compare offers without seeking re-submission of catalogues by suppliers.

**Central purchasing bodies**

As now contracting authorities may purchase through Central Purchasing Bodies (CPBs).

CPBs may act as a ‘wholesaler’ – supplying an authority on the basis of contracts it has itself awarded and/or provide contracting authorities with access to framework deals or dynamic purchasing systems it has established.

Frameworks 16.1 The Public Contracts Directive introduces minor clarifications of the rules on frameworks relating mainly to transparency. Thus contracting authorities must not use a framework unless clearly identified in the notice as permissible users and contracting authorities must be transparent about the methods of call off to be used. It does however confirm that a contract awarded under a framework may have a completion date after the end of the framework.

As now, generally contracts covered by the Regulations must be the subject of a ‘call for competition’ published in the OJEU. In most cases this will be a Contract Notice but in a change from the current rules contracting authorities other than central government (e.g. local authorities) will also be able to use the Prior Information
Notice (PIN) for this purpose in certain defined circumstances. A number of
detailed changes have also been made to the information that must be included in the
notice forms.

The Commission is preparing revised versions of its Standard Forms to
accommodate these changes. We hope these will be available in time for the UK and
other Member States proposing to implement the Public Contracts Directives early.
The Crown Commercial Service is considering the most appropriate way to proceed if
they are not available and if necessary will issue guidance in due course.

Shorter minimum time limits 18.1 The minimum time allowed for responses or
tenders is reduced to allow flexibility where the current minimum time limits are
unnecessarily long. In certain circumstances these can be shortened further where the
requirement is urgent or where sufficient information has already been provided by a
prior information notice to allow suppliers to respond quickly. See Annex B for a
summary of the time limits in the new Public Contracts Directive.

Choice of Procurement Procedure

The new Public Contracts Directive provides for five award procedures, other
than the existing four: • the open procedure, under which all those interested may
respond to the advertisement in the OJEU by submitting a tender for the contract; •
the restricted procedure, under which a selection is made of those who respond to the
advertisement and only they are invited to submit a tender for the contract. • the
competitive dialogue procedure, under which a selection is made of those who respond to the
advertisement and the contracting authority enters into dialogue with
potential bidders, to develop one or more suitable solutions for its requirements and
on which chosen bidders will be invited to tender. The new Public Contracts Directive
provides greater freedom to use this procedure than do the existing rules (see below); •
the competitive procedure with negotiation under which selection is made of those who respond to the advertisement and only they are invited to submit an initial tender for the contract. The contracting authority may then open negotiations with the tenderers to seek improved offers. The new Public Contracts Directive provides greater freedom to use this procedure than the existing rules (see below).

The innovation partnership procedure, under which a selection is made of those who respond to the advertisement and the contracting authority uses a negotiated approach to invite suppliers to submit ideas to develop innovative works, supplies or services aimed at meeting a need for which there is no suitable existing ‘product’ on the market. The contracting authority is allowed to award partnerships to more than one supplier.

In certain narrowly defined circumstances the contracting authority may also award a contract using the ‘negotiated procedure without prior publication’. Here the contracting authority would approach one or more suppliers seeking to negotiate the terms of the contract. One of the permitted circumstances is where, for technical or artistic reasons or because of the protection of exclusive rights, the contract can only be carried out by a particular supplier.

Contracting authorities have a free choice between the open and restricted procedures. The competitive dialogue procedure and the competitive procedure with negotiation are available where certain criteria are met, including where the contract is complex or cannot be purchased ‘off the shelf’. The ‘negotiated procedure without prior publication’ may only be used in the limited circumstances described in the Public Contracts Directive.

Contracting authorities using the restricted procedure, competitive dialogue procedure and the competitive procedure with negotiation must aim to select a
number of suppliers sufficient to ensure genuine competition. Provided there are sufficient suitable candidates, the Public Contracts Directive requires a minimum of five for the restricted procedure, and three for competitive dialogue and competitive procedure with negotiation.

The Public Contracts Directive includes procedural requirements designed to ensure all suppliers established in countries covered by the rules are treated on equal terms, to avoid national discrimination. The rules in particular cover the following:

Specification stage --- how requirements must be described, avoiding brand names and other references which would have the effect of favouring or eliminating particular providers, products or services and the requirement to accept equivalence. The use of performance specifications is encouraged.

The new Public Contracts Directive also makes clear that there is some scope for building into the specification equality issues (e.g. access issues for the disabled) and social/environmental issues (e.g. a requirement to conform to social or environmental labels). Regarding social/environmental issues, contracting authorities also may specify production processes and methods as long as they are linked to the subject matter of the contract.

Selection stage --- there are a number of grounds for the exclusion of suppliers based on evidence of unsuitability, some of which are mandatory. Reasons include criminal conviction for certain offences (mandatory), failure to pay taxes (mandatory) and previous poor performance which has led to early termination, damages or other comparable sanctions (discretionary).

Some of the grounds for mandatory exclusion are subject to account being taken of remedial action by the supplier, e.g. organisational changes. There are
statutory limits to the duration of any exclusion period. Those suppliers not excluded can then be assessed on the basis of their economic and financial standing, e.g. whether they meet proportionate levels of financial soundness.

The Public Contracts Directive requires that where this is judged on the basis of turnover this should not normally exceed twice the value of the contract. Suppliers may also be assessed on their technical capacity and ability e.g. that they will be adequately equipped to do the job and that their track record is satisfactory. Award stage - the award of contract must be based on the tender most ‘economically advantageous’ to the authority (MEAT).

This can however include assessment on the basis of price/cost only as well as other methods including the ‘best price/quality ratio’ (equivalent to value for money), which can include social and environmental requirements provided they relate to the contract.

The Public Contracts Directive also places a duty on the contracting authority to investigate tenders it considers abnormally low and to disregard those that are based on approaches in breach of international environmental or social law.

To allow suppliers to seek effective review of contracting authorities’ decisions, contracting authorities will as now be required to include a 10---15 day standstill period between the point when the decision on the award of the contract is made and the signature of the contract. The standstill letter must provide certain information about the contracting authority’s decision. There are detailed requirements for this process, which are set out in the Public Contracts Directive
5.5 United Kingdom

According to Common Law, before 1947, the Crown could not be sued in a Court on a contract. This privilege was traceable to the days of feudalism when a lord could not be sued in his own courts which had arisen out of the theory of irresponsibility of the State as propounded by Roman Law\textsuperscript{23}. Another maxim which was pressed into service was that the "King can do no wrong". A subject could, however, seek redress against the Crown through a petition of right in which he set out his claim, and if the royal fiat was granted, the action could then be tried in the Court. The royal fiat was granted as a matter of course and not as a matter of right, and there was no remedy if the fiat was refused\textsuperscript{24}. The Crown Proceedings Act, 1947, abolished this procedure and permitted suits being brought against the Crown in the ordinary courts to enforce contractual liability, a few types of contracts being, however, excepted\textsuperscript{25}. It follows, therefore, that regular proceedings now lie against the Crown for breach of contract, in those cases in which the petition of right earlier lay.\textsuperscript{26}

After the enactment of the Crown Proceeding Act, 1947, in United Kingdom the liability of the government has transformed to a great extent. The important provisions with regard to the liability of the government subject to Act are as follows:

1. Proceeding against the government by way of petition of rights is abolished.

2. A claim against the government that is the Act had not been passed, might be enforced by petition of right subject to the grant of a fiat by the Lieutenant Governor, may be enforced as a right by proceeding against the

\textsuperscript{24} Contractual Liability of The State In India: An Analysis, Swat Rao, Manupatra
\textsuperscript{25} Jain, M. P., Outlines of Indian legal & Constitutional History, Wadhwa and Co. Nagpur, New Delhi, 2006 at p. 1801
\textsuperscript{26} Windsor & Annapolis Ry. Co. vs Counties Ry. Co., (1886) 11 App. Cas. 607
government in accordance with this Act, without the grant of a fiat by the Lieutenant Governor.

3. The government is subject to all the liabilities to which it would be liable if it were a person, and

4. The law relating to indemnity and contribution is enforçable by and against the government for any liability to which it is subject, as if the government were a person.

The Crown Proceeding Act has also provided limitations on liabilities of the Government as follows:

- It does not authorize proceedings against the government for anything done or omitted to be alone by a person acting in good faith while discharging or purporting to discharge responsibilities of a judicial nature vested in the person (or) that the act was in connection with the execution of judicial process.

- The act also equalities the responsibilities of the government to level of the responsibility of a person for the acts and omissions.

- The act does not affect the right of the government to intervene in proceedings affecting its rights, property or projects.

- The act also does not authorise proceeding against the government for a cause of action that is enforceable against a corporation or any other agency controlled by the government.

- The act also does not authorize proceeding against the government for anything done in the proper enforcement of the criminal law or the penal provisions of an Act.
5.6 WTO and Government Contracts

a) Agreement on Government Procurement

Today we live in the era of globalization, quality has become mantra in each and every economic activity of various entities, whether it is public, private or Government with there being no exception. With the advent of WTO the principles such as national treatment and MFN obligation have become universal norms in the field of International Trade Law. However the area of public procurement or Government procurement remains a matter of grave concern in the eyes of international community because many countries are providing protection to the domestic or foreign suppliers ignoring the meritorious criteria and the cornerstone principle such as competition, transparency and objectivity in decision making and integrity as embodied and mandated by the WTO GPA, and UNCITRAL Model Law on Public Procurement and UN Convention against Corruption. Various studies show that around 15 – 30 % of GDP of various economies is being wasted by corruption in the matters relating to public procurement irrespective of status of countries such as developed, developing and the least developed countries. However, the developing and least developed countries are more vulnerable to corruption. The recent incidents in India such as Coalgate Scam, 2G Spectrum and AgustaWestland deal demonstrates the high risk of corruption that exists in matters of public procurement.

27 Refer Articles 3 and 4 of WTO GPA (available at: http://www.wto.org/english/docs_e/legal_e/gpra-94_e.pdf)
28 Refer the Preamble of WTO GPA
29 Refer Art 9 (1) (a) to (d) of the UNCAC (available at: http://www.unode.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)
Transparency is a key feature of a sound procurement system and generally involves the following criteria:

a) publicity of procurement opportunities and the disclosure of the rules to be followed;
b) undertaking procurement processes publicly and visibly, according to prescribed rules and procedures that limit the discretion of officials; and
c) the provision of a system for monitoring and enforcing applicable rules. Given that procuring entities frequently have a high degree of discretion in the procurement process; it is transparency which allows this exercise of discretion to be monitored.

Procurement systems depend on transparency to allow stakeholders (policymakers, officials, competitors and members of the public) to monitor the procurement process. Monitoring is a crucial tool to ensure that the government agents in the procurement process, the procuring officials and the vendors themselves pursue the government’s ends and not their own. Transparency ensures that the rules are followed, and conversely, to ensure that non-compliance can be both identified and addressed. It is thus transparency that makes it more difficult to disguise and maintain discriminatory procurement decisions. Importantly, transparency also facilitates the achievement of the other objectives of a procurement system (in particular, non-discrimination), and thus it must be addressed at all stages of the public procurement process.

The fundamental aim of the GPA is to mutually open government procurement markets among its parties. As a result of several rounds of negotiations, the GPA parties have opened procurement activities worth an estimated US$ 1.7
trillion annually to international competition (i.e. to suppliers from GPA parties offering goods, services or construction services).

The GPA is composed mainly of two parts: the text of the Agreement and parties' market access schedules of commitments.

The text of the Agreement establishes rules requiring that open, fair and transparent conditions of competition be ensured in government procurement. However, these rules do not automatically apply to all procurement activities of each party. Rather, the coverage schedules play a critical role in determining whether a procurement activity is covered by the Agreement or not. Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values are covered by the Agreement. These schedules are publicly available here.

As a binding international treaty, the GPA is administered by the Committee on Government Procurement which is composed of representatives of all its parties. The enforcement of the Agreement is realized through two mechanisms: the domestic review mechanism at the national level and the WTO dispute settlement mechanism at the international level.

**Evolution of the GPA**

The revised GPA, which entered into force on 6 April 2014, is attracting more and more attention worldwide but liberalizing procurement markets is not a completely new idea. Early efforts to bring government procurement under internationally agreed trade rules were undertaken in the OECD framework. The matter was then brought into the Tokyo Round of Trade Negotiations within GATT in 1976.
As a result, the first agreement on government procurement (the so-called “Tokyo Round Code on Government Procurement”) was signed in 1979 and entered into force in 1981. It was amended in 1987 and the amendment entered into force in 1988. Parties to the agreement then held negotiations to extend the scope and coverage of the agreement in parallel with the Uruguay Round. Finally, a new Agreement on Government Procurement (GPA 1994) was signed in Marrakesh on 15 April 1994 — at the same time as the Agreement Establishing the WTO — and entered into force on 1 January 1996.

Within two years of the implementation of GPA 1994, the GPA parties initiated the renegotiation of the Agreement according to a built-in provision of the 1994 Agreement. The negotiation was concluded in December 2011 and the outcome of the negotiations was formally adopted in March 2012. Instruments of acceptance, often based on the completion of domestic ratification procedures, had to be submitted by two-thirds of the GPA parties in order for the revised Agreement to enter into force 30 days later. This requirement was fulfilled on 7 February 2014, with the tenth instrument of acceptance of the Agreement being deposited by Israel. The revised Agreement consequently entered into force on 6 April 2014.

Parties will continue improving the GPA. The revised GPA clearly sets out that, no later than three years after the entry into force of the revised GPA and periodically thereafter, the parties shall undertake further negotiations to progressively reduce and eliminate discriminatory measures and to achieve the greatest possible extension of the coverage. In this spirit, the GPA parties have also agreed to undertake a number of work programmes which will influence the future evolution of the Agreement.
**Analysis of the text of the agreement**

Generally speaking, the two versions of the Agreement are based on the same principles, i.e. non-discrimination, transparency and procedural fairness, and contain the same main elements:

- guarantees of national treatment and non-discrimination for the suppliers of parties to the Agreement with respect to procurement of covered goods, services and construction services as set out in each party's schedules
- provisions regarding accession to the Agreement and the availability of special and differential treatment for developing and least-developed countries
- detailed procedural requirements regarding the procurement process designed to ensure that covered procurement under the Agreement is carried out in a transparent and competitive manner that does not discriminate against the goods, services or suppliers of other parties
- additional requirements regarding transparency of procurement-related information (e.g. relevant statutes and regulations)
- provisions regarding modifications and rectifications of parties' coverage commitments
- requirements regarding the availability and nature of domestic review procedures for supplier challenges which must be put in place by all parties to the Agreement
- provisions regarding the application of the WTO Dispute Settlement Understanding in this area
- a “built-in agenda” for improvement of the Agreement, extension of coverage and elimination of remaining discriminatory measures through further negotiations.

Nonetheless, the revised text improves on the GPA 1994 in a number of ways:
• The revised text entails a complete revision of the wording of the various provisions of the Agreement to streamline them and make the text easier to understand.

• The revised text takes into account developments in current government procurement practice, notably the use of electronic tools. It sets out related requirements to ensure that the general principles of the GPA are fully respected in the electronic era. It also incorporates additional flexibility for parties' procurement authorities — for example, shorter notice periods when electronic tools are used.

• The special and differential treatment provisions (S&D) that are available to developing members acceding to the GPA have been clarified and improved. This is expected to facilitate their accession, thus expanding the membership of the Agreement and market access opportunities.

• The revised text introduces a specific new requirement for participating governments and their relevant procuring entities to avoid conflicts of interest and prevent corrupt practices. This signals a belief on the part of the parties that the GPA can play a part in promoting good governance. The revised Agreement is also seen as an important tool for promoting a transparent and relatively corruption-free environment in the economies that are in the process of acceding to the Agreement.

5.7 Conclusion

The international perspective regarding government contracts is dynamic and developing day by day. In recent years we could see lot of developments in legislative and judicial perspectives in government contracts. It is high time to enact a specific and comprehensive law for the purpose of regulating public procurement, government contract so as to avoid ambiguity. It is highly appreciable that the Government of India has framed guidelines for the purpose of e-auctioning under the
relevant legislations. The government of India should be a part of WTO GPA and UNCITRAL model law on procurements as early as possible. The contractual liability of the governments in international spheres is also changing due to LPG era but at the same time it is mindful to agree that the developments in international sphere in these areas are consistent.