

Exclusion System Summary

World Trade Organization's Agreement on Government Procurement 2012



Note: Unlike most jurisdictions surveyed, the Agreement on Government Procurement 2012 ("GPA 2012") is a binding international treaty ratified by 21 Parties comprising 48 members of the World Trade Organization ("WTO") (as of January 1, 2021). The text of the GPA 2012 is a flexible legal framework providing for minimum requirements that Parties' national procurement systems must meet. The GPA 2012 applies to procurement for governmental purposes of goods, services, and construction services by central, sub-central and other entities, above threshold values as specified in the Parties' schedules to the Agreement.

I. Government-Wide Legal and Institutional Framework:

Government-Wide Exclusion Framework?

- The GPA 2012 provisions on exclusion are permissive and do not mandate that Parties adopt any particular exclusion system (e.g., contract-by-contract exclusions v. an independent exclusion system).

Relevant GPA 2012 Provision: [Art. VIII:4](#)

Primary Legal Foundation:

- The GPA 2012 and its provisions can be categorized as Public International Law, but Parties are free to decide how they implement the GPA 2012 in the context of their domestic legal systems.

Decision-Maker:

- The GPA 2012 does not contain any provisions regarding who/which authorities must decide on exclusion. Parties to the GPA 2012 are free to assign decision-making authority to whatever entity or entities they deem appropriate within their legal framework provided that in so doing they act consistently with the GPA 2012.

II. Functioning and Enforcement of the Government-Wide Exclusion System:

General Provisions:

Type of Procedures: Not addressed by the GPA 2012.

Decision Deadline: No specific deadlines required by the GPA 2012.

Provisional Exclusions: Not addressed by the GPA 2012.

Commencement of Proceedings: Ability to Initiate an Exclusion Proceeding.

- Specific exclusion procedures are not discussed in the GPA 2012, which provides only that a Party, including its procuring entities, may exclude a supplier if “there is supporting evidence” that grounds for exclusion exist. (GPA 2012, Art. VIII:4)

Notice Requirements & Opportunity to be Heard: Yes & Yes.

Notice of Procuring Entity Decisions:

- Suppliers must be given notice of procuring entity decisions, including when an exclusion, provisional exclusions, or suspension becomes effective.
 - Parties to the GPA 2012 must require their procuring entities to “promptly inform” a supplier of any decision to reject the supplier’s request for participation in a procurement or determination that the supplier is unqualified. (GPA Art. IX:15)
 - On request of the supplier, the procuring entity must “promptly provide the supplier with a written explanation of the reasons for its decision.” (GPA Art. IX:15)

Opportunity to be Heard:

- The GPA 2012 requires Parties to establish domestic review procedures that would allow interested suppliers to challenge a breach of the GPA 2012 directly or a failure to comply with a GPA Party's measures implementing the GPA 2012. Pursuant to Art. XVIII:6 of the GPA 2012, Parties must ensure that these procedures provide certain due process rights to all participants in the procurement, including:
 - The procuring entity shall respond in writing and disclose the evidentiary record to the review body;
 - All participants shall have the right to be heard before the review body comes to a decision;
 - All participants shall have access to all proceedings; and
 - All participants shall have the right to request that proceedings take place in public and that witnesses be presented.

Appellate Review of Exclusion Decisions: Yes.

Nature and Forum of Review: Administrative and Judicial.

- If procurement challenges are initially reviewed by the procuring entity or another body that is not independent of the procuring entity, the GPA 2012 requires Parties to ensure that the supplier can appeal the initial decision to “at least one” impartial administrative or judicial authority that is independent of the relevant procuring entity. (GPA 2012, Art. XVIII:4 and Art. XVIII:5)

Means Available to the Supplier:

Judicial review in conformity with the domestic law of the reviewing country or independent administrative review under which suppliers may:

- Obtain the evidentiary record.
- Make a written submission to the independent review body.
- Request a public in-person hearing with the independent review body.
- Call witnesses to an in-person hearing to testify on the supplier's behalf.

Duration of Appeal Process: The GPA 2012 provides only that domestic review procedures **must** be "timely, effective, transparent and non-discriminatory." (GPA 2012, Art. XVIII:1)

Legal Representation:

- A supplier **may** be represented by counsel. Art. XVIII:6 of the GPA 2012 explicitly ensures the right to be represented.

Subsequent Modification of Exclusion Decision:

- Not addressed by the GPA 2012.

III. Substantive Grounds for Government-Wide Exclusion:

Exclusion Grounds: Yes.

Art. VIII:4 of the GPA 2012 provides a non-exhaustive list of exclusion grounds on which a Party and its procuring entities may exclude a supplier, subject to there being supporting evidence:

- Bankruptcy;
- False declarations;
- Significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;
- Final judgments in respect of serious crimes or other serious offences;
- Professional misconduct or acts/omissions adversely reflecting on supplier's commercial integrity; or
- Failure to pay taxes.

The GPA 2012 does not address how its Parties and their procuring entities must establish the above exclusion grounds. GPA 2012 Parties are free to structure their national frameworks to provide for either **automatic** or **discretionary** exclusion.

Exclusion based on Cross-Debarment: Not addressed by the GPA 2012.

IV. Scope and Effect of Government-Wide Exclusion:

Types of Excluded Suppliers:

- Not addressed by the GPA 2012. The "suppliers" are defined as persons or a group of persons (GPA 2012, Art. I(t)). Parties thus seem to be free to exclude individuals or corporations, or both.

Scope of Exclusion:

Extension to Other Agencies and Organizations:

- The GPA 2012 does **not** require that exclusions extend to all covered procuring entities within a Party's jurisdiction, but neither does it prohibit such an extension.
- Art. IX:2 does, however, encourage the minimization of differences in qualification procedures and registration systems across a Party's procuring entities.

Effect on Ongoing Contracts: Not addressed by the GPA 2012.

Effect on Subcontracting: Not addressed by the GPA 2012.

Effect on Excluded Individuals: Not addressed by the GPA 2012.

Tailoring Exclusion: Not addressed by the GPA 2012.

Effect on Affiliates:

- Not addressed by the GPA 2012.

Duration of Exclusions:

- Not addressed by the GPA 2012.

Exceptions/Waivers to Exclusions:

- Not explicitly addressed, although the GPA 2012 does provide for general public interest and emergency exceptions. (*See, e.g.,* Art. III)

V. Government-Wide Transparency and Exclusion List:

Official List of Excluded Suppliers?

- Not addressed by the GPA 2012.

Procurement Checks:

- Not addressed by the GPA 2012.

Reporting on Exclusions:

- Not addressed by the GPA 2012.

VI. Limited Scope Exclusion Systems:

Entity-Wide (e.g., Single-Agency) Exclusion?

- Not addressed by the GPA 2012.

Contract-By-Contract (e.g., Single-Tender) Exclusion?

- Not addressed by the GPA 2012.

Subnational Exclusions:

- Subnational exclusions by covered procuring entities are consistent with, but not required by, the GPA 2012.