



FEM42-02

FEMISE RESEARCH PAPERS

"Potential Accession to the Revised WTO Government Procurement Agreement: The Cases of Egypt and Turkey"

B. The Case of Egypt

***Directed by: Pr. Sübidey Togan
(Centre for International Economics at Bilkent University in Ankara,
Ankara, Turkey)***

With Contributions by:

*Kamala Dawar (Sussex University, UK)
Peter Holmes (Sussex University, UK)
Ahmed Ghoneim (Cairo University, Egypt)
Bedri Kamil Onur Taş (TOBB University, Turkey)*

November 2017



Ce rapport a été réalisé avec le soutien financier de l'Union Européenne dans le contexte du projet UE-FEMISE sur: "Support to economic research, studies and dialogue of the Euro-Mediterranean Partnership". Le contenu du rapport relève de la seule responsabilité des auteurs et ne peut en aucun cas être considéré comme reflétant l'opinion de l'Union Européenne.

This document has been produced with the financial assistance of the European Union within the context of the EU-FEMISE project "Support to economic research, studies and dialogue of the Euro-Mediterranean Partnership". The contents of this document are the sole responsibility of the authors and can under no circumstances be regarded as reflecting the position of the European Union.

The Egyptian Public Procurement System: Main Features

By Ahmed Farouk Ghoneim¹

Introduction

The Egyptian Public Procurement System is discussed in this paper. We aim in Section One at providing an overview of the main features of the Law 89/1998 which is the main law governing the public procurement in Egypt. In Section One we discuss the principals and coverage of the law, the main public procurement authority, the different methods of procurement allowed by the law, the different major rules applicable to public procurement, adoption or lack thereof of electronic methods, the relationship of the law with the concessions and public private partnership agreements, the status of defense procurement, corruption, transparency and enforcement related issues, participation of foreign tenderers, and finally the relationship with preferential trade agreements. In Section Two we provide a snapshot, following the information available, on the market of public procurement in Egypt. Within the two sections we discuss when relevant the compatibility of the law 89/1998 and the whole public procurement system with the WTO GPA. In Section Three we discuss the different potential costs and benefits likely to face Egypt when joining GPA. A short conclusion follows. We were not able to provide any econometric analysis due to the paucity of data and information on public procurement in the Egyptian case.

1. The Characteristics of the Egyptian Public Procurement System

In this section we aim at discussing the following: (i) Principles and Coverage; (ii) Public Procurement Authority; (iii) Methods of Procurement and Procurement Tools; (iv) Rules Applicable to Public Procurement; (v) Electronic Methods; (vi) Concessions and Public-Private Partnerships; (vii) Procurement by Utilities; (viii) Built-Operate-Transfer Contracts and Works Concessions; (ix) Defense Procurement; (x) Below Threshold Contracts; (xi) Corruption, Transparency and Enforcement; (xii) Participation of Foreign Tenderers; and (xiii) Preferential Trade Agreements.

(i) Principles and Coverage:

¹ Professor of Economics, Faculty of Economics and Political Science, Cairo University. I would like to thank Heba El Dekken for her research assistance. Comments provided by Subdiy Togan, Kamala Dawar, and Peter Holmes are highly appreciated.

The public procurement in Egypt is governed by the Tender Law 89/1998 (which replaced Law 9/1983), its executive regulations, and a number of complementary prime ministerial decrees, ministry of finance circulars, and provisions in other laws (Articles 668 to 673 of the Civil Code contain provisions for Concession agreements which are not governed by Law 89/1998), and legal opinions (fatwas) issued by the State Council (World Bank, 2003). The law has been amended twice in 2008 and 2010, without any major changes in its regulations (EBRD, 2013). In general, there are two main procedures for public procurement where the purchaser is free to choose among them, namely public tender, and public practice (WTO, 2005). The law regulates the three phases of tendering process, namely pre-tendering, tendering, and post-tendering. Yet, the regulation of post tendering is not as comprehensive as pre tendering and tendering (EBRD, 2013). Moreover, the enforcement of the law in the post tendering phase tends to be relatively weaker than the first two phases.

The general principles of the law, following the report of the joint committee on Constitutional, Legislative, and Economic Affairs of the Egyptian Parliament on April 14th, 1998, are *Transparency and Publicity* (as proclaimed in Article 2 of the law), *Quality* (as proclaimed by Article 10 of the Law which emphasizes quality standards by differentiating between the financial and technical sides of a bid), *Determination and Competition* (where purchases have to be clearly determined by the procuring body, tenders have to be published on the basis of sufficient specifications, and fair competition. It is worth noting that following Article 16 of the Law, national bidders are given a 15 % price advantage over foreign bidders, which is against the basic principles of the WTO GPA Article III related to national treatment and non discrimination(EBRD, 2013), yet it is a wide and common practice applied in a large number of countries worldwide. Despite the fact that all such principles are stated clearly in both the Egyptian Tender Law as well as the GPA, it is difficult to assess the extent of compliance. Yet anecdotal evidence hints towards lack of compliance with such principles in practice where preference towards national bidders and specific persons or entities is obvious (Ministry of Foreign Trade, 2002; EBRD, 2013). In this regard GPA can add to the transparency issue. In 2015, Law 5/2015 was introduced asking governmental agencies to provide a preference in government procurement for Egyptian manufactured products, while defining Egyptian manufactured product to be the one with at least 40% of its final price. Law 5/2015 applies for all firms fully owned by the government, public sector, and public sector enterprises. Yet, the procurements undertaken by the Ministry of Defense, Ministry of State for Military Production, Ministry of Interior and General Intelligence Agency are exempted

from the law, as well as the procurement undertaken by ministries and authorities dealing with national security. Moreover, exemptions are allowed in other circumstances but following a Prime Ministerial decree and based on the suggestion of the responsible Minister and/or Ministers of Planning and Finance as well the Prime Minister has the discretion to alter + or – 10% of the 40% following the suggestion of the concerned Minister (Articles 2 and 3). Extra preference in terms of decreasing the security collateral associated with bid is given to small and medium enterprises² engaged in public procurement (Article 7). Law 5/2015 in this regard represents a violation to the GPA as well as Trade Related Investment Measures (TRIMS) Agreement. Yet, Egypt has the possibility of utilizing GPA Article XVI regarding offsets by including explicitly its local content requirement as part of its negotiating its accession to GPA.

Law 89/1998 covers, in theory, the public procurement system by all civilian and military agencies. Moreover, the whole central government related entities (ministries, departments, etc.), as well as local governments, and public and general entities are subject to that law. It does not deal with public sector and state owned enterprises' procurement procedures (OECD, 2016).

The law is divided into 4 main Sections and contains 42 Articles. The first section deals with the purchases of movables, procurement of goods, construction works, transportation, and consulting services. The second section is concerned with the purchase and renting of real estate by governmental entities. The third section deals with the sale and lease of real estate, movables, and specific projects and concessions to use or exploit real estate. Finally, the fourth section is devoted to the general principles. An example of complementary ministerial decrees is the one issued by Prime Minister in 2000 (No. 1664/2000) identifying that the purchases of selected items set in the decree of all related aforementioned governmental agencies must be produced by Egyptian public, public enterprise or private sector (Ministry of Foreign Trade, 2002).

(ii) *Public Procurement Authority*

The Ministry of Finance (MOF) is the responsible entity for executing and implementing the Law, and its related regulations. It is the ultimate authority concerned with government procurement planning. It is also responsible for issuing the needed directives related to the public procurement, where all other governmental agencies wishing to procure something

² Defined following Law 141/2004.

have to abide by. Following Article 2 of the Law there are three entities involved in the procurement process, namely the “Administrative body” which is the procuring entity, the “Purchasing department”, which is the department concerned with procurement matters within the Administrative body, and finally the “Authority”, or the “Competent Authority” which is the concerned Minister, or Governor, or any delegated person from him to undertake the procurement process, and this Authority is the one that should be held accountable for abiding by the law (Ministry of Foreign Trade, 2002). In other words, decentralization of the public procurement is guaranteed by law where each authority, usually appointed by the concerned minister, is responsible for the Ministry’s own procurement whereas the Ministry of Finance and to a certain extent the State Council have oversight responsibilities for all public procurement activities (World Bank, 2003). Yet, such decentralization is pre-empted due to the large number of checks and balances and other bureaucratic procedures which hamper the whole process and render it inefficient.

Another important player in public procurement is the General Authority for Government Services (GAGS). GAGS undertakes procurement and financial control activities and inspections for central and local budget resources by participating in all evaluation committees and monitoring compliance with applicable laws and government procedures. Its role is mainly to develop procurement policy and centralize purchasing (OECD, 2016). The director of GAGS reports directly to the Minister of Finance. However, GAGS is physically and functionally separate from the accounting and reporting functions of the MOF. GAGS issues reports that highlight irregularities in compliance with regard to specific transactions, but does not deal with the overall matter of policy or efficiency of the public procurement system. Moreover, and per law, the Central Auditing Organization (CAO) and the Parliament provide independent oversight of all the Government, and its related agencies expenses (World Bank, 2003).

(iii) Methods of Procurement and Procurement Tools

There are two main procurement methods under Law 89/1998. They are namely the public tendering and public negotiations. Public tenders follow the principles of open competitive bidding, using two envelopes (one for financial and the other for technical proposals), whereas public negotiations are similar to auctions (World Bank, 2003). The main difference is related to the ability of amending tenders with regard to price and financial aspects in public negotiations (and to a lesser extent with technical specifications), which is not allowed under

public tendering. Moreover, in limited circumstances and with exceptional authorization and “exceptionally and by justified decree by the Competent Authority” contracting can be concluded through limited tendering, local tendering, limited negotiations, or direct contracting³. Such limited circumstances are set by the law and its decrees (Ministry of Foreign Trade, 2002; World Bank, 2003). Yet, in practice, there is extensive use of direct contracting, due to cumbersome bureaucratic measures associated with the different phases of the law. In direct contracting no tender bond is required, but a contract performance guarantee must be submitted by the public sector contractor. The cumbersome procedures negated the efforts to achieve competition, which is evidenced by the limited number of bids per tender and large number of cancelled tenders as surveyed by EBRD 2012 and EBRD 2013)⁴. In theory, such provisions are in line with GPA, yet in practice, Egypt will need to reconsider its application of such provisions to be compatible with GPA X, XI, XII, XIII and XIV. Data on public purchases of goods and services provided by the Ministry of Finance does not allow us to differentiate between the different means of purchase and include several items that are not

-
- ³ “Limited Tender is used “in the cases whose nature require the restriction of participation of specified suppliers[...]”.The bid invitation is addressed to “the largest number of contractors working in the type of activity connected with the subject of the tender and whose name has been approved by the Competent Authority [the purchasing Ministry]”
 - Local Tender for Procurements under LE 200,000 are confined to local suppliers whose activities fall within the boundary of the governorate where the contract is to be implemented.
 - Limited Practice Negotiations is used when: (i) the item is manufactured, imported, or available only from particular entities; (ii) items whose nature or acquisition purpose dictates that they would be either selected or purchased from their production location; (iii) technical works which require, according to their nature, to be undertaken by certain experts; and (iv) national security requirements dictate confidentiality.
 - Direct Contracting is permitted in urgent cases, provided a decree from the Competent Authority has justified it including: For: “movables, service, consultancy studies, technical works or transport enterprises” with approval of the Head Authority up to LE 50,000 and approval of the Minister up to LE 300,000; and For “enterprising contracting works”²⁴ with approval of the Head Authority up to LE 100,000 and approval of the Minister up to LE 300,000.
 - A decree from the Minister of Finance states that direct contracting should not be abused and that normal procedures must be followed, except for emergencies. It also states that the government should not use direct contracting for multiple contracts with the same contractor or for multiple items. A Fatwa from the State Council provides for the same.” (World Bank, 2003)

⁴ As stated by EBRD (2013):

-The head of a contracting entity can approve entering into contracts to purchase goods/ services through *direct agreement* with a value up to **EUR 50, 000**, and entering into contracts of works through *direct agreement* with a value up to **EUR 100, 000**.

-The relevant minister or governor can approve entering into contracts through *direct agreement* to purchase goods / services with a value up to **EUR 100, 000**, and entering into contracts of works through *direct agreement* with a value up to **EUR 300, 000**.

- In cases of extreme urgency, the prime minister can approve entering into contracts through **direct agreement** to purchase goods/services and contracts of works with a value that exceeds **EUR 300, 000**.

purely considered procurement as expenses on cultural activities abroad and holding exhibitions as well as fuel used by governmental cars.

(iv) Rules Applicable to Public Procurement

There are a number of rules and regulations that feature within the law. We address here the most important of which as the fact that bids cannot be negotiated after bid opening, changing tender to a negotiation is prohibited, rejected and awarded bids contain an explanation for why the decision was made, bid bond to be refunded immediately upon the expiry of validity of tender, dispute settlement procedures allow the parties to appoint any accepted legal body to resolve the dispute after the permission of the responsible minister, a two phase decision making where a bid committee convenes a public session to which all bidders are invited and the bid prices are read aloud and a decision making committee that reviews the technical bids and makes a decision or recommends a decision to the minister concerned if the value of the bid is over a certain threshold (62,000 US \$), and finally bid bonds of 1 or 2% and a performance bond by the winning firm of 5%. Moreover, Article 16 of the law provides limited preferential treatment (15%) for the bidders offering local goods, services or works. Yet, neither the law nor the executive regulations specified any criteria for what is meant by the word "local" (Ministry of Foreign Trade, 2002) and there is no specified local content requirement (which is in line with the offset Article of the WTO GPA Article XVI). However, Law 5/2015 has specified what is meant by local, at least in what is concerned with manufactured products, which represents a violation to the WTO GPA and TRIMS agreements, unless it is clearly specified during Egypt's accession to the GPA which is allowed under offsets.

The law also allows for appeals to take place following certain procedures, where Article 41 stipulates that any protests related to violations of provision of the law should be submitted to a certain unit in the MOF, which represents the first resort. If the decision made by the unit does not satisfy the bidder he has the right to go to the Court of State Council. But, such unit affiliated to MOF where the protest can be made implies lack of independent protest mechanism, which is another pitfall associated with the law (EBRD, 2012; EBRD, 2013). The law also allowed for arbitration to be used in administrative contracts, yet has to be approved first by the Competent Authority. Once approved, arbitration has to be held at the Regional Arbitration Center in Cairo. However, in practice, the State Council reviews all signed

contracts and, usually issues a “fatwa”, which states that that the arbitration clause is void. As a result, and in most cases, the arbitration clause in contracts with the government becomes unenforceable (World Bank, 2003; EBRD, 2012; EBRD, 2013). The lack of independent and clear protest mechanism is one of the major aspects affecting the transparency of the public procurement system in Egypt and renders in its low compliance with the WTO GPA Article XX.

There is a gap between what is stated in the law and what is implemented. Among the reasons for such gap is broad concepts embedded in the law and its executive regulations, which make them insufficient for consistent application. Moreover, the excessive and cumbersome bureaucratic procedures and extensive checks and balances resulted in huge inefficiency in terms of applying the law. As a result of such gap the ministries have created their own unwritten procurement rules which became by time known for bidders and became the norm in this regard (World Bank, 2003). Hence, despite the fact that the law in general as has been assessed to allow for fair competition and non discrimination (EBRD, 2012; EBRD, 2013) the lack of specific regulations and discretionary power for contracting agencies as a result of such lack of specific regulations have resulted in pre-empting the law from its good faith.

(v) *Electronic Methods*

In general, bidding opportunities are advertized in well-known newspaper. Moreover, large projects are advertized through foreign publications and embassies (World Bank, 2003). A government procurement portal⁵ was launched in Egypt to be the first of its kind in the region following the second amendment in Law 89/1998 which took place in 2010 (Prime Minister decree no 33/2010). The amendment introduced electronic means for tender notification and established a governmental website where contracting agencies should publish their contract notices. Law 5/2015 emphasized the need to publicize related information on local products preferences on the governmental portal (Article 9 of Law 5/2015).

(vi) *Procurement by Utilities and Defense Procurements*

Law 89/1998 is comprehensive. As stated in the law, it applies to “State’s Administrative Body Units, inclusive of ministries, departments, bodies having special balances [*having their*

⁵ www.etenders.gov.eg

own budget], as well as local administration units, public authorities, whether being servicing or economic.” The law has also its specific rules applied to the Ministry of Defense and the Ministry of State for Military Production (World Bank, 2003). Yet, following Article 8 of the Law, both Ministry of Defense and Ministry of State for Military Production in case of need can use limited tender or local tender or limited negotiation or direct agreement following Law 204/1957. Moreover, they are exempted from the provisions allowing for preference of local manufactured products following Law 5/2015.

(vii) *Concessions and Public Private Partnerships (PPP)*

The concessions are not regulated by the Law 98/1989. Moreover, gas and oil concessions can be procured and awarded through project specific laws. In addition, there are a number of other laws and regulations dealing with concessions including Law 149/2006 which allows for concessions in public utilities for establishing railway lines and operating them. In addition, Law 229/1996 allowed private sector participation in the field of roads, whereas Law 28/1981 concerned with civil aviation and Law 3/1997 allowed for concessions in public utilities by allowing private sector to establish, manage and utilize ports (El Gibaly, 2010).

In 2010 the Government issued Law 67/2010 which regulates the public private partnership (PPP) agreements (EBRD, 2013). The law is complemented by its executive regulations issued by the Prime Ministerial decree 238/2011 and another Prime Ministerial Decree 11875/2011 on the structure of the PPP Supreme Committee. To avoid any conflict with Law 89/1998 the First Article of the PP law explicitly excludes its jurisdiction from that of Law 89/1998 “... and these contracts (PPP contracts) shall not be governed by Tenders and Bids Law 89 of 1998 and any specific laws related to granting concessions of public utilities”. Article 16 of the PPP Law establishes the PPP Central Unit within the Ministry of Finance, and PPP satellite units may be established, when necessary, within the Administrative Authorities (World Bank, 2015). The law allows for a wide range of schemes including build operate transfer (BOT) and build own operate transfer (BOOT) and build own operate (BOO) (EBRD, 2012). In other words, the PPP are handled under another regulatory framework different from that of Law 89/1998 and following the IBRD assessment it is a highly developed regulatory framework at least in theory (EBRD, 2012). It is worth noting that transactions following Law 67/2010 are exempted from Law 5/2015 as per Article 3 of Law 5/2015. However, in practice the law has not been functioning so well, with several

impediments in its applications associated with lack of a formal, pre decision consultation process between the different stakeholders associated with the PPP projects (including ministries, authorities, governorates, etc.) which led to lack of buying-in of line ministries and broader public. Moreover, there is no sector specific and/or horizontal regulatory framework covering PPPs and failed establishment of satellite PPP units in line ministries to follow up with the Ministry of Finance Central PPP unit. In general, so far Egypt was not successful enough in being able to attract investment to selected projects via its PPP law. This has been a result of wrong choice of projects (e.g. large and complex projects that did not appeal to investors as the case of the "New Schools" project where it was planned the procuring of 345 schools in different governorates but there was lack of interest from the private sector and the case of "River Ports" on the Nile which also failed due to the unbalanced distribution of risk amongst public and private sectors with a bias against the private sector) or because of specific loopholes associated with the government's financing model as the absence of an exchange rate guarantee.

Egypt has initially been less successful than expected in attracting investment to selected projects via its PPP programme, partly due to a choice of overly large and complex pilot projects that have not appealed to investors. In addition, the government's financing model (including the absence of an exchange rate guarantee) and the lack of long-term project funding have also been obstacles to the success of the PPP programme. Investor perceptions of political and economic instability have also played a role. (OECD, 2014).

(viii) Corruption, Transparency, and Enforcement

Corruption is dealt with under the Egyptian Penal Code, which addresses bribery in both public and private sectors and contains stringent criminal sanctions applicable to bribery of a government employee for the purpose of the performance (or lack of performance) of his or her duties. Private sector employees are subject to less severe penalties. Egypt ratified the UN Convention against Corruption in 2005 (OECD, 2010), but is not party to the OECD Convention on Bribery of Foreign Public Officials in International Business Transactions or the African Union Convention on Preventing and Combating Corruption. Less severe penalties apply for bribery of a private employee. There is no legislation that prohibits the bribery of foreign government officials and the Egyptian law does not extend to criminal acts committed abroad, with the exception of the fact if the act is constituted as a crime in Egypt.

Among the related provisions in the law is the article that bans companies due to fraud or manipulation from bidding. The State Council makes the banning decision and recommends to the competent authority, and the competent authority asks GAGS in turn to publicize the ban. Banning is for life and is only lifted by court decision. Despite, such a provision is good in combating corruption, yet it suffers from lack of interpreting what is meant by manipulation and the law does not differentiate between the extent or degree of fraud (World Bank, 2003).

Regarding transparency, and specifically in 2007, the Government of Egypt embarked on a number of initiatives aiming at enhancing transparency in this regard. As an example, the Ministry of State for Administrative Development set up the Transparency and Integrity Committee (TIC) to study and recommend means and mechanisms of enhancing transparency, accountability, and the fight against corruption at central and local government levels. Moreover, the Ministry of Investment established a Transparency Unit with the mandate of improving the investment climate through legislative amendments that strengthen freedom of information and transparency, raise public awareness and stakeholder engagement, and build capacity and knowledge management. The Ministry of Investment also established a National Contact Point, in light of Egypt signing up the OECD Declaration on International Investment and Multinational Enterprises. The mandate of the National Contact Point is to implement the declaration's Guidelines for Multinational Enterprises and assist businesses in developing strong ethical practices in their business dealings (European Commission, 2009). Despite such achievements to enhance transparency, the law itself still suffers from a number of loopholes that affects negatively its transparency and can result in lack of confidence of the bidders in the whole process. For example, there are no clear limits on the nature of communications that can occur if bidders are asked to provide additional or missing information during the technical evaluation. Allowing broad and unmonitored exchanges of information between the bidder and the Evaluation Committee without specific guidelines can affect negatively the transparency of the whole process (World Bank, 2003). When tenderes are rejected in the technical evaluation, which is separated from the financial one, they are subsequently excluded from the financial evaluation. For enhancing transparency, a debriefing session is held with unsuccessful bidders, and the decisions regarding technical evaluation must be published for a minimum of one week before the opening of financial proposals (OECD, 2016).

Egypt has also joined a number of international initiatives and projects to combat corruption including the MENA-OECD Task Force on Anti-Bribery, the OECD Good Governance for Development in Arab Countries Initiative, the Arab Anti-Corruption and Integrity Network (ACINET), and the UNDP-POGAR project to support the Ministry of Investment in the fight against corruption, and the UN Convention against corruption (Kassem, 2014).

Regarding enforcement, the available studies, which are highly limited indicate weak enforcement and a huge gap between what is stated in law (which is relatively strong) and how it is enforced. In general, rendering a weak and ineffective implementation of the law. The implementation of the law is viewed to be highly manipulated to suit vested interests (Kasper and Puddenphat, 2012; EBRD, 2013).

The Government of Egypt does not have standard bidding documents following Law 89/1998. Documents containing descriptions of work and services, and other information required are available to bidders as per Article 8 of the executive regulations (World Bank, 2003). As a result, each governmental agency has started developing its own version of needed documents, which defies the principles of standardization of the UNICTRAL Model Law.

(ix) Participation of Foreign Tenderers

As proclaimed by law, external tenders are announced in Egypt and abroad in Arabic and English, with notifications to embassies and consulates of foreign countries residing in Egypt. Article 61 of the Executive Regulations states that bidders have to be residents in Egypt, or have an agreement with an Egyptian agent. This implies that foreigners are allowed to enter bids under Law 98/1989. However, following Article 4 of the law if the value of a tender is below a certain threshold (400,000 LE) an agreement will be concluded with local suppliers and local contractors only who are the only eligible candidates allowed to participate in the bid. Local suppliers and contractors are defined in this case to be the ones who are engaged with their activities in the governorate in which the execution of the agreement will take place. Though, this article does not explicitly exclude foreigners, but it has a de facto discrimination against all foreign bidders who are likely not have participated in such bids before and are not engaged in local activities. Moreover, a decree from Ministry of Finance qualifies the eligibility criteria for construction contracts stating that the advertisements shall mention that the main contractor should be an Egyptian national and that foreign companies may participate as subcontractors if no Egyptian company is available or qualified (World Bank, 2003). This decree constitutes an explicit discrimination against foreigners. Finally, and

as stated above the law gives preference to national suppliers, where Article 16 states that “The tender submitted for supplies of local production or for works or services undertaken by Egyptian Entities shall be considered less-priced if the increase therein shall not exceed 15% of the value of the least foreign tender” (World Bank, 2003). Such preference for local suppliers defies the WTO GPA non-discrimination principle (Article III) in general, however, and in case that Egypt accedes to the GPA such preference for local suppliers can be stated in the terms of accession, which is allowed by GPA and in this case Egypt will not be violating the GPA Article III.

(x) Preferential Trade Agreements (PTAs)

Egypt is a member of a number of PTAs including one with the European Union (Association Agreement), with Arab countries (Pan Arab Free Trade Area, PAFTA), with Jordan, Morocco, and Tunisia (Agadir), and with some African countries (COMESA). None of such agreements have included actual implementation of government procurement agreement despite the fact that public procurement has been included in a number of such agreements as Article 38 of the Association Agreement between Egypt and the European Union (EU), which stated that the parties agreed on progressive liberalization of public procurement in the future. Other agreements as the COMESA includes provisions for future cooperation or enhancing existing coordination, etc. Yet, serious steps to be engaged in some type of regional government procurement agreement have never materialized in Egypt’s PTAs. In 2008 Egypt participated with six other COMESA members in drafting COMESA regional procurement regulation (Abt Associated Inc. et al, 2003) and there have been ongoing projects aiming at enhancing the capacity building of COMESA members in this regard as the project coordinated and financed by the African Development Bank (African Development Bank, 2012; African Development Bank, 2006). The project has helped to some extent in establishing the needed regulatory framework among COMESA members and in taking initial steps to create a regional procurement market, where issues as regional preferences and bidder complaints procedures have been agreed upon, however issue of common regional thresholds has been still pending (COMESA, 2011). PAFTA was silent on the issue of public procurement whereas Agadir just mentioned the respect of domestic laws regarding public procurement.

2. Public Procurement Markets in Egypt

There are no available published data or information on the size of the public procurement in Egypt. In fact, in 2016 the GAGS issued a circular (circular 8/2016 urging the different agencies to provide it with the information related to public procurement in a special format. Yet available unofficial estimates put a figure of 27% of GDP as what the government spends on public works, goods, and services, which does not cover procurement by state owned enterprises (CPAR, 2003). Another figure put by El Gibaly (2010) was 27 LE billion allocated by the government in its budget for 2009/2010 for purchasing good and services and 36 LE billion allocated by the government in the same budget for government spending on investment projects to be performed by private sector. It is worth noting that the Ministry of Finance is still in the process of collecting a comprehensive database for public procurement in Egypt (Ministry of Finance, 2016). Some scholars attempted to estimate Egypt's public procurement share in GDP. It was stated that it reached 17% of GDP in 2010/2011 (Abdellatif and Zaky, 2013). However, this figure is probably underestimated as its source is the State Budget, which does not include figures on either economic authorities or public sector. Yet, it remains comparable to other world-wide estimates which were put in the range of 15-20% of GDP (Anderson et. al, 2011), and specifically 18% for Middle East and North Africa (MENA) region (OECD, 2016).

3. Potential Benefits and Costs for Egypt from joining GPA

The task of determining the potential benefits and costs for a country like Egypt from joining the GPA is far from being easy. The reason is simply paucity of data and information on the public procurement system as shown in Section 2 of this paper which prevented us from carrying any kind of rigorous quantitative assessment. Hence, the approach followed in this Section follows the evaluative framework for individual WTO members considering accession as depicted in Anderson et. al (2011) and Chakravarthy and Dawar (2011). Yet, the approach is complemented by other aspects either raised in other studies or following Egypt's particular status as an emerging economy that has passed by a revolution in 2011 and hence faces economic as well as political challenges.

- (i) *Enhancing exports and inward investments of the country concerned in the GPA members' economies*

Currently there are 42 members of the GPA including the European Union (EU) countries. In addition 10 countries have applied for accession whereas 4 other WTO members have provisions in their WTO accession protocols in which they have agreed to eventually seek GPA membership (Anderson et. al., 2011; Anderson, 2010). This is a significant increase in membership which started by 21 members in 1996 (Chen and Whally, 2011). Despite the fact, that it is always argued that developing and least developed countries have always been reluctant to apply for GPA accession, it is worth noting that all the countries that have applied for accession are developing ones. Yet is this bad or good for Egypt if the decision was made to join? To answer this question a number of facts needs to be stated.

First, Egypt's major trading partners accounting for more than 60% of its trade are European Union (EU) and USA, which are already members of the GPA. The total market value of the GPA members was estimated to be \$ US 1.6 trillion in 2008, which is a significant number (Anderson et. al, 2011) though what really counts is the market penetration rate. Moreover, among the countries seeking accession are Jordan and Oman where Egypt has strong trade relations with them through the PAFTA and Agadir agreements. In addition, Saudi Arabia (which is among the WTO members with provisions in their accession protocol pinpointing their interest in accession) is considered among the major trading partners for Egypt within the Arab countries and PAFTA. The strong trade ties with existing or potential GPA members imply that both Egyptian and foreign businesses in such countries are familiar with the Egyptian as well as those countries' markets, which could be a positive aspect for both Egyptian businesses when bidding outside in such markets, as well as for foreign businesses bidding in Egyptian market, yet there is no guarantee that such information on trade will be easily translated into equivalent information on public procurement. In other words, the presence of several trading partners in the GPA could either act as a positive aspect or neutral for Egypt when joining the GPA. In fact, empirical evidence has confirmed that GPA membership has a positive impact on trade in goods and services between GPA parties as well as on outward foreign affiliates' service sales (Chen and Whally, 2011).

The second issue which needs to be considered is the presence of China among the countries seeking accession to the GPA. However, this issue will not be discussed here as presence of China will be equally worrisome if not more for all GPA members when compared to Egypt

due to its aggressive price competition tools. In other words, China's accession will be probably subject to strict conditions that ensure that its aggressive price competition will be handled in its terms of accession, and hence we cannot depend on this factor as one of the criteria to evaluate Egypt's accession to the GPA. It is rather a mute factor that will remain so till the conditions of China's accession are known, as well as the conditions of Egypt's accession especially those regarding threshold and sectors, as well as the conclusion of the negotiations on the revised text of GPA. Indeed, the available literature confirms what we have pointed above in terms of the GPA acting as a device or a vehicle for achieving market gains or as an "insurance policy" against "buy national" types of policies that have recently proliferated in a number of countries (Anderson et. al, 2011). Yet, it is also confirmed that the ability to benefit from GPA depends on the capacity of each country to join (i.e. its competitiveness, infrastructure, export readiness, etc).

It is also worth noting that GPA can act as an engine for enhancing inbound foreign direct investment (FDI), especially in the fields that require domestic establishment as for example construction activities, which represents a significant portion of government procurement in a country like Egypt. The membership of GPA acts as "stamp of approval" for the investment and procurement policy of the country concerned which helps to encourage more FDI (Anderson, et. al, 2011). However, the GPA can only work if other regulatory reforms are carried out in terms of improving the business and investment environment in general and the Investor State Dispute Settlement (ISDS) mechanism where data shows that there has been increasing number of disputes arising after the 25th of January revolution where 18 cases have been reported in the period 2011-2016 compared to 20 cases over the period 1998-2010 (<http://investmentpolicyhub.unctad.org/ISDS/CountryCases/62?partyRole=2>). Moreover, there is no direct incentive for foreign investors that they can enjoy if Egypt joins the GPA, as the dispute settlement mechanism of the WTO does not allow them to take the Government to the dispute settlement body. It only provides them with some kind of indirect incentive if they were able to push their governments to take the Egyptian government to the dispute settlement in case of violations.

(ii) *Promoting good governance: enhancing competition and lessening costs*

As explained in Section One, the merit of the Egyptian government procurement law is certainly good, yet the practice suffers several loopholes, which render the law ineffective in achieving one of its ultimate goals of enhancing competition and lessening cost (value for

money) incurred by the government in its procurement activities. Joining the GPA will surely help to enhance competition and lessen costs (Anderson et. al, 2011) simply as it will act as an effective device for enhancing transparency and abiding by rules which by themselves will lead to achieving such two goals. The negative side always mentioned here is that the efficiency gains enjoyed by the government will not be shared by domestic or local suppliers who might be kicked out of the market due to fierce foreign competition, hence the economy as a whole, versus the government, will not enjoy the full reap of such gains unless consumers will enjoy better prices for publically procured goods and services, which is an issue that has to do with efficiency in distribution. But if focus is on the production side, then kicking out local producers out of the market can have negative socio-economic effects. Again such fear, can be controlled in the accession terms by identifying phased-in addition of specific sectors and entities (including defense departments), offsets (including local content requirements), price preferences, and thresholds which will enable the government to count for the sensitive sectors and/or small firms. As a matter of relief for Egypt, it is worth noting that the estimates of government procurement which falls outside the purview of GPA for a developed member as the EU has been 80% of total public EU procurement (Anderson, et. al, 2011) which is expected to be higher for developing countries. Not to mention the "home bias" in the Egyptian procurement system which is driven by many factors rooted in the Egyptian economy including compliance costs, domestic policy environment, etc. which all as a shield from high substitution of foreign firms for domestic ones in procurement activities. Adding to that there is some evidence that the public and private imports are not substitutes (Shingal, 2011) which act as another shield level against the fear from substituting Egyptian products and services by foreign ones. Moreover, and as identified by Anderson et al, 2011 the negative impact on the economy is lessened by the high probability of foreign firms winning the bids subcontracting local firms, and possibility of technology transfer. Moreover, empirical evidence has shown that joining GPA has not led to the increase in the value of foreign procurement in the countries which have joined, though it has increased the import demand for contracts (Shingal, 2011). Another fear, that can act as an obstacle is the negotiating costs as well as the costs of altering different laws, rules, and regulations related to adapting the domestic law and regulations to GPA. It is worth noting in this regard that such costs, despite the fact that they might be relatively significant can be lessened through the technical and financial support provided by international organizations and donors (Anderson et. al, 2011). Moreover, Egypt is not a federal state, and hence the government procurement is governed by a central law which will lessen the costs associated with adapting

to the GPA when compared to federal systems. Yet, the different procedures applied by each procuring agency can stumble the process of abiding by a common method and can probably increase the reluctance to join such agreement. Finally, the flexibilities embedded in the accession process for any country where tailor made exceptions are made to the GPA rules depending on the specific needs of the acceding country (Anderson et. al, 2011) is certainly an important aspect which should be considered if Egypt decided to join.

(iii) Fighting corruption, anchoring reforms, and enhancing transparency

The GPA in itself can act as an anchor for reforms, whether on the investment policy, procurement procedures, export strategy, or institutional and legal framework. The nature of binding commitments and level of reporting and transparency required by the agreement can act as a device for undertaking and anchoring domestic reforms. This is important in the case of Egypt, as has been argued in Section One, that the law itself is fine regarding its merit, yet its application suffers several pitfalls, and that there is paucity of information and data, where joining GPA will definitely help in improving data reporting (Shingal, 2012). Moreover, and despite that the law has been modified twice, it remained short of addressing the shortcomings of its implementation implying the existence of reluctance for reforms by some stakeholders who benefit from the current status quo of its implementation. It is worth noting that corruption is a world wide phenomenon in public procurement worldwide and especially in developing countries (Shingal, 2015). As a result, joining an international agreement like GPA can act as an effective device in initiating and anchoring reforms on several fronts whether related to the procurement policy per se or related fields including corruption, investment, and exports. It is worth mentioning that the revised GPA includes a new provision that imposes a specific requirement on GPA Parties to avoid conflicts of interest and corrupt practices (Anderson et. al, 2011). The current governing regime has undertaken tough economic reforms in the last two years (in terms of reducing fuel subsidies, devaluation, etc.) emphasizing that if the political will is present it can be translated into credible implementation of acceding to the WTO GPA. Moreover, the desire of the current regime to combat corruption can make use of joining such agreement as it can act as an effective tool in this regard to overcome the loopholes of implementation of the domestic law. For example, where economic growth recorded high rates between 2000 and 2010 and was celebrated by international organizations as the World Bank and the International Monetary Fund (IMF) for

a country like Egypt prior to 2011 (see for example, World Bank, 2004; IMF, 2008), crony capitalism was increasing and income distribution was worsening (Chekir and Diwan, 2015; Diwan et. al, 2015; Saif, 2013). Hence, in this regard GPA can help in addressing such pitfalls and cleaning up the proliferation of nepotism and crony capitalism that have characterized the Egyptian economy and hindered fair competition. Yet, the political domestic sensitivity of joining such agreement (in terms of the loss of the domestic contractors' preference) implies that the decision of accession if undertaken should be prudently communicated to the public. Moreover, it is worth mentioning that joining GPA can help only indirectly in providing a fair ground for bidders in their dispute with the Government. As discussed in Section One, the Egyptian law remains in low compliance with GPA Article XX, and by the nature of WTO agreements a dispute can be only solved by WTO dispute settlement mechanism. This implies that if the Government of Egypt failed to comply with GPA, then only other governments can take the Egyptian one to the dispute body, and not investors. Hence, GPA in this regard will not create an incentive for foreign bidders to sue the Government of Egypt, but joining the GPA will create an indirect pressure on the Government of Egypt to abide by the law and reform it to allow foreign bidders the right to sue the Government. In this regard accession to GPA should be accompanied by reforms as ISDS as mentioned in Section One.

Concluding Remarks and Policy Recommendations

The above review has pointed out that despite the adoption of a procurement law, it seems that Egypt does not have a full fledged national public procurement policy. Government procurement is decentralized in theory, but in practice it is highly centralized as revealed in Section One. The dominance of Ministry of Finance, GAGS, and State Council in the procurement process has pre-empted the theoretical decentralization due to the large number of checks and balances and other bureaucratic procedures which hamper the whole process and render it inefficient. The cumbersome bureaucratic procedures created a sort of informal discretionary decentralization for different entities in terms of having their own norms of applying procurement procedures, which added to the lack of transparency.

As a result, and due to the absence of a clear procurement policy a plethora of rules and procedures govern the implementation of public procurement in Egypt. While the law has good merit and follows international practices its implementation falls short in providing

transparency, and efficiency in the award of public contracts. The system is plagued by delays in procurement decisions leading to extra expenses, delays in payments, absence of fair competition, collusion practices, and weak dispute settlement mechanism. Hence, a reform is surely needed and joining GPA could act as an effective device in initiating such reform and making such reforms sustainable. The reform should focus mainly on narrowing the gap between the application of law in theory and practice, as well as standardizing the decentralization process. Moreover, reform should focus also on lessening the unnecessary delays in the procurement process, and strengthening the dispute settlement process to have a level playing field for the bidders in terms of their relationship with the government.

The weak economic situation of Egypt in the current period might deter any government from thinking of joining an international agreement like the GPA. Yet, the analysis above has shown that a lot of the fear from joining GPA is based on misinformation and that for a country like Egypt there are *conditional benefits* that can be reaped provided domestic regulatory reforms governing the business and investment environment are undertaken prior or in conjunction with accession (e.g. the ISDS). Moreover, and most importantly the amount of costs expected have been wrongly magnified, and in fact our analysis has shown that the safety valves already embedded in the GPA and its revised version can help Egypt to lessen such potential costs (e.g. thresholds, sectors, and offsets). In addition, given the embarking of Egypt on several mega infrastructure projects (including the new administrative capital), the joining of GPA as an instrument for efficient public procurement tool in infrastructure projects can be useful for Egypt's developmental goals. Embarking on structural economic reforms as recently undertaken by the Egyptian government (through floating the Egyptian pound, reducing fuel subsidies, applying value added tax, etc.) needs to be complemented by regulatory reforms that ensures investors' rights and their ability to have access to fair and speedy arbitration if needed. In this regard and as part of this reform process joining GPA can help Egypt to achieve its developmental goals.

Joining GPA is not a panacea for Egypt. The political will for reform and the desire to fight corruption could act as strong incentives for the current regime to join GPA as a mean to achieve such goals. Yet, joining GPA alone might not help if the surrounding business and investment environment is not ready and the human capacity concerned with implementation of the GPA remains reluctant to apply GPA. Hence, joining GPA with its flexible provisions allowed for development purposes can be misused and abused by the implementing agencies in Egypt not for the sake of development but for serving the special interests. Hence, political

will is of paramount importance to ensure that flexibility is not abused and that GPA helps the Government to achieve transparency in the procurement process and provides a fair ground for competition. In this regard and for acceding to the GPA be useful for Egypt, there is a need to revisit the related rules and regulations, especially those dealing with investment disputes. Moreover, there is a need to amend the law to be in compliance with GPA Articles, as Article XX. Finally, the institutional setup governing the procurement must be revised to ensure common practice by all implementing agencies and lessen the discretion provided to each of the Competent Authority in his own jurisdiction.

References:

Abt Associates Inc., SCS Engineers Community & Institutional Development, and The Institute for Public-Private Partnerships (2003), "review and analysis of the Egyptian Tender Law and its Executive regulations" prepared for the Governorate of Alexandria, Governorate of Cairo, Governorate of Qalyoubiya, Egyptian Environmental Policy Program, and the United States Agency for International Development.

Abdellatif Lobna and M. Zaky (2013), "The Macro-Micro Nexus and Public Procurement Support Policy for SMEs: the Case of Pharmaceuticals in Egypt", working papers series, ERF. <http://erf.org.eg/programs/smes-and-public-procurement-policies-in-egypt-the-case-of-small-and-medium-pharmaceutical-industries/>

African Development Bank (2012), "COMESA Public Procurement Reform and Capacity Building Projects: Project Performance Evaluation Report", Operations Evaluation Department, African Development Bank Group, https://www.afdb.org/fileadmin/uploads/afdb/Documents/Evaluation-Reports-Shared-With-OPEV/_COMESA_%20Project%20Performance%20Evaluation%20Report_web.pdf

African Development Bank (2006), "Common Market for Eastern and Southern Africa: Enhancing Procurement Reforms and Capacity Project", Appraisal report, May, 2006, https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Multinational_-_COMESA_-_Enhancing_Procurement_Reforms_Capacity_Project_-_Appraisal_Report.pdf

Anderson, Robert D., Philippe Pelletier, and Kodjo Osei-Lah (2011), "Assessing the value of future accessions to the WTO Agreement on Government Procurement (GPA): Some new data sources, provisional estimates, and an evaluative framework for individual WTO members considering accession", World Trade Organization Staff Working Paper ERSD-2011-15, https://www.wto.org/english/res_e/reser_e/ersd201115_e.htm

Anderson, Robert D. (2010), "The WTO Agreement on Government Procurement: an emerging tool of global integration and good governance", EBRD *Law in Transition Autumn*, 2010, pp. <http://www.ebrd.com/downloads/research/news/lit102.pdf>

Chakravarthy, S. and Kamala Dawar (2011), "India's possible accession to the Agreement on Government Procurement: what are the pros and cons?", Chapter 4 in S. Arrowsmith and R. D. Anderson *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge University Press

Chen, Hejing, and John Whally (2011), "The WTO Government Procurement Agreement and Its Impacts", NBER Working Paper No. 17365, <http://www.nber.org/papers/w17365>

Chekir, Hamouda and Ishac Diwan (2015), "Crony Capitalism in Egypt", *Journal of Globalization and Development*, Volume 5, Number 2, pages 177-211.

COMESA (2011), *COMESA Pre Summit Newsletter*, 2011, <http://www.comesa.int/wp-content/uploads/2016/06/Pre-summit-newsletter-2011.pdf>

Diwan, Ishac, Philip Keefer, and Marc Schiffbauer (2015), "Pyramid Capitalism, Cronyism, Regulation, and Firm Productivity in Egypt", Center for International Development, Harvard University, CID Faculty Working Paper No. 291, available at <https://www.hks.harvard.edu/centers/cid/publications/faculty-working-papers/pyramid-capitalism-cronyism-regulation-and-firm-productivity-in-egypt>

EBRD European Bank for Reconstruction and Development (2013), *Public Procurement Sector Assessment: Review of Laws and Practice in the SEMED region – Egypt, Jordan, Morocco, Tunisia*. http://www.marchespublics.gov.tn/onmp/upload/documents/ebrd_report_eng.pdf

EBRD European Bank for Reconstruction and Development (2012), *Global Practice Guide: Public Procurement*, prepared by Lex Mundi. http://www.lexmundi.com/lexmundi/Public_Procurement_Guide2.asp

El Gibaly, Abdel Fatah (2010), "Transparency in Government Procurement", Series of White Papers to Promote Transparency & Combat Corruption in Egypt, CIPE. http://www.cipe-arabia.org/files/pdf/Corruption/Policy_Paper_Procurement-EN.pdf

European Commission (2009), "Business Development Strategy: Phase 1 Policy Assessment Egypt, Dimension II-1 Anti Corruption", <https://www.oecd.org/globalrelations/46341460.pdf>.

International Monetary Fund (IMF) (2008), *IMF Survey: Egypt: Reforms Trigger Economic Growth*, <http://www.imf.org/external/pubs/ft/survey/so/2008/car021308a.htm>

Kaspar, Lea and Andrew Puddenphatt (2012), "Benefits of transparency in public procurement for SMEs: General Lessons for Egypt", <http://www.gp-digital.org/wp-content/uploads/pubs/Benefits-of-transparency-in-PP-for-SMEs.pdf>.

Kassem, Taha (2014), "Poor Governance in Egypt, an Obstacle to Economic Development", *IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 19, Issue 7, Ver. II (July. 2014), PP 01-14 e-ISSN: 2279-0837, p-ISSN: 2279-0845*. http://www.aast.edu/pheed/staffadminview/pdf_retreive.php?url=50535_77_10_Poor%20Gov

World Bank (2003), *Arab Republic of Egypt Country Procurement Assessment Report*, December 2003 Operational Core Services Middle East and North Africa Region. <http://siteresources.worldbank.org/INTMNAREGTOPGOVERNANCE/Resources/CPAREGYPT2003.pdf>

World Trade Organization (WTO) (2005), *Trade Policy Review Egypt*, Report by the Secretariat, Report No. WT/TPR/SP/150, https://www.wto.org/english/tratop_e/tpr_e/tp250_e.htm