

GENERAL AGREEMENT ON
TARIFFS AND TRADE

Committee on Government Procurement

ARTICLE IX:6(b) NEGOTIATIONS

CONSOLIDATED LIST OF SUGGESTIONS MADE
FOR IMPROVEMENTS OF THE AGREEMENT

Note by the secretariat

1. At its April 1984 meeting the Committee requested the secretariat to circulate, in preparation for the June 1984 meeting, a consolidated list of suggestions made concerning improvements of the Agreement (GPR/M/11, paragraph 40).

2. The present note, which is circulated in response to the request, contains the proposals already on the table (GPR/W/51, 53, 54 and GPR/M/11, paragraph 34) in the order of Articles referred to. The order in which the proposals are set out should therefore not be taken as indicating any priorities. Where a specific Article has not been referred to, the secretariat has assigned the proposal to the Article which appeared to be the most relevant. It should be noted that the note does not incorporate general introductory remarks made in the written proposals, nor the comments made at the last meeting, an account of which is given in GPR/M/11, paragraphs 31-39.

3. The contents of the note are without prejudice to the negotiating position of any delegation. It is recalled that delegations remain free to present further proposals whenever they so wish, including draft texts, when relevant, and that informal consultations would be held concerning improvement aspects prior to the June meeting (GPR/M/11, paragraph 40).

A. Article I:1(b): The threshold

(i) Lowering the threshold

- Footnote 2 to Article I:1(b) directs the Parties to the Agreement to consider covering below-threshold purchases during the renegotiation of the Agreement. In this context, serious consideration should be given to the possibility of lowering the current threshold level.

(ii) Estimated value/actual value

- A second sentence should be added to Article I:1(b) in order to ensure that all contracts which have been advertized as being covered by the Agreement shall subsequently be awarded in accordance with the provisions of the Agreement regardless of whether the actual value of the contract falls below the threshold value.

(iii) Recurring contracts

- This disposition places the onerous task on the procurement authority of estimating the value over the coming twelve months of recurring contracts in order that they may determine whether the value of the contracts are above the threshold. In these circumstances it is suggested that a procurement authority may declare that it will each year base its estimate of the value of recurring contracts using the previous twelve months as a reference.

- A problem with respect to the calculation of the threshold is that the disposition concerning recurring contracts has not or has only partially been transposed into their national legislation by some signatories. The Committee should cover this point in its review of implementation legislation.

B. Article I: Leasing

- Clarify the Agreement to provide that all forms of acquisition, including leasing, are covered.

C. Article II:3: Rules of Origin

- The Agreement currently stipulates that rules of origin for the purpose of the Agreement must be the same as used in the normal course of trade. In practice this is problematic because it requires procurement officers to make judgements requiring customs expertise or to rely on input from customs officials who are often occupied with matters of more immediate concern to them. It is also confusing to firms because determinations are complex and the rules vary from country to country. Using different definitions may lead to confusion and/or errors in determining origin. The question of origin would be greatly simplified if a simple 50 per cent rule were adopted by all Parties to the Agreement.

D. Article V: Tendering procedures/single tendering

- Observation of the practices employed in the various signatory countries over the last year indicates that there is a need to eliminate potential "grey" areas between the selective and single-tendering procedures. Some signatories appear to regard as selective procedures those tenders where the entity selects a limited number of suppliers and then denies for one reason or another - usually shortage of time - the possibility of participating in the tender to additional suppliers. This procedure usually discriminates against foreign suppliers since the selected candidates for participation in the tender are usually domestic suppliers. Other signatories, however, tend to regard such procedures as a form of single tendering even though a number of suppliers may be involved in the negotiation of the contract since the procedure lacks the essential transparency and openness characteristics of a truly selective procedure. Unless the possibility of participation in a market is genuinely open to all potential suppliers it should in future not be classified under the open or selective tender heading.

- It is important for the proper functioning of the Agreement to reduce the use of single tendering, or at least improve the transparency of single tendering procurement; the Parties should explore the possibilities for

further discipline on the use of single tendering; the discipline over the use of single tendering would be improved through a requirement that information be published indicating that this procedure is being used, as well as why it is being used, each time an entity uses single tendering.

E. Article V:2: Qualification procedures

- The Agreement currently requires that government agencies which employ qualification procedures must ensure that these procedures are non-discriminatory and are followed in an open and expeditious manner. The Parties should explore the need for further discipline on the use of qualification procedures to meet these objectives.

F. Article V:3 and 4: Separate publication

- Article V:3 should be amended to provide that notices of proposed purchases covered by the Agreement should be clearly identifiable in the national publication listed in Annex II by means of separate headings.

- The synopsis of the invitation to tender foreseen under Article V:4 and indeed all other notices required to be published under the Agreement should be published under a separate and clearly defined heading with the indication "Contracts covered by the GATT Agreement on Government Procurement" in the relevant Journal listed in Annex II of the Agreement. The addition of footnotes or other appendages to invitations to tender do not constitute an adequate fulfillment of obligations under the Agreement.

G. Article V:4: Contents of synopsis and quality of information

- The Agreement specifies in its Article V:4 the minimum contents of the synopsis of the invitation to tender. There is widespread disrespect of this particular disposition among purchasing entities to the point where it is sometimes scarcely possible to identify the basic parameters of the invitation to tender. Thus it becomes impossible for a potential supplier to identify whether the invitation to tender interests him or not. Indeed it is becoming evident that some signatories may not have adequately transposed the contents of Article V:4 into their national legislation. It is incumbent on those signatories who are in default in this respect to remedy it now before other signatories are obliged to seek redress under the terms of the Agreement. The Committee may wish to review national legislation on this and indeed other matters during the negotiations.

- In respect of those signatories whose entities observe in form at least the terms of Article V:4, the Committee should verify that the contents of the publication are in conformity with the terms of the Agreement. (The Party making this proposal) is already carrying out such an investigation into the contents of the synopsis of invitations to tender published in (its) Official Journal. Other signatories should carry out similar studies in order that appropriate proposals may be made at a later date during the negotiations for the modification of Article V:4, if it should prove to be necessary.

H. Article V:8: Amendments/reissue of a notice

- There has been an increasing tendency in recent times to publish amendments to notices without extending bid times, e.g. an amendment indicating that the purchase is covered by the GATT Agreement with ten days remaining of the existing bid time. The Agreement should be amended to indicate that in the case of amendments to or reissue of a notice the normal period for receipt of bids should be started again.

I. Article V:9: Delivery times

- This Article specifies that delivery times should take account the normal time required for transport of goods from the different points of supply. Some entities have interpreted this clause literally by indicating delivery dates of thirty-forty days after the signature of the contract in their invitation to tender. This of course effectively rules out the participation of foreign suppliers in such markets. This clause should be modified in order to avoid such over rigid interpretations.

J. Article V:10: Bid times

(i) Sub-paragraphs (a), (b) and (c)

- An examination of the performance during the past three years indicates that the minimum bid delays established by the Agreement have frequently not been observed by entities in the signatory countries. One of the prime reasons for this non-observation has been the assumption by entities that the submission for publication and the actual publication are simultaneous events which as we all know they are not. A number of signatories have already adopted procedures in order to in general avoid such breaches of the Agreement. The Committee should examine these procedures with a view to modifying the Agreement.

- In order to allow exporters sufficient time to prepare and transmit tenders, the period for the receipt of tenders in Article V:10 should be extended from thirty to [forty] [forty-five] days from the date of publication of notice of proposed purchase.

(ii) Sub-paragraph (d)

- Recurring purchases: Under Article V:10(d), the thirty-day bid deadline requirement may be reduced in the case of recurring purchases. It should be considered, in light of experience, whether this provision should be retained or modified.

- Article V:10 should be redrafted in order to limit the recourse to shorter deadlines than the general deadline in the tendering procedures.

K. Article V:11: Languages

- Article V:11 should be redrafted to read "Entities shall, except in exceptional circumstances, allow tenders to be submitted in an official GATT language of their choice, and shall, on request, favourably consider the acceptance of tenders submitted in other languages."

L. Article VI: Publishing information on winning bids

- A requirement to publish the name of the winning bidder and the price of the winning bid would allow firms to assess their competitiveness and identify possible follow-on bids. It would also be a useful tool in monitoring compliance.

M. Article VI:9: Statistics

(i) General

- It is clear after the experience of the last two years that the statistical requirements of the Agreement have presented problems for most signatories. A wide diversity of methods has been developed to face up to these problems. However, much of this ingenuity may have led to a situation where the statistical returns submitted for the information and examination of the Committee are scarcely comparable. It is thus necessary to discuss within the framework of the renegotiations the experience amassed by the signatories over the last three years in order to distill from it a series of more detailed guidelines than those presently foreseen in the Agreement for the preparation of the annual statistical returns.

(ii) Expanded statistical reporting requirements

- Annual statistical submissions should be expanded to include the following additional information, which, it is believed, would be useful in assessing the Agreement's commercial effects and illuminating implementation problems:

- (a) purchases below threshold by entity;
- (b) single tendering by entity;
- (c) origin of the product, rather than nationality of the winning bidder;
- (d) use of derogations; and,
- (e) more detailed product breakdowns.

- Article VI:9 should be amended to include the requirement that each case, where specific derogations are made use of, shall be reported to the Committee through the GATT secretariat within thirty days of the award of the contract and that annual statistical reports by governments should include statistics on the number and value of contracts awarded under specific derogations.

N. Annex 1: Preferences and exceptions/specific derogations

- Although the Agreement recognizes the existence of a number of preferences and exceptions, it would appear that some of these preferences have been more extensively used than was expected at the time of the negotiation of the Agreement. In the meantime other instruments and exceptions, which appear to discriminate against foreign suppliers, have surfaced. It would seem appropriate that signatories should further examine the validity and importance of such preferences and exceptions during the renegotiations with a view to defining more restrictive conditions for their use.

- It might further be noted that at the last meeting one Party stated that despite the fact that most Parties had not provided the agreed information which made it possible to quantify the impact of specific derogations, it was of the view that such limitations on coverage could be used to circumvent the Agreement. This Party suggested that serious consideration be given to the elimination of all derogations under the Agreement (GPR/M/11, paragraph 34).