

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

GPR/W/56/Rev.1

8 October 1984

Special Distribution

Committee on Government Procurement

ARTICLE IX:6(b) NEGOTIATIONS

CONSOLIDATED LIST OF SUGGESTIONS MADE FOR IMPROVEMENTS OF THE AGREEMENT

Note by the secretariat

Revision

1. The present working document has been prepared by the secretariat in response to the request made by the Committee at its meeting on 19 September 1984 that the consolidated list of suggestions made for improvements of the Agreement be revised and include concrete draft texts where such had been put forward in writing.
2. The order in which the proposals are set out follows generally the order of Articles referred to and should therefore not be taken as indicating any priorities.
3. For the convenience of delegations, the proposals made are listed in the left column below. The relevant provisions of the Agreement are listed in the right column below.
4. The contents of this working document 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.

PROPOSED NEW TEXT

PRESENT TEXT

1. Leasing

- Article I:1(a): Redraft first sentence

(This Agreement applies to:)

"any law, regulation, procedure and practice regarding any procurement contract for any type of acquisition, including acquisition through purchase or lease, by the entities subject to the Agreement".

"any law, regulation, procedure and practice regarding the procurement of products by the entities subject to this Agreement."

- Article I:1(b): Add new sentence after first sentence:

(This Agreement applies to ... (b) any procurement contract of a value of SDR150,000 or more.)

"For leasing contracts, the value of the contract for purposes of determining whether or not it exceeds SDR150,000 (or some new value of) SDR's, shall be the sum of the total payments plus the estimated residual value."

- Article V:4: Add new sub-section (h):

(Each notice of proposed purchase shall contain the following information:)

"whether the entity is inviting offers for purchase, for lease, or both."

¹Footnote 1 is not reproduced here, as no proposals have dealt with it.

2. The Threshold Value
- Article I:1(b): Redraft first sentence:
(This Agreement applies to:)
"any procurement contract of a value of SDR75,000 or more."²
 - 3. Estimated Value/Actual Value
 - Article I:1(b): Add new sentence after first sentence:
A second sentence should be added to Article I:1(b) in order to ensure that all contracts which have been advertised 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.
No precise text has been put forward.
 - Article I:1(b): Redraft footnote 2 to first sentence:
"²The Agreement shall also apply to any procurement contract for which a notice of proposed purchase has been made in accordance with Article V:3, whether or not the value of the contract as awarded exceeds SDR150,000."
Former footnote 2 to be deleted.
- "any procurement contract of a value of SDR150,000 or more."²
- "²For contracts below the threshold, the Parties shall consider, in accordance with paragraph 6 of Article IX, the application in whole or in part of this Agreement. In particular, they shall review the procurement practices and procedures utilized and the application of non-discrimination and transparency for such contracts in connection with the possible inclusion of contracts below the threshold in this Agreement."

¹ A proposal concerning footnote 2 is dealt with under 3 below.

4. Recurring Contracts

- Article I:1(b): Redraft third sentence:

"If an individual requirement for the procurement of a product or products of the same type results in the award of more than one contract or in contracts being awarded in separate parts, the basis for application of this Agreement shall be either the value of similar recurring contracts concluded over the previous twelve months or the value of recurring contracts in the twelve months subsequent to the initial contract."

- 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.

A change of the text of the Agreement has not been proposed.

5. Rules of Origin

- Article II:3

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.

"If an individual requirement for the procurement of a product or products of the same type results in the award of more than one contract or in contracts being awarded in separate parts, the value of these recurring contracts in the twelve months subsequent to the initial contract shall be the basis for the application of this Agreement."

Idem

"The Parties shall not apply rules of origin to products imported for purposes of government procurement covered by this Agreement from other Parties, which are different from the rules of origin applied in the normal course of trade and at the time of importation to imports of the same products from the same Parties."

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.

No precise text has been put forward.

6. Special and differential treatment for developing countries

- Negotiations on entity offers presented by developing countries

Article III:3

In particular, it has been suggested that Parties should show the necessary flexibility in accepting the entity offers of developing countries and that the quantitative and qualitative criteria used by Parties might be clarified.

- Transparency

Article VI:9

The views have been expressed, inter alia, that the activities of the Committee ought to be more transparent and that information concerning purchases by Code-covered entities would, in particular, be extremely useful in evaluating the benefits accruing from membership.

Article III:3 (first sentence)

"With a view to ensuring that developing countries are able to adhere to this Agreement on terms consistent with their development, financial and trade needs, the objectives listed in paragraph 1 above shall be duly taken into account in the course of the negotiations with respect to the lists of entities of developing countries to be covered by the provisions of this Agreement."

At the Committee's meeting on 20 June 1984 the Chairman announced that, in the future, statistics will be circulated as ordinary GPR documents (and thus be available to observers), that statistical reviews would be conducted in regular Committee meetings, and that the statistics will be derestricted one year after the conclusion of the annual review. (GPR/M/12, paragraph 9)

7. Qualification procedures

- Article V:2(b): Add new clause at the beginning of the existing provision:

(... Qualification procedures shall be consistent with the following:
"Conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfill the contract in question."

- Article V:2(d): Redraft the existing provision:

(... Qualification procedures shall be consistent with the following:
"entities maintaining permanent lists of qualified suppliers shall ensure that all qualified suppliers may apply for qualification at any time; and that all qualified suppliers so requesting are included in the lists within a reasonably short time."

"entities maintaining permanent lists of qualified suppliers shall ensure that all qualified suppliers so requesting are included in the lists within a reasonably short time;"

Article V:2(d): Add new clause at the end of the existing provision:

(... reasonably short time;)
"and on their permanent supplier list, entities shall not maintain subgroups of qualified suppliers within a product category on such grounds as volume of business, nor shall they use such distinctions as a basis of restricting invitations to tender."

8. Single tendering

Article V: General observations

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

Article V:1

"The Parties shall ensure that the tendering procedures of their entities are consistent with the provisions below. Open tendering procedures, for the purposes of this Agreement, are those procedures under which all interested suppliers may submit a tender. Selective tendering procedures, for the purposes of this Agreement, are those procedures under which, consistent with paragraph 7 and other relevant provisions of this Article, those suppliers invited to do so by the entity may submit a tender. Single tendering procedures, for the purposes of this Agreement, are those procedures where the entity contacts suppliers individually, only under the conditions specified in paragraph 15 below."

Article V:15

"The provisions of paragraphs 1-14 above governing open and selective tendering procedures need not apply in the following conditions, provided that single tendering is not used with a view 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.

No precise texts have been put forward.

Article V:3: Redraft first sentence:

"Entities shall publish a notice of each proposed purchase, including purchases to be procured through single tendering, in the appropriate publication listed in Annex II."

Article V:4: Add new subparagraph (h):

(Each notice of proposed purchase shall contain the following information:)

"In the case of single tendering, notice that the procurement is being made under single tendering procedures and identification of the reason under Article V:15 for doing so."

Article V:15: Modify first line to conform to these other changes by changing the reference "paragraphs 1-14" to "paragraphs 3, 5-14."

avoiding maximum possible competition or in a manner which would constitute a means of discrimination among foreign suppliers or protection to domestic producers:" (Sub-paragraphs (a)-(e) then follow)

In addition to Article V:1 and 15 and the provision concerning statistics in Article VI:9(c), Article VI:2 may be relevant to the question of transparency in single tendering.

"Entities shall publish a notice of each proposed purchase in the appropriate publication listed in Annex II. Such notice shall constitute an invitation to participate in either open or selective tendering procedures."

First line of Article V:15: "The provisions of paragraphs 1-14 above, etc."

9. Separate publication

- Article V:3: Redraft second sentence:

(Entities shall publish a notice of each proposed purchase in the appropriate publication listed in Annex II.)

"Such notice, constituting an invitation to participate in either open or selective tendering procedures, shall be published under a separate heading referring explicitly to this Agreement."

"Such notice shall constitute an invitation to participate in either open or selective tendering procedures."

10. Contents of synopsis and quality of information

Article V:4:

- 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.

"Each notice of proposed purchase shall contain the following information:

- (a) the nature and quantity of the products to be supplied, or envisaged to be purchased in the case of contracts of a recurring nature;
- (b) whether the procedure is open or selective;
- (c) any delivery date;
- (d) the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted;
- (e) the address of the entity awarding the contract and providing any information

necessary for obtaining specifications and other documents;

- (f) any economic and technical requirements, financial guarantees and information required from suppliers;
- (g) the amount and terms of payment of any sum payable for the tender documentation.

The entity shall publish in one of the official languages of the GATT a summary of the notice of proposed purchase containing at least the following:

- (i) subject matter of the contract;
- (ii) time-limits set for the submission of tenders or an application to be invited to tender; and
- (iii) addresses from which documents relating to the contracts may be requested."

9(a) "Any prescribed time-limit shall be adequate to allow foreign as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time-limit, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the proposed purchase, the extent of sub-contracting anticipated, and the normal time for transmitting tenders by mail from foreign as well as domestic points.

(b) Consistent with the entity's own reasonable needs, any delivery date shall take into account

A change of the text of the Agreement has not been proposed.

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.

A change of the text of the Agreement has not been proposed.

11. Delivery times

Article V:9

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.

No precise text has been put forward.

the normal time required for the transport of goods from the different points of supply."

12. Bid times

- Article V:10(a), (b) and (c)

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.

10(a) "In open procedures, the period for the receipt of tenders shall in no case be less than thirty days from the date of publication referred to in paragraph 3 of this Article.

(b) In selective procedures not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender shall in no case be less than thirty days from the date of publication referred to in paragraph 3; the period for receipt of tenders shall in no case be less than thirty days from the date of issuance of the invitation to tender.

(c) In selective procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders shall in no case be less than thirty days from the date of the initial issuance of invitations to tender. If the date of initial issuance of invitations to tender does not coincide with the date of the publication referred to in paragraph 3, there shall in no case be less than thirty days between those two dates."

- Article V:10: Add new sub-paragraph (d):

"Entities shall take due account of publication delays when setting the final date for receipt of tenders or of applications to be invited to tender."

Former sub-paragraph (d) to become sub-paragraph (e).

- Article V:10(d): Redraft as follows:

"The periods referred to in (a), (b) and (c) above may be reduced where a state of urgency duly substantiated by the entity renders impracticable the periods in question."

"The periods referred to in (a), (b) and (c) above may be reduced either where a state of urgency duly substantiated by the entity renders impracticable the periods in question or in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 4 of this Article."

13. Languages

- Article V:11: Redraft as follows:

"Entities shall, except in exceptional circumstances, allow tenders to be submitted in an official GATT language of their choice."

"If, in tendering procedures, an entity allows tenders to be submitted in several languages, one of those languages shall be one of the official languages of the GATT."

14. Offset procurement and technology licensing

- Article V:14(h)

The Committee should consider the possibility of modifying this provision to make the present restraints on the use of offset procurement and technology licensing requirements stricter and perhaps forbidden in Code-covered purchases.

"entities should normally refrain from awarding contracts on the condition that the supplier provide offset procurement opportunities or similar conditions. In the limited number of cases where such requisites are part of a contract, Parties concerned shall limit the offset to a reasonable proportion within the contract value and shall not favour suppliers from one Party over suppliers from any other Party. Licensing of technology should not normally be used as a condition of award but instances where it is required should be as infrequent as possible and suppliers from one Party shall not be favoured over suppliers from any other Party."

No precise text has been put forward.

(The note to this provision is not reproduced in this document)

15. Publishing information on winning bids

- Article VI: Add new subsection 1, and renumber all existing subsections accordingly:

(1) "Within 45 days of a contract awarded under Article V:14 and 15, entities shall publish a notice in the publication listed in Annex II. Such notice shall include:

- (a) the nature and quantity of the goods in the contract award(s);
- (b) the name of the awarding entity;
- (c) the name and address of the winning supplier(s);
- (d) the value of the winning bid; and
- (e) a means of identifying the proposed purchase notice issued for the contract under Article V:3."

16. Information to unsuccessful tenderers

- Article VI:3: Redraft as follows:

"Entities shall promptly and in no case later than seven working days from the date of the award of a contract, inform the unsuccessful tenderers by written communication or publication that a contract has been awarded, the value of the winning bid and the name and address of the winning bidder."

17. Statistics¹

- Article VI:9: General comments

¹ Another suggestion relating to statistics is also dealt with under item 6 above.

"Entities shall promptly, and in no case later than seven working days from the date of the award of a contract, inform the unsuccessful tenderers by written communication or publication that a contract has been awarded."

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.

No precise text has been put forward.

Article VI:9(a):

- Redraft as follows:

"(a) statistics on estimated value of contracts awarded, both above and below the threshold value on a global basis and broken down by entities;"

- Redraft as follows:

"(a) statistics on number and value of contracts awarded by each entity above and below the threshold value;"

Article VI:9(b):

- Redraft as follows:

Article VI:9, GPR/M/1, Annex III and subsequent decisions concerning a common format are not reproduced in this document.

"(a) global statistics on estimated value of contracts awarded, both above and below the threshold value;"

Idem

"(b) statistics on number and total value of contracts awarded above the threshold value, broken down by entities, categories of products according to a classification system using 100 product categories, and country of origin of the product, according to a recognized trade or other appropriate classification system."

- Redraft as follows:

"(b) statistics on number and total value of contracts awarded above the threshold under open and selective procedures, broken down by entities, categories of products and country of origin of the product, according to the classification system listed in Annex V;"

Article VI:9(c):

- Redraft as follows:

"(c) statistics broken down by entities, on the number and total value of contracts awarded under each of the cases of Article V, paragraph 15 showing country of origin of the product."

- Redraft as follows:

"(c) statistics on the total number and value of contracts awarded above the threshold value under each of the cases of Article V, paragraph 15, broken down by entities, categories of products and country of origin of the products, according to the classification system listed in Annex V."

"Statistics on number and total value of contracts awarded above the threshold value, broken down by entities, categories of products and either nationality of the winning tenderer or country of origin of the product, according to a recognized trade or other appropriate classification system;"

Idem

"statistics on the total number and value of contracts awarded under each of the cases of Article V, paragraph 15."

Idem

- Add new subsection (d):

"(d) statistics, broken down by entities, on the number and total value of contracts awarded under derogations to the Agreement listed in Annex I."

- Annual statistical reports by governments should include statistics on the number and value of contracts awarded under specific derogations. (No specific text put forward.)

18. Preferences and exceptions/specific derogations (Annex I):

In addition to the two proposals concerning statistics on the use of derogations, the following points have been made:

- 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.

- Despite the fact that most Parties have not provided the agreed information which makes it possible to quantify the impact of specific derogations, such limitations on coverage could be used to circumvent the Agreement. Serious

The notes contained in the Entity lists in Annex I are not reproduced in this document.

Idem

Idem

consideration should be given to the elimination of all derogations under the Agreement.

A requirement should be added to Article VI:9 that each case in which derogations are made use of shall be reported to the Committee through the GATT secretariat within thirty days of the award of the contract.

No specific texts have been put forward.