

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

GPR/W/56/Rev.4
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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

Fourth Revision

1. The present fourth revision of document GPR/W/56 has been prepared by the secretariat as requested by the Committee at its meeting on 19 June 1985 (L/5822, paragraph 2(a)). It contains the proposals as they are presently formulated and an updating of main points made following meetings of the Informal Working Group on 30 April-3 May, 6-7 and 17-18 June 1985. Annex I gives the texts of the proposals which have been accepted on an ad referendum basis; these proposals are not expected to be reverted to by the Informal Working Group.

2. The proposals are listed in the left column, the relevant provisions of the Agreement in the right column, and the summary of main points underneath these. The secretariat would like to stress that this brief summary is based on its own understanding of the positions of delegations as they have been made known in the recent past and mostly in an informal setting.

3. The contents and lay-out of this note, including the Annex and the suggested categories of proposals, are without prejudice to the position of any delegation in the overall Article IX:6(b) negotiations.

CATEGORY A: NON-CONTROVERSIAL PROPOSALS

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, through such methods as purchase, lease, rental or hire-purchase, with or without an option to buy, 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, rental or hire-purchase 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 any estimated residual value.";

- Explanatory Note to Article I:1(b):

"With regard to the basis of calculation to be used for the purposes of Article I:1(b):

(a) in the case of fixed-term contracts, the total contract value during the year following its entry into force, or, where its term exceeds twelve months, its total value;

- (b) in the case of contracts concluded for an indefinite period, the monthly instalment under the contract multiplied by forty-eight;
- (c) if there is any doubt, the second basis of calculation is to be used, namely forty-eight months.

- 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, lease, rental or hire-purchase, or more than one of these methods."

Main points made

Proposed change of Article I:1(a)

It is the Group's understanding that the word "option" in the proposed new first sentence of Article I:1(a) should be taken to mean "possibility".

One Party preferred to deal only with cases involving ownership changes, this being a suitable definition of purchase vs. other forms of acquisition (rentals, according to this view, should rather be taken up as a service or in the context of broadening); moreover, other Articles of the Agreement would also have to be redrafted as they did not fit situations not involving ownership transfers. It was suggested as a possibility to maintain the language of the present first sentence of Article I:1(a), with the following addition: "Such methods as purchase, lease, rental or hire-purchase, with or without an option to buy, should not be used by the Parties in order to avoid the application of this Agreement". Another delegation accepted to deal with leasing but argued that if the motivation was to avoid circumvention it would be better to have a clause prohibiting abusive use of rentals/hire-purchases, than to introduce special procedures involving problems of values, publication, etc. The original drafter commented that if a country's rules presently prohibited entities from entering into contracts without purchasing clauses, such a country would not undertake any new obligation under the proposal, the motivation of which was to close loopholes and possibilities for circumventing the Agreement; because of rapid technological development many products were not purchased, and the Agreement should be kept up-to-date with new circumstances. An assessment undertaken in this Party showed, inter alia, that international leasing between countries referred to two distinctly different types of activity

(1) cross-border leasing - where the lessor is located outside the country where the lessee is located - and (2) indirect foreign leasing - where the lessor is located in the lessee's country, but is wholly or partially owned by an entity outside the lessee's country. Renting occurred in this second category. Three Parties supported the proposal which they felt would lead to more contracts being brought under competition. The other drafter noted that more and more notices called for either leasing, rental or purchase; although such options had been relatively little used in some countries the situation was about to change, e.g. for budgetary reasons; it was in the interest of entities, as well as suppliers, to know whether a contract would be Code-covered or not. Two Parties indicated that in their view no additional obligations, e.g. in respect of tender notices, should be imposed on entities which do not use leasing. Two Parties noted that their entities do not practise leasing. One Party was open-minded but considered it necessary to examine further how various types of procurement should be valued for threshold purposes (i.e. the proposal concerning the Explanatory Note). The original drafter held that the premiums in short term hiring/rental contracts would probably not exceed the threshold and should not be too much of a burden.

Proposed Explanatory Note to Article I:1(b): The total value referred in (a) is the value of all payments less the residual value if the good were not to be kept. The proposing Party had experience with leasing only in the computer area and then never for less than twelve months; this explained the language in (a). Its experience was also that entities seldom decided on leasing in advance but called for a "most favourable" bid, whether or not purchased, leased, or otherwise procured. Forty-eight months had been chosen for internal reasons; this period had at any rate to be arbitrary.

2. 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 actual value of similar recurring contracts concluded over the previous fiscal or calendar twelve months adjusted, where possible, for anticipated changes in quantity and value over the subsequent twelve months, or the estimated] [the value of similar contracts concluded over the previous twelve months adjusted, as appropriate, for anticipated changes in quantity and value over the subsequent twelve

"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."

months. Where no similar contracts have been awarded over the previous twelve months, the basis for application of this Agreement shall be the value of recurring contracts in the twelve months subsequent to the initial contract."

Main points made

The Party proposing the first bracket considered that this text took care of problems indicated by another Party to the effect that its entities were subject to a "single fiscal year" system and could not base themselves on past values. The intention behind both proposals is to give entities which do not operate under such a system an alternative way to proceed. However, the Party proposing the second bracket stressed the need for a uniform system and maintained that its proposal indicated the priorities which should be sought.

One delegation would have difficulty with setting the immediately preceding twelve months as a requirement and therefore supported the first bracket. Another Party also supported the first bracket but wondered whether an entity might switch from one approach to another, with which one of the drafters saw no problems.

3. Information on the Use of Single Tendering

Alternative proposals concerning Article V:3 and V:4:

- 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."; ["such notice shall constitute an invitation to participate in either open or selective tendering procedures"];

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

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

"In the case of single tendering, [the notice shall state] [notice that the procurement is

"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."

being made under single tendering procedures and identification of] the reason under Article V:15 for doing so."; and

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

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

Main points made

One delegation noted that under its system advance notices could for practical reasons not be given in cases of single tendering. Another Party found the wording too strong, e.g. in cases of urgency created by an absence of responsive tenders. Four Parties pointed out that single tendering might be made more transparent with less administrative burden through more detailed statistical reports; one of these Parties added that publication would not lead to more competition in single tendering. Another Party stated that it saw no particular need to impose publication requirements for single tendering. The Parties proposing or supporting the texts argued that it should be made less attractive to use single tendering. It was noted that firms from smaller countries were often not known to entities abroad. One Party added that this matter was also important in the context of sub-contracting for larger contracts.

Additional suggestions:¹

One participant noted that of the five situations stipulated in Article V:15(a)-(e), only categories (b), (d) and (e) were real situations of single source tendering where the purchasing agency had determined in its opinion that there was only one possible supplier. On the contrary the situations (a) and (c) could and did give rise to a certain degree of competition. This participant proposed to split the present single tendering category into two separate procedures, one which would be called negotiated tendering justified by conditions (a) and (c) and the second to be called single source tendering justified by conditions (b), (d) and (e). The negotiated procedure would be a two stage one, the first phase being an open invitation to participate in the tender, the second the actual negotiation phase which, hopefully, would in the majority of cases be multi-participant. The invitation to participate would be subject to the same time limits as the restricted procedure, the case of extreme urgency would be treated as being equivalent to the first phase of an accelerated restricted procedure. No time limits would be fixed for the second phase of the procedure. An ex-ante publication would be obligatory and could take a number of forms - it could be a simple open invitation to participate in a tender or, for example, it could specify a number of candidates already selected by the purchasing agency and seek others to join this list. The single source tendering would be subject to publication simultaneously

¹The secretariat has been requested to indicate provisions in the Agreement which might need to be modified if these suggestions were accepted.

with (or slightly after) the award of the contract. The announcement would include a clause inviting other suppliers who believe they could have met the requirement to present their credentials to the purchasing agency in order that they might be taken into account in a future procurement of the product.

Commenting on these suggestions, one Party considered them basically to mean that Article V:15(a) and (c) should no more be justified grounds for single tendering and wondered why it was necessary to create a new type of "negotiated" procedure. Another Party considered that if negotiations were started this in fact meant that a selective procedure was used. The proposing participant stated that in countries where open/selective procedures forbade negotiations there was an automatic recourse to single tendering in certain cases. Also, it was a fact that in most countries a certain pre-selection took place which did not fit in with the concept of selective procedures in the Agreement. More discipline should be introduced in such negotiated procedures. Three delegations supported the proposal to publish single tendering as closely as possible after the award; two arguing that this element was perhaps the only really efficient new change proposed; it was added that ex ante or ex post information were similarly efficient in gradually opening markets to more competition. The point was also made that since the dates of future awards were difficult to forecast a certain flexibility was justifiable as to the precise timing of such publicity. One Party saw no need to require a second publication as there had been no reaction to the first notice; ex post publication was an unnecessary burden since it would suffice for suppliers to get annual statistics. Another delegation argued that statistics would not show whether a single source or many sources had been involved under the new proposed category. One Party explained that its experience with publishing all winning bids showed that information as suggested was indeed of interest to suppliers. Some considered it useful for companies to have more information since they might sometimes not participate in tender because of the uncertainty and the cost involved in preparing bids. In response to questions as to whether sub-groups of suppliers were intended to be used, the proposing participant replied that the proposal did not necessarily mean that lists of suppliers had to exist. To some who felt that extreme urgency should continue to justify single tendering, it was replied that negotiated procedures would not always lead to competition; exceptions where "pure" single tenders were called for could not be ruled out - the intention was to encourage a move towards competition. Urgency, moreover, was from time to time found to exist only after single tendering had already been decided upon. Another participant agreed with the proposal and thought extreme urgency could be considered a force majeure situation where entities ought to prove why it acted late.

4. Definition of Single Tendering

- Article V:1 should be replaced with the following:

"Single tendering procedures, for the purpose of this Agreement, are any procedures other than the procedures defined for purposes of the Agreement as open or selective tendering procedures.

"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."

Single tendering may only be used under the conditions provided for in paragraph 15 below."

Main points made

The drafter viewed this revision only as a clarification which did not represent a departure from current interpretations of the Agreement. Seven Parties supported the proposal. This matter is linked to the previous item.

CATEGORY B: PROPOSALS THAT ARE GENERALLY ACCEPTABLE EXCEPT FOR ONE PARTY

5. Treatment of Options Clauses

- Article I:1(b): Delete the semi-colon at the end and add the following new sentence:

"In cases where a procurement contract includes an option, or options, for the procuring entity to purchase additional goods, the basis for application of this Agreement shall be the total value of the maximum permissible purchase, inclusive of optional purchases;"

- Add the following new paragraph after Article V:11:

"Contract provisions permitting entities the option to purchase additional goods shall not be used in a manner which discriminates against or among foreign suppliers. A contract subject to this Agreement may include an option for the purchase of additional goods only (1) in cases where there is a foreseeable future need for the exercise of such an option and (2) where such option provision does not permit substantive changes in the original terms of the contract."

Main points made

The drafter stated that the purpose was to increase transparency and close loopholes. In order to be able to bid, a firm had to know the conditions under which it worked. Concerning the first element, i.e. the value, this proposal dealt with situations where the entity knew its needs, but precluded it from having open-ended contracts without any limit in time. Concerning the second element, if a foreseeable need was documented and finances were available, entities should be able to give a reasonable estimate that suppliers could rely on; matters such as, e.g. price, product specifications and delivery times would have an important bearing on cost analyses. Flexibility on the part of entities was not included; they might, for instance, tender for a certain reasonable range of products, stipulating the amount at the upper/lower limit thereof. The proposal only intended to avoid an abusive use of options to buy larger amounts of additional products without re-advertising. One Party supported the proposal because option clauses were used and were important, just as leasing. One Party agreed with the objectives but saw problems in implementing the proposals. The drafter argued that the problem of valuing a purchase was not any different if one called for maximum units than if one called for a range of units. Another Party was not in a position to take a stand at this stage but was ready to examine this further; it noted that there could be invitations for unspecified quantities, a possibility the drafting suggests should be eliminated. One Party could accept a text which maintained the right to use options in cases where additional needs arose under a previous contract. One Party, still reserving its position, agreed that it was not necessary to define precisely all elements in the proposal. One Party wondered whether it was necessary to use the word "foreign" in the second element of the proposal.

6. Qualification Procedures

Article V:2(b):

- Add new clause at the beginning of the existing provision:

"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."; and

- Add new clause to the end of the existing provision:

"The financial, commercial and technical capacity of a supplier shall be judged on the basis of that supplier's global business activity rather

"2. Entities, in the process of qualifying suppliers, shall not discriminate among foreign suppliers or between domestic and foreign suppliers. Qualification procedures shall be consistent with the following:"

"(b) any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, shall be no less favourable to foreign suppliers than to domestic suppliers and shall not discriminate among foreign suppliers;"

than its activity in the territory of the purchasing entity, taking due account of the legal relationship between the supply organizations;"

Main points made

These two proposals have been tabled by two different Parties who have mutually supported one another's text.

Concerning the first proposal dealing with "essential conditions", the drafter - while not withdrawing it - suggested the following understanding be reached: "in the first instance a decision on what is essential would be made by the entity maintaining lists of qualified suppliers; however, like elsewhere in the Agreement, the decision might be subject to potential challenge". One Party maintained its reserve on new provisions that would restrict the existing rules and might put into question its fundamental system which it held had considerable merits in being non-arbitrary and based on price; it asked what the drafter precisely meant should be covered by "financial, commercial and technical capacity" and how the proposal was related to Article V:2(f). The drafter gave examples but maintained that this concept did not lend itself to a precise definition which was, moreover, not necessary. However, a number of irrelevant criteria were presently in use. As for the right to ban firms for reasons such as fraud and non-compliance with previous contracts, it is considered that Article V:2(f) takes care of the first and the intention of the drafter takes care of the second concern.

Concerning the second proposal dealing with "global business activity", one Party would reflect further.

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."

Main points made

One Party explained that this proposal would imply a fundamental change of its system under which qualification might depend on the scale of a purchase, bids were considered solely on the basis of price and, in order to ensure fairness, suppliers' various merits were translated into numerical terms which differed from one entity to another. One

Party saw little hope that a firm could expand its business activity under such a system. Another Party stated that it would retain the right to have sub-groups of qualified suppliers "under different financial limits" because this was an important criterion of business efficiency and related to the ability of a company to perform contracts. One Party considered sub-groups unnecessary since companies would not bid for contracts they knew they could not fulfill; some argued that sub-groups excluded without good reason potential, qualified suppliers and that the price would eliminate the margin of subjectivity.

7. Global Statistics

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;"

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

Main points made

One Party has indicated that statistics below the threshold entity-by-entity do not exist and will not exist unless the threshold be reduced to zero.

CATEGORY C: CONTROVERSIAL PROPOSALS

8. Time Limits in Recurring Purchases

Original proposal:

-- 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."

Alternative proposal:

- "Article V:4(a): "the nature and quantity of the products to be supplied, or the nature, quantity and [when known] the subsequent publishing date of the products envisaged to be purchased in the case of contracts of a recurring nature";
- "Article V:10(d): "the periods referred to in (a), (b) and (c) above may be reduced 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. In this case, the period for the receipt of tenders shall in no case be less than 25 days."

- "The original proposal to become subparagraph (e) of Article V:10, referring to its subparagraphs (a), (b), (c) and (d)."

Main points made

The Party behind the alternative texts argued that the original proposal might increase recourse to the urgency provision and undermine transparency. Its entities presently often set as short deadlines as 10 days which would (under its suggestion) be extended to minimum 25 days. It was unreasonable, however, to forbid any shortening for recurring purchases - the Agreement had recognized that such purchases might require special rules for entities in this respect. It added that the initial notice made suppliers aware of recurrent purchases. The Party proposing the original text and one other Party wondered whether a difference of 5 days (between the proposals) would change anything in respect of recourse to urgency procedures; the former of these Parties wondered why it should be necessary to shorten the period if a subsequent purchasing date was known. It was replied that even in such cases it might not be possible to know the amounts of procurement and that publication might therefore not be feasible. It was noted that the proposed subparagraph (e) might override the 25 days rule in urgency cases but that urgency might perhaps be less likely after an initial notice had been made. Concerning the alternative text for Article V:10(d), one Party considered this a compromise worth further reflection. Two Parties indicated difficulties in accepting the proposed new Article V:4(a) as an unconditional obligation. The bracketed words were introduced by the Chairman as a possible solution on this point.

(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;"
- "(d) 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."

9. 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."
"any procurement contract of a value of SDR150,000 or more."

Main points made

Seven Parties indicated that a lowering of the threshold was inappropriate at this stage, some of these adding that the matter might be discussed in the context of the entity negotiations, another pointing out that inflation has effectively reduced the threshold already, and one considering that, if anything, the value should be raised. One delegation reserved its positions or indicated that further reflection was needed. One delegation stated that, whilst a lower threshold might encourage smaller countries to adhere to the Agreement, the extra administrative burden involved might have the opposite effect, generally it would be prepared to go along with a consensus. In this Party, a SDR75,000 threshold would lead to only a few more contracts becoming Code-covered. The effect upon Code-coverage was questioned by other Parties as well, in particular when compared to the additional administrative burden. Another Party stated that it was open-minded to the proposal, SDR150,000 could often to a too high threshold for its exporters. Another Party also considered a lower threshold (although not as low as SDR75,000), particularly interesting from this particular point of view. In the Party making the proposal SDR75,000 would lead to a large increase in Code-coverage; this Party pointed out that a reduction of the threshold might lead to a less pronounced disparity of Code-covered awards from one Party to another.

10. Rules of Origin

- Article II:3: Replace by the following:

For the purposes of application of this Agreement, a product will be considered to have originated in a Party to the Agreement if such product is wholly the growth, product, or manufacture of a Party or if it is manufactured in a Party and the cost of its component materials mined, produced, or manufactured in such Party exceeds 50 per cent of the cost of all its component materials."

"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."

Main points made

The proposing Party explained that the purpose of this revision was to provide for uniformity in application of the Agreement among countries that do not apply the Agreement on an m.f.n. basis. Currently, signatories were required to apply those origin rules which they use "in the normal course of trade" for imports from each other signatory. This had generally meant that each country used the rules of origin applicable in determining whether a product was eligible for m.f.n. treatment but these rules varied considerably from country to country. The proposed approach was taken in the belief that a percentage criteria was easiest for the business community and procurement officials to interpret and use. Ten delegations indicated that they preferred the existing language of the Agreement; three pointing out that the proposed rules would not be possible, or at least burdensome, to administer. The existence of a number of origin rules and the difficulty of envisaging special rules for this Agreement were referred to by a number of delegations. One delegation suggested that the country with the highest cost of all component materials be taken as the country of origin. The question was raised as to whether the profit element is to be included in the suggested calculation. One Party stated that a 50 per cent rule would introduce a more onerous local content requirement; another stated that the proposal seemed to discriminate against countries with few natural resources.

11. Technical Assistance

Article III:8 and 9

"Technical assistance referred to in Article III, paragraphs 8 and 9, would include translation from a GATT official language of pre-qualification documentation and bids made by suppliers from developing Parties."

"8. Developed country Parties shall, upon request, provide all technical assistance which they may deem appropriate to developing country Parties in resolving their problems in the field of government procurement.

9. This assistance which shall be provided on the basis of non-discrimination among the developing country Parties shall relate, inter alia, to:

- the solution of particular technical problems relating to the award of a specific contract;
- any other problem which the Party making the request and another Party agree to deal with in the context of this assistance."

Main points made

While the problems intended to be overcome by this proposal were generally recognized, questions concerning implementation remained. Problems mentioned were those of legal responsibility in cases of translation errors, time-limits and costs. One Party expressed willingness to try to solve problems on a case-to-case basis, with finding ways of assisting firms in translating documents without legally binding the entity. Three other Parties expressed similar views, adding that the proposals under item 15 below addressed similar questions and that in some countries special agencies had been set up to assist developing countries exporters in general. Contacts between entities and diplomatic missions in the importing countries were suggested by another participant. The drafter noted that although developing countries were at a clear disadvantage, the matter could be referred to another provision of the Agreement, so as to make it one of general concern. One Party thought that at least some qualification documents (such as balance sheets) might be accepted in a GATT language, however, bids had to be translated and some qualification papers could be quite voluminous. Three other Parties considered that at least qualification documents could be acceptable in a GATT language. The drafter suggested that a best endeavours solution be found for bids and a more compulsory language be introduced for qualification documents. The voluminous papers sometimes required with respect of the latter might even be a deliberate means of dissuading foreign companies from competing. This type of document should, moreover, represent less of a legal problem. One Party supported a compromise along these lines. Another Party explained that the general problems it had concerning languages also applied to this matter. One participant argued that the initiative should be with the suppliers and that the proposed text did not carry that message clearly enough.

12. Technical Specifications

- Article IV: Add the following as paragraph 4:

"4. Should a procurement entity seek or accept advice which may be used in the preparation of specifications for a product which may be purchased under the terms of the Agreement from an individual or firm that may have a commercial interest in such potential procurement, the entity shall [provide an equal opportunity to submit advice to all potential suppliers. The procuring agency shall take all such advice into account when establishing specifications for a contract."] [do so in a manner that does not give an unfair advantage to certain potential suppliers."]

Main points made

The drafter of the first bracket stated that this provision was particularly important in the case of purchases of sophisticated equipment where procurement entities might not have sufficient in-house expertise to prepare specifications. The phrase "individual or firm that may have a commercial interest" was used in place of the term "potential supplier" to cover a situation where the commercial interest might be less direct. For instance, there could be the case where the advising firm was the manufacturer of a key component or subsystem for a particular supplier. Similarly, the advising firm might not be a supplier but might have a financial interest in a supplier.

Six Parties saw problems with the proposal although they found the concern behind it to be important. Four of these Parties suggested, one by way of the second bracket, that elements of items 12 and 13 be combined. One of these Parties saw a particular difficulty with the last sentence of the first bracket and the reference to "all potential suppliers". Two Parties wondered whether the proposal would not imply that the winner could be chosen at this stage already or whether the suggestion might not penalize companies that did not participate in this pre-procurement process, to which it was replied that the service was intended to be separated from the purchase of goods; the proposal dealt with a stage prior to the tender invitation and without a notice the entities would most certainly not contact a small foreign firm. One Party considered Article IV:2 sufficient and less cumbersome. One Party, considering the idea good, wondered whether this question was not one of services. One Party did not believe that Article IV could be made more precise than it was already. One Party saw a possibility of abusive practices being developed under the present Agreement, but considered the wording of the proposal unclear and introducing an administrative burden on entities which were engaged in a normal, ongoing process of seeking advice. The drafter stated that the proposal dealt neither with services nor threshold but with a conceptual advice prior to a procurement.

Following the comments and questions, one of the drafters intended to review the precise language of the first bracket and invited other delegations to make suggestions.

13. Information Prior to Notice of Proposed Purchase

- Article V:2: The following new paragraph should be added:

"Entities shall not provide to any potential supplier information on possible upcoming purchases [that will, or might, afford such a potential supplier with] [with the intent of giving such a potential supplier] an advantage over other potential suppliers."

Main points made:

The drafter of the first bracket stated that the purpose of this proposal was to ensure that one potential supplier was not advantaged over other potential suppliers by receiving information on upcoming purchases before other potential suppliers. This might also lead to a reduction in recourse to short deadlines. It was questionable how any firms were able to bid on purchases with exceptionally short deadlines unless they had advance word of the purchase. Two Parties referred to Article V:8, second part, as possibly relevant; one of these Parties asked whether information seminars would be prohibited under the proposal, another whether a price/availability enquiry would be affected. Two Parties considered that this was not a big problem in practice, except perhaps for complex purchases, and wondered how the proposed provision could be enforced. The rôle of sales opportunity seminars in revealing future plans was referred to by some. One Party indicated that it had not arrived at a position in this complex matter; a possibility might perhaps be to publish every year major products to be procured; while this might be difficult for smaller entities it might be worth reflecting further on the practice followed by one major entity in one of Parties. One Party wondered whether there could be an inconsistency between this proposal and proposal number 12.

Following the number of questions, one of the drafters intended to review the precise language and invited other delegations to make suggestions.

14. 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."

Main points made

Five Parties suggested or expressed readiness to discuss forty days. One of these delegations suggested as an alternative to make it obligatory for tender notices to state that the bid-time is thirty days from the date of publication. Two Parties suggested forty-five days. One Party, as well as three proposing forty days, indicated that either solution could be acceptable. Four Parties expressed reservations; one considered it unnecessary to formalize a uniform extension since in practice this might be possible to achieve anyway; one argued that the question was one of conforming to present requirements in Article V:10(a); a third explained that under its present practice of weekly publications entities already worked on a forty-day time horizon and had difficulties in living up to the existing obligations; an extended period might cause further practical difficulties; a change could be justified only if more entities were to be Code-covered.

15. Languages

- Article V:11: Redraft as follows:

"Entities shall, except in exceptional circumstances, allow tenders to be submitted in an official GATT language designated by the entity."

"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."

- Article V:4: Add new subsection (h):

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

"(h) where applicable, the GATT language or languages in which tenders can be submitted."

Main points made

The first proposal was supported by nine Parties. One Party, while appreciating the objective of the proposal, stated that it could not accept it because it would create serious implementation problems at entity level. However, it might perhaps be possible to envisage a flexible approach, not making the proposed idea mandatory. Another Party

considered the proposal unacceptable and inequitable as amongst entities and countries depending on whether or not the official language was a GATT language. In response, the drafters explained that the proposal was intended for the unequal situation in which certain exporters found themselves. Two Parties expressed concern about the "exceptional circumstances" provision and sought a clarification on this point. Another Party supported this particular reference. One Party stated that the problem which the proposal sought to solve was particularly serious for pre-qualification documentation, and suggested that such documents be considered separately from bids in terms of the proposal. See also comments under item 11 above.

The second proposal is being discussed in connection with the first, but this text could apparently be acceptable except for one Party (i.e. Category B).

16. Offset Procurement and Technology Transfer

- Article V:14(h): to be replaced with the following:

"Entities shall not award contracts on the condition that the supplier provide offset procurement opportunities or license technology, or similar conditions."

The note regarding Article V:14(h) should be eliminated.

"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."

The note: "Having regard to the general policy considerations of developing countries in relation to government procurement, it is noted that under the provisions of paragraph 14(h) of Article V, developing countries may require incorporation of domestic content, offset procurement, or transfer of technology as criteria for award of contracts. It is noted that suppliers from one Party shall not be favoured over suppliers from any other Party."

Main points made

Four Parties supported the proposal. The drafter explained that the purpose was to close a potentially important loophole before it became a more serious problem, whereby countries could require more offsets and technology transfers on a limited basis. Three Parties added that offsets risked to spread into the civil sector. Two Parties indicated that an outright prohibition could not be accepted, one of these noted that its entities had not used the provision and that it was not a loophole in the Agreement. The drafter gave some examples of offsets or technology licensing in civil procurement. One Party asked what the situation would be if the supplier proposed offsets; the drafter replied that if such a proposal was not commercially viable, it might be required into by suppliers not getting the award. Another Party held that offsets would only be used if considered economically viable by the entity. Two Parties were particularly concerned with the proposal to delete the Note to Article V:14(h); one Party argued that considerations about offsets/technology licensing/local content requirements applied generally, above the area of government procurement, and that to amend the Agreement on this point could change the perception of it at political level. The drafter did not rule out elements of special and differential treatment for developing countries, but considered that the objectives of Article III:1 were sufficient for their purposes; the problem as such was general and was not limited to developing country Parties.

17. 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."

Main points made

Two Parties stated that they could accept this proposal. One Party had not yet taken a position. Four other Parties accepted the proposal if the price was not to be given. The drafter, after eight years of experience with the proposed practice, had never registered collusion between suppliers. One Party, publishing such data monthly and on a voluntary basis, referred to Article VI:6 and 8 and suggested these provisions be left as they were. One participant noted that the proposal gave the erroneous impression that price was more important than was actually often the case. The drafter argued that all criteria were listed in the tender notice, a reference to this data might suffice. It was ready to consider a longer period than seven days.

"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."

18. 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."

Main points made

This proposal was supported by two Parties. It was pointed out that these data often existed and that the main burden was to make the publication. One Party indicated difficulties in particular with respect to sub-paragraphs (c) and (d) as proposed, but also that the business community wanted more information and that many firms might not participate in tenders because they lack knowledge about the market, prices paid, etc. Five other Parties also expressed reservations on giving price information. Some delegations expressed a doubt as to whether any benefits would match the costs and additional administrative work involved. Some delegations found new obligations on publishing unnecessary, as in their view sufficient information can be obtained under the present Agreement; the latter half of Article VI:6 was referred to in this connection by one Party which wondered whether "unsuccessful tenderer" might be replaced by "any supplier" in the relevant provisions of Article VI. Another Party pointed out that Article VI was a channel of information only for companies that had participated in a given competition. One Party suggested that publication, if any, should be less frequent than proposed.

19. Use of Derogations

- Article VI - add new section 10:

"Each case in which derogations to the Agreement are made use of shall be reported to the Committee through the GATT secretariat within thirty days of the award of the contract."

Main points made

The proposal has been supported by five delegations, one stating that it would have preferred to abolish the derogations altogether but that reports on their use are important because rights and obligations can be affected. One Party considers transparency through better statistics to be sufficient. One Party has stated that nothing in the Code should discourage the use of derogations which the Parties in question have already paid for. In this sense, derogations could not be compared to single tendering (a comparison made by two Parties). Moreover, monthly reports were of no use since there would be annual statistical reports and since no commercial opportunities were involved. In its own case, the derogations were of a mandatory nature with no discretion possible. Therefore, the proposal would not inhibit the use of derogations but only create an additional administrative burden. Two other Parties considered that it was sufficient to learn about the use of derogations annually.

20. Statistical Information

- Article VI:9: add a new paragraph:

"The Committee shall determine the details of presentation of the information mentioned above. It may, if need be, agree on an exchange of additional statistical information."

The new paragraph would constitute a basis for treating all existing and future proposals as decisions by the Committee rather than amendments to the text of the Agreement.

Main points made

Two Parties considered that Article VII:1 provided the necessary legal cover. The drafter suggested that the proposal become the basis for adopting other detailed proposals on statistics but agreed to leave it aside until it was clearer what the various statistical texts would look like after all changes had been made.

21. Complaints by Suppliers

- Proposed new provisions

"1. Parties may refer to the Chairman complaints received by them from suppliers concerning any aspect relating to an ongoing individual procurement by entities of another Party or to the qualification procedures used by such an entity. The Chairman will examine the issue raised in the complaint with a view to reaching an understanding among the parties concerned. Whenever no understanding is reached, the Chairman will issue his advice to the parties. The examination shall be concluded within two weeks upon the receipt of the complaint.

2. Following the receipt of the complaint, the Chairman will promptly inform the supplier and the entity concerned of their right to present views and information to him. Where the complaint relates to ongoing procurements the period set by the entity for the receipt of tenders will, as applied to the complaining supplier, be prolonged by the number of days consumed from the time of the Chairman's invitation for information until the end of the examination.

3. Whenever a Party makes a subsequent complaint on the issue(s) already examined as above, the dispute settlement proceedings of Article VII:6-10 will be immediately applicable."

Main points made

The proposal was tabled at the meeting of 19 June 1985. So far, no comments have been made.

CATEGORY D: QUESTIONS LEFT ASIDE UNTIL CONCRETE TEXTS HAVE BEEN PRESENTED

22. Contents of Synopses 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.

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

"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:

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.

Main points made

One Party has stated that it would be interested to consider any concrete texts as it supported improved tender notices and quality of information. Four other Parties have noted that the observations seemed to be related to implementation/administration in general.

23. Statistics

- Article VI:9: General comments

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.

(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."

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

24. Preferences and Exceptions/Specific Derogations
(Annex I):

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

In addition to textual proposal concerning statistics on the use of derogations (items 5 and 8 above), the following suggestions 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.

Main points made

One Party has stated that clarification is needed.

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

Main points made

Five Parties have expressed reservations, some considering it necessary to have a political assurance that a safety net exists, one noting that the proposal would meet with great domestic difficulties. One delegation, which had difficulties with the proposal, considered, nevertheless, that some derogations have been used more frequently than anticipated and that it would be useful to have data, e.g. on the use of small-business set-asides.

ANNEX I

The Informal Working Group has accepted the following texts on an ad referendum basis and does not expect to revert to them.

1. Estimated Value/Actual Value

- Article I:1(b): Add additional footnote to first sentence (present footnote 2 being kept):

"The Agreement shall apply to any procurement contract for which the contract value is estimated to equal or exceed [SDR150,000] [SDR75,000] at the time of publication of the notice in accordance with Article V:3."

2. Variety of Qualification Procedures

- Article V:

Add new paragraph 3:

"Parties shall ensure that

- (a) each entity and its constituent parts follow a single qualification procedure, except in cases of duly substantiated need for different procedures;
- (b) differences between the qualification procedures of separate entities are minimized."

Note: Japan's understanding is that this provision would not change its basic qualification system as such, and that changes in practice might require some time to be implemented in cases of duly substantiated need.

3. Publication Delays

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

"Entities shall take due account of publication delays where 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).

4. Statistics on the Use of Single Tendering

- Article VI:9(c):

Redraft as follows:

"(c) statistics, broken down by entity, and by category of product, 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."

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

Note: The understanding is that this text does not change the Parties' interpretation of origin.

5. Timing in Qualification Procedures

- 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 suppliers may apply for qualification at any time; and that all qualified suppliers so requesting are

"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;"

included in the lists within a reasonably short time.";

6. 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."

7. Delivery Times

- Article V:9 (b): Redraft as follows:

"Consistent with the entity's own reasonable needs, any delivery date shall take into account such factors as the complexity of the proposed purchase, the extent of sub-contracting anticipated, and the realistic time required for production, de-stocking and transport of goods from the points of supply."

"9(b) Consistent with the entity's own reasonable needs, any delivery date shall take into account the normal time required for the transport of goods from the different points of supply."

Note: Japan's understanding is that decisions can be taken on a case-to-case basis since delivery times constitute an important element in the administration of an entity's business and may also be related to the price of a contract; the understanding of Canada is that entities will not be required to carry out any extensive research to take into account the various factors listed in the proposal.

8. Statistics under Article VI:9(b)

Article VI:9(b):

- Redraft as follows:

"(b) statistics on number and total value of contracts awarded above the threshold value, broken down by entities, categories of products and either according to a uniform classification system to be determined by the Committee, and country of origin of the product";

"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;"

Note: The understanding is that this text does not change the Parties' interpretation of origin.

9. Statistics on the Use of Derogations

- Article VI:9

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."

Note: Japan's understanding is that its derogation is Note 3 to its entity list.