THE WTO
AGREEMENT ON GOVERNMENT PROCUREMENT (GPA)

Transparency and Procedural Rules

(1994 Agreement and 2006 Revised Text)

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Outline

A. General considerations

B. Transparency and tendering provisions under the 1994 Agreement and 2006 Revised Text (GPA/W/297 of December 2006)

C. Summary highlights of changes and flexibilities introduced in the Revised Text

Competition

- Open and effective competition
  - key to achieving government procurement goals
- Openness of government procurement regime
  - transparency
  - accessibility to public, interested suppliers
  - predictability of bidding environment
- Effective competition
  - maximum competition; opportunities for new suppliers
  - use of appropriate procurement procedure
  - cost-effective bidding and procurement processes
  - transparency, objectivity, of evaluation criteria, process
  - identify, address constraints to effective competition

Source: APEC Principles on Government Procurement

Transparency, a definition

"Transparency in the government procurement context means that sufficient and relevant information should be made available to all interested parties consistently and in a timely manner through a readily accessible, widely available medium. This applies to all aspects of government procurement, including the general operational environment, procurement opportunities, purchase requirements, bid evaluation criteria and award of contracts."

- *APEC Transparency Standards on Government Procurement*

B. Transparency and procedural rules under the GPA (1994 Agreement and Revised Text of 2006)*

**Note: in the following slides a reference to, say, 'Art X/RT' signifies Article X of the provisionally agreed revised text; similarly a reference to, say, 'Art X/94' signifies Article X of the 1994 Agreement.*

Transparency – general (1)

- Requirements for general information
  - procurement regime/system (Art VI/RT, Art XIX:1/94)
  - notification of changes to measures (VI/RT, XXIV:5(b)/94)
- Additional elements of transparency
  - prescribed procedural rules (VII-XV/RT; VI-XVI/94)
  - review, debrief opportunities for suppliers (XVII/RT, XVIII/94)
  - opportunities for supplier challenge (XVIII/RT, XX/94)
  - documentation and reports (XVII:3-6/RT, XIX:5/94)
- Individual procurements – publication of:
  - procurement notice (VII/RT, IX/94)
  - award notice (XVI:2/RT; XVIII:1/94)

Transparency – general (2)

- New or streamlined elements in revised text – examples
  - definitions (Art I/RT) – *new*
  - conduct of procurement (V:4/RT) – *new*
  - transparency of procurement information (XVI/RT)
  - disclosure of information (XVII/RT)
- Use of electronic means in revised text – *new*
  - Agreement applies to procurement by e-means (II:1)
  - various provisions incl. requirements for interoperability, integrity, electronic traceability (V:3, VII:1, XIV, XVI:5-6)
- Developing countries: information on
  - any offsets (XVI:2/94); transitional measures, implementation period (IV:3,5/RT)

Procedural rules (1) – procurement methods, notices

- Conduct of procurement
  - procurement methods: open, selective, limited tendering
  - electronic auctions (XIV/RT) – *new*
- Notice of intended procurement (NIP) (VII/RT, IX/94)
  - Annex 1 entities – accessibility by electronic means – *new* (RT)
  - Annex 2, 3 entities – publication by e-means encouraged (RT)
  - summary notice – mandatory (VII:3/RT, IX:8/94)
  - content of notices: VII:2/RT, IX:4/RT; IX:6-9/94
- Notice of planned procurement (NPP) – encouraged
- Annex 2, 3 entities – possibility to use
  - NPP as NIP (VII:5/RT, IX:4,7/94)
  - qualification system/multi-use list as NIP (IX:12/RT, IX:5,9/94)

Procedural rules (2) – supplier participation

- Conditions for participation, qualification (VIII-IX/RT, VIII/94)
  - fair and equitable procedures
  - qualification based on necessary requirements only
    - not allowed: any requirement of a prior contract award
    - allowed: requirement of "relevant prior experience..." (VIII:2(d))/RT – *new*
  - opportunities for late qualification, participation
  - supplier exclusion – grounds further clarified (VIII:3/RT) – *new elements*

Procedural rules (3) - selection of suppliers

- Selection of suppliers
  - non-discriminatory basis
- Multi-use lists (IX/RT); (VIII, XII/94)
  - Suppliers to be able to apply at any time
  - equitable opportunities for suppliers on list
  - opportunities for qualification, participation by later suppliers
- Information, review, debrief
  - information on entity's decisions (IX:13-14/RT, VIII(f)/94)
  - opportunities for review of decisions (see later)

Procedural rules (4) – technical specifications, tender documentation

- Technical specifications (X:1-6/RT, VI/94)
  - to be open and trade non-restrictive
  - performance-based and to international standards
  - allow for submission of "equivalent" offers
  - specifications to promote environmental protection, natural resource conservation (X:6/RT) – *new*
- Tender documentation (X:7-11/RT, XII/94)
  - to include all necessary information e.g. evaluation criteria; incl., where e-means (– *new)*
    - authentication & encryption requirements; rules, if e-auction
  - timely provision to suppliers, on request
- Modifications
  - transmission in same manner as original information

Procedural rules (5) – Time-limits (XI/RT, XI/94)

- Standard time-periods - (no change)
  - qualification: 25 days, then continuously open if multi-use list
  - tendering (standard minimum): 40 days
- Tendering period reductions (1994 Agreement) – to
  - 10-24 days, for recurring contracts; where prior separate notice previously published
  - 10 days, for Annex 2, 3 entities with permanent lists; state of urgency
- Tendering period reductions (Revised Text) – additional flexibilities (see later – slide 22)
  - commercial goods and services
  - use of electronic means
  - state of urgency (qualification – clarified)

Procedural rules (6) – award; negotiation

- Submission, receipt and opening of tenders (XIII)
  - procedures to guarantee regularity
- Award to be made (XV:5/RT, XIII:4/94)
  - on basis of pre-disclosed criteria/essential requirements
  - to fully capable and compliant tenderer
  - on basis of either lowest tender or the most advantageous
    - unless, in the public interest, contract not issued
  - issue of abnormally low tenders
- Negotiation allowed (XII/RT, XIV/94)
  - if pre-specified in NIP, or no obvious winner

Procedural rules (7) – Limited tendering

- An exception; conditions for use include (XV/94)
  - non-responsive tenders, collusion or non-compliant suppliers
  - works of art; protection of exclusive rights; limited competition; lack of alternatives
  - extreme urgency
  - prototypes, first product or service
  - additional deliveries, new or additional construction services
    - under certain conditions
  - purchases from commodity market or under "exceptionally advantageous conditions"
- Revised text (XIII) – broadly as above with some changes
  - additional deliveries now cover <u>goods and services</u> (XIII:1(c))

Information and review

- 1994 Agreement
  - information on awards/decisions (XVIII)
  - explanation of procedures and practices (XVIII)
  - information to other Parties (XIX)
  - provisions on confidentiality (XVIII:4, XIX:4)
- Revised text – streamlined under:
  - transparency of procurement information (XVI/RT)
  - disclosure of information (XVII/RT)

C. Summary highlights of changes and flexibilities introduced in the Revised Text

Note:

Article references from this point onwards refer to the revised text, unless otherwise indicated

General

- General
  - updated, streamlined, simplified, restructured
  - more user friendly
  - takes account of current practices, e.g. role of electronic tools, commercial goods & services
  - shorter time periods in some cases
  - clarity in S&D provisions
- New themes in the *Preamble*
  - avoidance of conflict of interest, corrupt practices
  - integrity and predictability
  - flexibility of procedural commitments
  - importance of transparent measures in GP
  - use of, and encouraging the use of, electronic means

Examples of some new or streamlined elements

- Definition of key terms (Art I) – *new as separate article*
- Scope and coverage (Art II) – clearer definition
- General principles, current practices
  - conduct of procurement, use of electronic means (V)
  - commercial goods and services (I(a), XI:7)
- Information on procurement system (Art VI)
  - Appendices for listing media for publication of procurement information clearly specified

Use of electronic means

- Some key provisions
  - requirement for interoperability, general availability of IT systems and software, system integrity (Art V:3)
  - specific rules for electronic auctions (Art XIV)
  - requirement to ensure electronic traceability (XVI:3(b))
- Flexibilities – examples
  - publication of information by e-means – e.g. procurement system (VI:1); notices (VII:1(a), XVI:2); multi-use lists (IX:7)
  - reduced time-periods for tendering (XI:5,7)
  - notification of website address in lieu of publication of award notices, of submission of statistics (XVI:5,6)

Notices (Art VII) – some new elements / flexibilities

- Accessibility by electronic means
  - Annex 1 entities – mandatory, and
    - free of charge (FOC) "for any minimum period of time" through single point of access (VII:1(a)) – *new*
  - Annex 2, 3 entities – 'encouraged'; where by e-means
    - "at least through links in a gateway electronic site that is accessible free of charge" – *new*
- Summary notice, in a WTO language
  - mandatory, and published 'at the same time' as publication of the notice of intended procurement
- Content of notices
  - to indicate if will involve electronic auction (VII:2(c)) – *new*

Participation, qualification, tendering – some new or streamlined elements

- Conditions for participation (VIII)
  - relevant prior experience where essential (VIII:2(d)) - *new*
  - grounds for exclusion of supplier more clearly set out (VIII:3)
- Qualification of suppliers (IX)
  - option to maintain supplier registration systems – *new*
  - provisions streamlined, improves clarity
- Technical specifications and tender documentation (X)
  - flexibility to take into account promotion of conservation of natural resources/environmental protection (X:6) – *new*
  - logical structure and arrangement of relevant provisions

New time-period flexibilities

- Standard time periods (unchanged)
  - qualification – 25 days (XI:2) - *clarified*
  - tendering – 40 days (XI:3)
- Flexibilities as regards qualification
  - state of urgency – minimum: 10 days (XI:2) – *new*
- Flexibilities as regards tendering – *new/modified*
  - recurring procurements – *new* minimum: 10 days (XI:4(b))
  - commercial goods or services (XI:7) – *new*
    - e-notice with e-tender issue – min: 13 days
    - above plus e-tender receipt – min: 10 days
  - use of electronic means – min: 25 to 35 days (XI:5) – *new*

Award, transparency of procurement information - streamlined

- Treatment of tenders and contract awards (XV)
  - treatment of tenders
  - awarding of contracts
- Transparency of procurement information (XVI)
  - information to suppliers
  - publication of award notice
  - maintenance of documentation, reports
  - electronic traceability – *new*
  - collection and reporting of statistics – *simplified*
    - website address notification in lieu of traditional notification or reporting – *new*