

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

GPR/W/73

22 November 1985

Special Distribution

Committee on Government Procurement

FIFTH ANNUAL REVIEW (1985) OF THE IMPLEMENTATION AND OPERATION OF THE AGREEMENT

Background Document by the Secretariat

This document is circulated by the secretariat on its own responsibility in preparation of the fifth annual review of the implementation and operation of the Agreement on Government Procurement to be conducted by the Committee at its forthcoming meeting in December 1985.

1. Article IX:6(a) of the Agreement on Government Procurement provides, inter alia, that "the Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof". Article III:13 states, inter alia, that "the Committee shall review annually the operation and effectiveness of this Article ..." i.e. Article III (Special and Differential Treatment for Developing Countries)".

[2. The Committee conducted its fifth annual review at its meeting of 12-13 December 1985, on the basis of a background working document by the secretariat (GPR/W/73). It was agreed to revise the document after the review session to take into account any additional points in order to give a full picture of the Committee's activities in 1985.]

3. It is recalled that the previous annual reviews, covering the work of the Committee in 1981, 1982, 1983 and 1984, are contained in GPR/W/9/Rev.1 and Corr.1, GPR/16, GPR/18 and GPR/25 respectively.

4. The contents of the paper are as follows:

	<u>Page</u>
A. Composition of the Committee on Government Procurement	2
B. Meetings of the Committee	2
C. Decisions taken by the Committee	2
D. National legislation (Article XI:4)	3
E. Article IX:6(b) negotiations	5
F. Adequacy and effectiveness of the Agreement and obstacles to acceptance which contracting parties may have faced	7
G. Review of 1983 statistics	8
H. Establishment in national currencies of the threshold for the purposes of public notices, referred to in Article V:3	8
I. Special and differential treatment for developing countries	9
J. Consultations and dispute settlement (Article VII:3-10)	9
K. Panelists (Article VII:8)	9
L. Other matters discussed by the Committee	9
M. Working Party on Computer Procurement	10

A. COMPOSITION OF THE COMMITTEE ON GOVERNMENT PROCUREMENT

Chairman: Mr. M. Shaton (Israel)

Vice-Chairman: Mr. A. Woo (United Kingdom, Hong Kong Office)

Members:

The Parties to the Agreement are members of the Committee in accordance with Article VII:1:

Austria, Canada, European Economic Community, Finland, Israel, Japan, Norway, Singapore, Sweden, Switzerland, United Kingdom on behalf of Hong Kong, and the United States.

Observers:

- (i) The following governments have become observers in the Committee under the procedures adopted for the participation of observers:

GATT contracting parties:

Argentina, Bangladesh, Brazil, Cameroon, Chile, Cuba, Czechoslovakia, Dominican Republic, Egypt, Gabon, Hungary, India, Indonesia, Ivory Coast, Jamaica, Kenya, Korea, Malaysia, Malta, New Zealand, Nicaragua, Nigeria, Peru, Philippines, Portugal, Romania, South Africa, Spain, Thailand, Trinidad and Tobago, Turkey, Zaire.

Non-contracting parties:

Ecuador.

- (ii) The following international organizations are invited on a meeting-by-meeting basis to be observers in the Committee, as provided for in the relevant decision taken:

IMF, UNCTAD.

B. MEETINGS OF THE COMMITTEE

The Committee held regular meetings on 13 February, 1-2 May, 19 June, 26 September and [12-13] December 1985. The notes by the Chairman are contained in L/5781, L/5801, L/5822, L/5877 and L/.... The minutes of these meetings are contained in GPR/M/15-16 and 18-20 respectively. The Committee held a special meeting on 2 May 1985 in pursuance of the Decision of the CONTRACTING PARTIES (L/5726) to examine the adequacy and effectiveness of the Agreement and the obstacles to acceptance which contracting parties might have faced. The minutes of the special meeting are to be found in GPR/M/17. The Working Party on Computer Procurement held met on 27 September, 8 November and [9] December 1985. In the context of the Article IX:6(b) negotiations, an informal working group met a number of times.

C. DECISIONS TAKEN BY THE COMMITTEE

Apart from decisions taken in the Article IX:6(b) context (item E below), the Committee has taken the following decisions during the period under review:

- (i) modifications and compensatory adjustments relating to Annex I of the Agreement (the entity lists) made by Sweden, Finland and Norway became effective as of 2 May, 2 June and 19 July 1985, respectively;
- (ii) minor rectifications and amendments to Annex I of the Agreement concerning Japan became effective on 2 June 1985, and concerning the European Economic Community in relation to France and the Netherlands on 26 September 1985;
- (iii) at its meeting of February 1985, the Committee settled the remaining technical points concerning the "Practical Guide to the Agreement on Government Procurement". The Guide was published in loose-leaf form in March 1985. It has no legal status in itself but is intended to give correct and hopefully valuable information and is available for sale to the general public;
- (iv) at its meeting in June 1985, the Committee established a Working Party on Computer Procurement. At its September 1985 meeting, the Committee was informed that the terms of reference of the Working Party, established in accordance with the agreed procedure, were as follows:

"To examine the way in which signatories' Code-covered entities treat procurement contracts in the computer sector and, in particular, how the provisions of the Agreement on Government Procurement have been applied by signatories, and whether or not existing disciplines are judged to be adequate, and report to the Committee."

The Committee agreed at its September 1985 meeting that these terms of reference in no way prejudiced the position of any delegation in the Article IX:6(b) negotiations, be it with respect to questions concerning improvements, broadening or service contracts.

D. NATIONAL LEGISLATION (ARTICLE IX:4)

The Committee examined national implementing legislation and practices at all regular meetings. In the course of this examination, a number of questions concerning individual countries were raised. Among issues discussed were the treatment of high-priced bids, where a collection of information was carried out, the frequency of Code-covered procurements, including their announcements, either generally, by certain entities or for certain products, the number of product categories covered by announcements; tenders published for information purposes; firms' possible advance knowledge of prospective contracts; the use of single tendering and negotiated procurement, either generally, by certain entities or for certain products; the frequency of below-threshold contracts; the use of derogations; the length of bid-times, either generally, in certain entities or in certain periods of the year; contracts of a recurring nature; the level of purchases of certain equipment by some entities; under-estimations of contract values; contract splitting; qualification procedures and criteria; the use of bid or performance bonds; the relationship in terms of procurement between a central entity and other, including local, entities; proposed new legislation or administrative

practices as well as planned purchases. Also raised were amendments, rectifications, modifications and compensatory adjustments, including those referred to under C(i) and (ii) above, and the procurement of computers and strategical materials, referred to under L and M below.

The following summary of general information concerning action by Parties to ensure that the provisions of the Agreement are applied, updates the general information contained in the documents emanating from the four previous annual reviews.

EUROPEAN ECONOMIC COMMUNITY

The Committee was informed in June 1985 that steps were being taken that would lead to virtually automatic translation of notices by the end of the year, thus reducing the delays in the EC's publications office and leading to average bid times over forty days.

- FRANCE

A change in France's entity list has come into force, as indicated under item C above.

- GERMANY, Federal Republic of

New German regulations concerning government procurement entered into force on 1 January 1985 with respect to the purchasing agencies subject to the Agreement.

- NETHERLANDS

A change in the Netherland's entity list has come into force, as indicated under item C above.

FINLAND

A change in Finland's entity list has come into force, as indicated under item C above.

JAPAN

At its September 1985 meeting the Committee's attention was drawn to the announcement by the Government of Japan in July 1985 of an Action Programme for Improved Market Access and to its implications for government procurement (L/5858, Chapter IV), including: drastically improved contract procedures, through reduction of single tendering, increased transparency, extension of bid times, simplification of qualification procedures; increased procurement of foreign products; extension of coverage of the application of the provisions of the Agreement; provision of guidance, also at the local level; and concrete schedules of implementation and review of the Action Programme.

NORWAY

A change in Norway's entity list has come into force, as indicated under item C above.

SWEDEN

A change in Sweden's entity list has come into force, as indicated under item C above.

UNITED STATES

The enactment of the Competition in Contracting Act of 1984 necessitated a number of modifications to the United States Federal Acquisition Regulations (FAR). The Federal Acquisition Circulars (FACS) which implement these modifications were FACS 84-5 and 84-6.

In the course of the Committee's discussion of national implementation and administration of the Agreement, the United States explained at the September 1985 meeting that the clause in a new automated format of the Commerce Business Daily was meant to be a catch-all and to help ensure compliance, in particular, with Article V:4(f) of the Agreement.

E. ARTICLE IX:6(B) NEGOTIATIONS

(i) General

The negotiations, undertaken by the Parties to the Agreement in accordance with Article IX:6(b), constituted a major task in the period under review. The negotiations cover three items: (i) Improvements of the Agreement; (ii) Broadening of the Agreement, and (iii) Service Contracts. In accordance with the agreed procedures the Committee is to oversee the conduct of the negotiations in the presence of observers. Observers have so far not participated in the negotiations as such, although, in order to facilitate participation by non-Parties interested in seeking accession to the Agreement, procedures have been adopted to this effect (reference: 1984 Annual Review (GPR/25, item C)).

At the meeting in September 1985, a number of suggestions were made concerning the time-table of further work leading up to the completion of the negotiations. Different views were expressed on the closeness of linkages between various aspects of the negotiations. The Committee agreed that the Chairman should consult delegations on a schedule of meetings for 1986, with a view to fixing a work schedule at the next meeting, bearing in mind the different scenarios mentioned in the discussions.

(ii) Improvements of the Agreement

At the February 1985 meeting, the Committee agreed that, although the positions of all delegations might not have been made entirely clear on all points and with respect to technical issues, the texts which had been put forward for improvements of the Agreement were clearly understood by every Party. Without prejudice in any way to the position of any delegation in the overall negotiations, the proposals might be grouped in three categories, i.e. non-controversial proposals; controversial proposals and questions left aside until concrete texts were presented.

For the May 1985 meeting, the secretariat prepared, as requested, a revised version of the "Consolidated List of Suggestions Made for Improvements of the Agreement" indicating main points made (GPR/W/56/Rev.3). At that meeting, one Party submitted a proposal for improvement of the Agreement with reference to Article III:8 and 9. An

informal Working Group was established with the dual task of (a) drafting texts on less controversial issues and (b) narrowing differences wherever possible on more controversial points relating to improvements of the Agreement.

At the June and September 1985 meetings, the Committee received oral reports from the Informal Working Group. The Group had noted that some delegations considered some proposals to belong to or be relevant to other areas than improvements. On this understanding (and in respect of some issues a few additional understandings), texts concerning a number of subjects had been accepted on an ad referendum basis, without prejudice to the final position of delegations in the overall negotiations. Proposals on other matters had been placed either in the category "Non-controversial proposals" or in the category "Proposals that are generally acceptable except for one Party". Remaining matters continued to be controversial proposals or were left aside until precise texts were tabled. It has been noted that some general observations have already been replaced by concrete texts and that some matters might be taken up in the Committee without amending the text of the Agreement. For the sake of transparency, and on the Committee's request, the secretariat circulated a fourth revision of the Consolidated List for the September meeting. [The Informal Working Group reported to the Committee at its December 1985 meeting.]

(iii) Broadening of the Agreement

So far, three Parties have made suggestions for a broadening of the Agreement by way of entity requests to other Parties. In February 1985, some Parties pointed out that agreed information on non-covered entities had not been forthcoming from certain delegations. At the May meeting, one Party submitted revisions to some of its request lists, while three other Parties indicated that comments on requests tabled would be given bilaterally. In June 1985, two Parties stated that they were still considering the tabling of possible requests; the decision would depend on results in the improvements exercise. Two Parties stated that they did not intend to make requests for the moment. One Party stated that it had not yet arrived at a position on the question of broadening of the Agreement. At the September 1985 meeting, two Parties reiterated the importance they attached to this area of the negotiations. One Party hoped to be in a position to contribute within some months, although not necessarily in the form of requests.

(iv) Service contracts

At its February 1985 meeting, the Committee set 1 March as the deadline for further contributions to the first two pilot studies, i.e. those on insurance and architectural/consulting engineering services. It agreed to launch a third pilot study covering management consulting, with 1 June 1985 as the target date for submissions to the secretariat. It was further agreed that Parties who so wished might carry out a study on freight forwarding for the benefit of the whole Committee.

In May 1985, under the item "Other business", one observer regretted that the Committee had decided to carry out a further study on service contracts, given the CONTRACTING PARTIES' definition in November 1984 of general activities (and the secretariat's rôle) in the area of services in the GATT. One Party recalled that this work was done by delegations in the context of the Article IX:6(b) negotiations, adding that observers had not

responded to the invitation to participate herein. It was noted that the Agreement - on which the CONTRACTING PARTIES had taken action on 28 November 1979 - explicitly provided for certain work to be done on service contracts.

Also in May 1985, Parties were invited to give further information, orally or in writing, on their treatment of Code-covered contracts which include both goods and services components. Some Parties have subsequently indicated that a particular procurement is generally deemed to be for goods as long as the service component is less than 50 per cent of the contract value. In one Party, the types of services considered to be incidental to goods are: installation of equipment, assembly, training to operate equipment, maintenance, follow-up support and packing. Another Party has added delivery to this list.

At the June 1985 meeting, the Committee agreed that, in order to provide a basis for the Committee's work, the secretariat be requested to look into the submissions made in order to see what kind of analytical work might usefully be undertaken. A note "Initial Analysis by the Secretariat of Submissions Made in the Area of Service Contracts" was before the Committee at its September 1985 meeting. Delegations who have not yet done so have been invited to table their service studies and outstanding statistical information. By the date of this document, replies to the questionnaire on insurance and architectural and consulting engineering services have been submitted by ten Parties. Submissions on management consulting services have been provided by six Parties, and three Parties have circulated contributions in the area of freight forwarding services. [The Committee will revert at the December 1985 meeting to the question as to how to proceed further.]

F. ADEQUACY AND EFFECTIVENESS OF THE AGREEMENT AND OBSTACLES TO ACCEPTANCE WHICH CONTRACTING PARTIES MAY HAVE FACED

At its special meeting of 2 May 1985, the Committee agreed that the secretariat note, GPR/W/68: "Adequacy and Effectiveness of the Agreement and Obstacles to Acceptance which Contracting Parties may have faced", supplemented by the minutes of the special meeting (GPR/M/17), be used by the secretariat in the preparation of the report called for in the CONTRACTING PARTIES' decision referred to above. The report to the Council by the Working Group on MTN Agreements and Arrangements (L/5832) deals with the Agreement on Government Procurement in paragraphs 13-14 as follows:

"13. It was pointed out that, with this Agreement, the GATT had entered into a new field. Taking into account the generally positive experience gained so far, the parties were now engaged in negotiations under Article IX:6 to broaden and improve the Agreement.

"14. Some members of the Group stressed the multilateral nature of the procedures set out in the Agreement for the entity negotiations between the parties to the Agreement and countries wishing to accept it. Two members said that their countries' efforts to participate had failed because their entity offers had not been found acceptable. They suggested that the parties, in responding to entity offers of developing countries wishing to accept the Agreement, should pay greater attention to the development, financial and trade needs of these countries in accordance with the principles set out in Article III:3. Another member said his authorities were considering

the recently revised entity offers of some developing countries in a positive light but did not consider purely symbolic offers sufficient. Relatively limited entity offers by developing countries might be acceptable in the context of a gradual expansion of their entity lists in accordance with an evolutionary clause."

At the September 1985 meeting, the Committee was informed of the Council's adoption of the report and noted that no further follow-up was required in the Committee for the time being.

G. REVIEW OF 1983 STATISTICS

A continued review of the 1983 statistical reports took place at the regular meetings in February and May 1985. According to the Committee's previous decision (GPR/M/12, paragraph 9; L/5722, paragraph 5(i)), the 1983 statistics will be derestricted one year after the conclusion of the annual statistical review, i.e. on 1 May 1986.

Among points discussed on the basis of the statistical reports were the following: the use of single tendering, either overall, in certain countries, in certain of their procuring entities or for certain products, and the frequency with which individual provisions of Article V:15 had been used; the level of total purchases and the level of above-threshold purchases, either overall in certain countries, in certain of their entities or for certain products; the number of advertisements in the relevant publications for Code-covered procurement; the shares of origin of contracts awarded; the use of derogations; the desirability of obtaining more detailed information in certain cases.

H. ESTABLISHMENT IN NATIONAL CURRENCIES OF THE THRESHOLD (150,000 SDRs) FOR THE PURPOSES OF PUBLIC NOTICES, REFERRED TO IN ARTICLE V:3

According to procedures agreed upon in 1981, thresholds expressed in national currencies are fixed for the calendar year, except for Japan and Singapore where the fiscal year (1 April to 31 March) is used.

Information received from the Parties for 1985 was as follows:

AUSTRIA - S 3,017,370
CANADA - Can\$ 199,000
EUROPEAN ECONOMIC COMMUNITY - ECU 193,000

Thresholds applied in member States:

[- BELGIUM - BF 8,100,000
- DENMARK - Dkr 1,439,000
- FRANCE - F 1,100,000
- FEDERAL REPUBLIC OF GERMANY - DM 403,811
- IRELAND - £Ir 125,450
- ITALY - Lit 238,008,360
- LUXEMBOURG - Lux F 8,195,029
- NETHERLANDS - f. 449,522
- UNITED KINGDOM - £ 103,996]

FINLAND - FIM 916,000
HONG KONG - HK\$ 1,212,000
ISRAEL - US\$ 156,000
JAPAN - ¥ 36,000,000
NORWAY - NOK 1,250,000
SINGAPORE - S\$ 331,470
SWEDEN - SEK 1,263,000
SWITZERLAND - Sw F 355,000
UNITED STATES - US\$ 156,000

I. SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

This matter was dealt with in connection with the examination referred to under item F above.

J. CONSULTATIONS AND DISPUTE SETTLEMENT (ARTICLE VII:3-10)

At the February and May 1985 meetings, one Party informed the Committee that Article VII:4 consultations with another Party regarding its use of single tendering had taken place.

At the May 1985 meeting, the Committee considered a request by one Party to establish an ad hoc panel, working party or other subsidiary body under Article VII:2, to consider what was referred to as a "Computer Literacy Programme" in one country. As agreed by the Committee, bilateral consultations between the Parties concerned were held pursuant to Article VII:3 and 4. Subsequent to these consultations the Committee decided to establish a Working Party on Computer Procurement to examine computer procurement practices in general.

The follow-up of the VAT Panel report adopted in May 1984 (GPR/21) was taken up at all regular 1985 meetings. The Committee was informed at the June meeting by the Party in question that it was prepared to offer a solution by way of a unilateral reduction of the threshold applicable to it. The Party which had raised the VAT issue stated that the proposal would be given serious consideration although it did not appear to be consistent with the letter of the Panel's findings and as such would involve a compromise which, to be acceptable, would have to be fully equivalent in economic effects to a solution consistent with the findings. At the September 1985 meeting, this Party formally rejected the other Party's proposal to lower its threshold by an amount which was less than an amount equivalent in economic effects to a solution consistent with the Panel's findings and added that any future proposals along these lines would have to be fully equivalent and backed by written justifications. The other Party offered to provide such a justification in writing as soon as possible and pointed out that, if a modification of the proposed solution was sought, this would require further consultations.

K. PANELISTS (ARTICLE VII:8)

Names of persons available to serve on panels were supplied for 1985 by one EEC member State (the United Kingdom), Finland, Japan, Singapore, Sweden, the United Kingdom for Hong Kong and the United States.

L. OTHER MATTERS DISCUSSED BY THE COMMITTEE

(i) Procurement of strategic materials for defence stockpiles in one Party

This matter was taken up by one Party at all four regular meetings in 1985, at the June meeting as a separate agenda item. Status reports have been given by the Party concerned.

(ii) Harmonized Commodity Description and Coding System

Some questions concerning this matter were initially tabled at the February 1985 meeting. In May 1985 it was agreed that matters concerning the Harmonized System that might be relevant to the Agreement on Government Procurement would be set aside for the time being.

(iii) Anticipated Enlargement of the European Economic Community

At the June 1985 meeting, one Party noted the need to start giving consideration to the implications for the Agreement of the anticipated enlargement of the EEC. It reverted to the question at the September 1985 meeting, when the Committee took note of explanations given concerning compatibility of the legislation concerned with the Agreement.

M. WORKING PARTY ON COMPUTER PROCUREMENT

At the June 1985 meeting the Committee agreed to set up a working party to examine questions relating to computer procurement (see item C(iv)). As noted under item B, the Working Party held meetings on 27 September, 8 November and [9] December 1985.