

GENERAL AGREEMENT ON TARIFFS AND TRADE

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Multilateral Trade Negotiations

Group "Non-Tariff Measures"

Sub-Group "Government Procurement"

LIST OF ELEMENTS THAT MIGHT BE TAKEN UP FOR EXAMINATION BY THE SUB-GROUP

Note by the Secretariat

1. At the October meeting of the Sub-Group, the secretariat was asked to prepare, in co-operation with interested delegations, a list of elements already identified in the area of government procurement which would be taken up for examination at the next meeting of the Sub-Group (MTN/NTM/22, paragraph 5). This note based on notifications in the GATT Inventory of Non-Tariff Measures and information provided by the OECD is provided in response to that request.
2. It may be noted that in the course of the discussions at the initial meeting of the Sub-Group, a number of delegations offered some initial comments on matters relating to government procurement and delegations from some developing countries stated that work in this area should have regard to the relevant provisions of the Tokyo Declaration relating to special and differential treatment for developing countries, where this is feasible and appropriate, both in respect to rights and obligations. These comments and observations have also been taken into account.
3. The check-list of elements set out below should not be regarded as exhaustive. The manner in which the points have been formulated and their presentation do not commit any delegation. As agreed in the Sub-Group (MTN/NTM/22, paragraph 6), delegations are invited to submit suggestions with respect to additional elements which they feel could be taken up for examination.
4. For the sake of convenience, the following elements (with the addition of derogations and escape clause) which were identified earlier in the Committee on Trade in Industrial Products and reproduced in paragraph 2 of MTN/NTM/W/16, have been taken as a basis for the check-list. It might be noted that the listing has no implications for the manner or sequence in which the points might be considered in any negotiations that might be undertaken in this area.

- A. Objectives and principles
- B. Definitions
- C. Procurement entities
- D. Elimination of existing discrimination
- E. Exceptions
- F. Purchasing procedures
- G. Publication of government procurement regulations
- H. Derogations and escape clause
- I. Reporting, review, complaint and confrontation procedures

A. OBJECTIVES AND PRINCIPLES

5. The objectives of negotiations on government procurement should be consistent with the aims and provisions of the Tokyo Declaration, in particular, as reflected in its paragraph 2 and in other relevant paragraphs such as, for example, paragraphs 4, 5, 6, 8 and 9 of that document. In this connexion, it has been stated that the principle of non-discrimination in respect of foreign products or suppliers should be a major objective in the negotiations on government procurement. Pertinent to this, is the relationship of the objectives of any guidelines, code or instrument which might be developed to the provisions of the General Agreement. While Article III, and notably its paragraph 4, provide for imported products to be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use, paragraph 8 contains exceptions to this provision in respect of government procurement. The relationship therefore of any dispositions that might be agreed upon in the area of government procurement with the existing provisions of Article III and any consequential action which might be called for in this regard would need to be considered at the appropriate stage. It may be noted that paragraph 2 of Article XVII requires that each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment with respect to imports of products for immediate or ultimate consumption in governmental use.

6. Among other objectives it has been stated that the achievement of substantially equal access as between domestic and foreign suppliers is of considerable importance, and that a greater measure of transparency in government procurement operations than at present exists would be a requirement to ensure this general aim.

7. Also relevant would be the possibilities which may exist for differential and more favourable treatment for developing countries in the area of government procurement in accordance with the Tokyo Declaration.

8. Certain aspects of these points are taken up and elaborated below under a number of the other elements included in the check-list.

B. DEFINITIONS

9. Certain terminology may require defining in order that there is a common understanding of what is meant. This may include the definition of government procurement itself, since that would also have a bearing on the legal and practical issues that would have to be tackled. In this connexion, consideration might be given to the language of the General Agreement (Article III:8) that government procurement consists of procurement by a government or its agencies for their own use and not with a view to commercial resale or with a view to use in the manufacture of goods for commercial sale. The notifications made in the context of the Inventory of Non-Tariff Measures also indicate that participants are interested primarily in government purchases of goods rather than services, etc., except where these may be incidental to the supply of goods.

C. PROCUREMENT ENTITIES

10. Two principal points seem to be related to this question - the entities themselves and the value threshold of contracts which might fall within the scope of any guidelines, code, or instrument that might be negotiated.

(i) Procurement entities

11. There would seem to be a need for agreement on the entities to which obligations may apply. For socio-economic, administrative, legal and constitutional reasons the position of such entities could differ from country to country. A factor which may also be taken into account is the expectation of satisfactory trading advantages and the overall balance of commitments arising from obligations undertaken.

12. In this connexion, the question might arise of provisions in relation to entities which fall outside the scope of more precise obligations for constitutional or other reasons - for example, public entities not directly under governmental, including federal governmental, control or direction, such as certain regional or local authorities. In such cases, the question is raised as to whether a "best endeavours" or some other provision to cover this point would be appropriate.¹

There could also be a question about the status of public utilities.

(ii) The value threshold

13. The point for consideration here is whether obligations, if agreed upon, would apply irrespective of the value of contracts, or only above a certain threshold, and also if such an exemption would operate for all or only some of these obligations.

¹Article XXIV:12 of the General Agreement states, for example, that "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory".

14. Among other things, the threshold question may be related to the overall balance of trading advantages, to administrative requirements, to the need for effective and equitable monitoring of compliance and to the possibilities of dealing effectively with disputes in this area.

D. NON-DISCRIMINATION

15. As mentioned earlier, a major point identified in the area of government procurement is the importance of ensuring the principle of non-discrimination. A review of the notifications on government procurement contained in the GATT Inventory of Non-Tariff Measures and summarized in MTN/NIM/W/16 reflects the types of measures and procedures, etc. which may tend to inhibit foreign competition. Some of the main elements which need to be dealt with under such measures and procedures are mentioned below.

(i) Existing discriminatory provisions

16. The Inventory of Non-Tariff Measures indicates that unequal treatment in government purchasing finds its basis in old as well as new legislation, cabinet or ministerial decrees, administrative directives, regulations or practices including certain working relationships which have evolved over the course of time and may include a price preference for domestic suppliers and discrimination practised through administrative procedures, etc. For a common effort by participants to achieve the maximum degree of non-discrimination in the field of government procurement to be successful, there would be a need for governments to review such rules and practices in the light of any commitments they enter into in this area of the multilateral trade negotiations.

(ii) Tendering techniques

17. It emerges from information contained in the GATT Inventory that governments tend to use both open and selective tendering techniques. This could indicate a need for ensuring non-discrimination and widening the area of competition through provisions which take into account both types of practices. The question arises as to whether any criteria could be developed to maintain the objective of non-discrimination in a situation where selective tendering procedures are used. It also appears that there are situations where neither open nor selective techniques are followed and the question how to limit the scope which may exist for discrimination in such cases may also need to be considered. What is also involved is whether any conditions could be prescribed for the use of single or selective tendering.

(iii) Ex-ante information

18. It would seem important that in calling for bids, all necessary details should be made available to prospective tenderers in such a way as to ensure transparency and the principle of non-discrimination.

(iv) Timing

19. Taking into account, in particular, the situation of distant suppliers, which includes both developed and developing countries and having regard to the multiplicity of government procurement operations, provision would need to be made for an adequate interval of time between the calling for bids and the closing of tenders.

(v) Conditions of participation

20. It has been stated that discrimination may result if procurement entities prescribe technical characteristics, require financial guarantees, request information or proofs, require suppliers to have resident establishments or representatives or prescribe other conditions or follow practices in such a way as to disadvantage suppliers of foreign products. The question here is whether any provision could be made to minimize such problems given the practical issues which arise.

(vi) Ex-post information and publicity

21. In the context of transparency of government procurement operations, it has been proposed that relevant information and publicity concerning contracts and reasons for the award or rejection of bids, etc. and details of the successful tender could be of interest to both domestic and foreign suppliers of the goods subject to tender. Under automatic tendering procedures relevant details of successful bids are generally made available without restriction, at least to eligible tenderers. Approaches may vary under non-automatic procedures, while the terms of single tenders are normally not revealed.

E. EXCEPTIONS

22. A number of policy considerations have been mentioned by governments (MTN/NTM/W/16, paragraph 13) in the context of the notifications in the Inventory of Non-Tariff Measures for limiting government procurement to domestic suppliers. These include, inter alia, certain strategic objectives such as independence from foreign sources of supply for certain essential goods of military importance, or for reasons of national security.

23. It may be noted in this connexion, that Article XXI of the General Agreement provides for security exceptions. Article XX concerning general exceptions to the General Agreement, lists a number of other measures which may be adopted or enforced by any contracting party.

24. It may need to be considered whether any more specific exceptions would be required in the field of government procurement.

F. PURCHASING PROCEDURES

25. Reference has been made to certain points relating to purchasing procedures in Section D where the question of non-discrimination and the importance of transparency in purchasing procedures have been identified. In addition to the points relating to competition, etc. mentioned in Sub-Section (v) of Section D, it may be necessary to give attention to certain other elements in procurement procedures having regard to the objectives of ensuring transparency and non-discrimination.

26. This would include the nature of the procedure (open or selective); the procedures for opening tenders and criteria for assessing bids and awarding contracts such as the price factor and the extent to which any criteria could be developed and specified with a view to limiting the scope for discrimination, taking account of the fact that at the present time the awarding of contracts may be automatic, discretionary or subject to negotiations; cost elements to be included in evaluating bids (such as customs duties and taxes, transport and insurance costs, etc.); provisions regarding sub-contracting or compensatory procurement, if any; requirements concerning after-sales service, etc; provisions of relevant national rules and regulations which are not otherwise published; specification of documentary and other requirements laid down for prospective suppliers (such as language requirements, financial guarantees, requirements that foreign firms operate through local counterparts, etc.). An element for consideration is whether it would be feasible and appropriate in this context to work towards certain minimum standardized procedural requirements and documentation.

G. PUBLICATION OF GOVERNMENT PROCUREMENT REGULATIONS

27. In furthering the interest of transparency, it would be important for government procurement regulations and requirements affecting such procurement (including any changes in regulations) of countries participating in any form of instrument dealing with this subject to be made available. In this connexion it may be noted that participants in the Anti-Dumping Code have agreed to make available relevant details of their anti-dumping regulations. Provisions of Article X concerning publication and administration of trade regulations could also be considered relevant.

H. DEROGATIONS AND ESCAPE CLAUSE

28. There has been the suggestion that any instrument might contain provisions permitting derogations in the form of temporary suspension of obligations for one or more contracts which are subject to the provisions of the instrument. In this connexion there could also be a question whether both provisions regarding derogations and escape clause may be required.

I. REPORTING, REVIEW AND COMPLAINT PROCEDURES, ETC.

29. If an instrument were to be established to deal with government procurement, appropriate machinery would be required to supervise its operations. Among other things, such machinery could be expected to seek ways of ensuring the transparency of developments through the collection of statistics and other relevant information concerning procurement, so as to provide a basis for periodic review and surveillance in this field.

30. There would also be a need to ensure that procedures and machinery for consultation, conciliation, dispute settlement and if necessary sanctions, etc. are available, note being taken of the provisions of Articles XXII and XXIII of the General Agreement, so as to ensure the effective implementation of rights and obligations.

Other matters

31. Depending on the type of instrument adopted for dealing with government procurement it may be necessary to draw attention to other questions such as, for example, entry into force, accession, withdrawal, rules of origin, etc.

Developing countries

32. As indicated in paragraph 2 above, a number of preliminary comments and observations were made in the Sub-Group on points of interest to developing countries. It was stated that these observations did not exhaust the possibilities which may exist for differential and more favourable treatment for developing countries in this area of the negotiations.

33. The importance of non-discrimination as between domestic and foreign suppliers taking into account the provisions of the Tokyo Declaration and the importance of transparency of government procurement operations for developing countries was raised. Reference was also made to the question of procurement entities and the value threshold as being points of significant interest to developing countries. Given the particular situation of many developing countries, attention was drawn to the difficulties of their participation in government procurement flowing from tendering procedures and techniques, the importance of ensuring the availability of relevant information (ex ante and ex post) concerning government procurement

and the calling of tenders and the importance of an adequate time interval between the call for tenders and the closing date for bids. In this connexion, it was suggested that information points taking into account the interests of developing countries might be considered and the question was raised concerning possibilities which may exist for technical assistance to help developing countries participate more actively in government procurement operations. The obligations which developing countries might be able to accept in any negotiated instrument would also need to be taken up at an appropriate stage.

34. In general it may be noted that developing countries have taken particular interest in such questions relating to the multilateral trade negotiations as concerns exceptions, safeguards, surveillance and dispute settlement, procedures, etc.