

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED
GPR/Spec/46
23 July 1985

Committee on Government Procurement

MINUTES OF MEETING OF 19 JUNE 1985

Chairman: Mr. M. Shaton (Israel)

1. The following agenda was adopted:

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A. Article IX:6(b) Negotiations

(i) Improvements of the Agreement

2. The Chairman recalled that the Committee had set this meeting as the target date for the work of the Informal Working Group (GPR/M/15, paragraph 59 and GPR/M/16, paragraph 22). The Group had pursued its task of drafting texts on less controversial issues and of narrowing down differences on more controversial points in three sets of meetings on 30 April-3 May, 6-7 June and 17-18 June 1985, using as the basis for its work the Consolidated List of Suggestions Made for Improvements of the Agreement (GPR/W/56/Rev.3) and additional suggestions contained in Addenda 1 and 2 of that document and in document GPR/M/16, paragraph 23. Further suggestions had been put forward in the course of the Group's work.

3. The Group had noted that some delegations considered some proposals to belong or be relevant to areas of the negotiations other than the area of improvements. On this understanding (and, in respect of some issues, a few additional understandings), texts concerning the following subjects had been accepted on an ad referendum basis, without prejudice to the final position of delegations in the overall negotiations, and would not need to be reverted to by the Group: Estimated Value/Actual Value; Variety of Qualification Procedures; Publication Delays; Statistics on the Use of Single Tendering; Timing in Qualification Procedures; Separate Publication; Delivery Times; Statistics on the Use of Derogations; Article VI:9(b) Statistics. Proposals on the following matters were presently in Category A, "Non-Controversial Proposals": Leasing; Information on the Use of Single Tendering; Definition of Single

Tendering; Recurring Contracts. Proposals concerning the following matters were presently in Category B, "Proposals that are generally acceptable except for one Party": Treatment of Option Clauses; Qualification Procedures; Global Statistics (certain elements). Proposals on the following matters remained in Category C, "Controversial Proposals": Time-Limits in Recurring Purchases; Threshold Value; Rules of Origin; Technical Assistance; Technical Specifications; Information Prior to Notice of Proposed Purchase; Bid Times; Languages; Offset Procurement and Technology Transfer; Information to Unsuccessful Tenderers; Publishing Information on Winning Bids; Global Statistics, i.e. the proposal in GPR/W/56/Rev.3/Add.2; Use of Derogations. Certain proposals had been left aside until precise texts were tabled; certain general observations had been replaced by precise texts, and certain other observations could be discussed in the Committee without leading to a change in the text of the Agreement.

4. The representative of Finland, also on behalf of Norway and Sweden, submitted in writing a proposal relating to complaints by suppliers.¹

5. The Committee agreed that a revised Consolidated List of Suggestions be drawn up on the basis of the Group's work and circulated as GPR/W/56/Rev.4. It also agreed that the Informal Working Group continue its work under the same terms of reference and report formally to the Committee at its December 1985 meeting.

(ii) Broadening of the Agreement

6. The Chairman recalled that only Canada, Sweden and the United States had so far presented request lists. Modifications to the United States lists had been circulated to all Parties on 10 May 1985.

7. The representatives of Canada and the United States reiterated the importance they attached to this aspect of the negotiations and urged other delegations to present request lists. The representative of the United States feared that the lack of activity in this area could endanger the whole process of negotiation.

8. The representative of Finland, also on behalf of Norway, hoped to have a decision by the autumn on whether or not request lists would be submitted, depending on progress made in the discussions currently underway on improvement of the Agreement. The representative of the European Economic Community stated that the matter was currently under consideration and hoped that his delegation's position on broadening of the Agreement would be defined by the autumn. The representatives of the United Kingdom on behalf of Hong Kong and of Switzerland had no plans for the submission of request lists. The representative of Switzerland stated that technical comments on the request list received had been transmitted to the delegation concerned.

9. On the question of a deadline for responses, the representative of Canada suggested that substantive responses could take the form of tabling either request lists or other proposals for broadening the Agreement, and that an overall target be set for the negotiations together with a programme of meetings that would bring the Committee into a negotiating position in the area of broadening the Agreement.

¹Subsequently incorporated in GPR/W/56/Rev.4.

10. The Committee took note of the statements made.

(iii) Service Contracts

11. The Chairman recalled that the background studies on insurance and on architectural and consulting engineering services were contained in the GPR/W/66 and 67 series respectively. Israel's contribution in the latter area would be circulated as GPR/W/67/Add.3. Only Canada and the United States had provided studies on management consulting (GPR/W/70) and he recalled that the target date in this area was 1 June 1985. The United States had submitted a study on freight forwarding services, pursuant to the Committee's invitation to do so (GPR/M/15, paragraph 81).

12. In response to the United States question at the last meeting on treatment of Code-covered contracts which included both goods and services (GPR/M/16, paragraph 32), the representative of the United Kingdom on behalf of Hong Kong replied that the 50 per cent rule was applied as provided for in the Agreement.

13. The representative of the United States stated that the 50 per cent rule was applied in her country also, but that the information she sought was qualitative rather than quantitative, namely the types of services considered to be incidental to goods.

14. The representative of Sweden undertook to supply shortly both a reply to the United States' question and, as did the representative of Canada, a study on freight-forwarding services.

15. The representative of Canada suggested that Parties put together the following information on the procurement of services in their own countries: (i) statistics on the total number and value, above and below the threshold, of contracts for services procured by existing Code-covered entities, together, if possible, with the proportion of such services procured from foreign suppliers and the reasons for such foreign purchases, as well as the percentage of total purchases combining both goods and services (with a services content above 50 per cent) as opposed to services alone; (ii) consideration of the applicability of present provisions of the Agreement to the procurement of services, in particular in regard to tendering procedures and technical specifications, and identification of areas where the present provisions might not apply to services; (iii) information on national laws and regulations which, while not intended as trade restrictive, would have to be taken into consideration if the key national treatment and non-discrimination provisions of the Agreement were to be applied to services.

16. While delegations conceded the usefulness of having such information at the disposal of the Committee, a number also expressed reservations about the proposed exercise. The representative of Finland, also on behalf of Norway and Sweden, recalled that it had been agreed that the study on management consulting services would be the last and that a new exercise would therefore require a decision by the Committee. The representative of the European Economic Community expressed concern about the considerable length of time required for such an exercise. The representative of Switzerland thought the proposal too ambitious and wished to see efforts directed at analysing existing information rather than collecting further information; the secretariat might be able to assist with such an analysis. The representative of the United Kingdom on behalf of Hong Kong stated that time was required for consideration of the Canadian proposal.

17. The representative of the United States stressed the lack of a complete picture of the dynamics in the services area and therefore welcomed the Canadian proposal, while urging that the studies already agreed to should be completed and the information so provided be examined with a view to answering the following questions: (i) the applicability of existing provisions in the Agreement to services, e.g. in terms of the current threshold level, entity lists, technical specifications; (ii) the relevance of existing procedural requirements, e.g. deadlines; and (iii) the determination of origin. The secretariat might be requested to undertake an analysis of the studies available to determine the applicability of the Agreement to the selected service areas.

18. The representative of Canada stressed that the information she proposed be collected would in any case be required on a national level. She suggested that points (ii) and (iii) of her proposal might be taken up in the context of the studies already carried out, with the secretariat tackling the former and delegations the latter.

19. The Committee took note of the statements made. In order to provide a basis for the Committee's work in the autumn, the Committee agreed that the secretariat be asked to look into the submissions made in order to see what kind of analytical work might usefully be undertaken. The Chairman stressed that Parties could go further in depth in their own national cases, and he urged delegations that had not already done so, to submit studies on management consulting.

(iv) Negotiations as a whole

20. On the question of a new deadline for completion of the negotiations, the representative of Canada noted the inter-relationship between the three elements of the negotiations. She wished to see better progress on the broadening of the Agreement, with more delegations tabling proposals in the form of entity request lists or other proposals, and on services, with the establishment of the information base necessary for true negotiations to be undertaken by mid-1986. While stressing the importance of moving ahead on all three fronts, she did not wish to establish a formal link or a common target.

21. The representative of the United States recalled the inter-relationship of the three elements of the negotiations and the top priority given by her authorities to the broadening of the Agreement. Work on improving the Agreement could not be finalized until negotiations on broadening and on services had taken place. If a target were to be set for mid-1986, careful programming and an accelerated schedule of meetings would be necessary in the coming year, and preparatory work in the two areas that were lagging behind should begin immediately to enable such an accelerated schedule.

22. The representative of Switzerland emphasized the differences in nature and complexity between the three elements of the negotiations. In view of the considerable progress made by the Informal Working Group, he suggested that in order to achieve rapid implementation of improvements, work in that area be finalized by the end of 1985 and work in the other two areas continued thereafter. He noted that given certain inter-relationships, completion on work in the area of improvements would also signify progress on broadening the field of application of the Agreement.

23. The representative of the European Economic Community sharing the views of the representative of Switzerland, thought it would be most unfortunate if implementation of a reasonable package of improvements, achieved by the end of 1985, had to be delayed. If a link were to be established between the three elements of the negotiations the required improvements in the image of the Agreement might come too late. He also expressed concern that meetings should not be scheduled so close as to prevent effective preparation for them.

24. The representative of Austria shared the views and concerns expressed by the representatives of Switzerland and of the European Economic Community. Noting the inter-relationship of the three elements of the negotiations, he nevertheless felt that a common target was not feasible and he recalled that services were being discussed in a wider context elsewhere.

25. The Committee took note of the statements made. The Chairman suggested that the Committee might, at its September meeting and after informal consultations between delegations and the Chairman, agree to a schedule of meetings and revert to the question of deadlines.

B. Implementation and Administration of the Agreement

(i) United States

26. The Chairman recalled that additional legislative texts had been submitted to the secretariat where they were open for inspection (GPR/14/Add.5).

27. The representative of the European Economic Community enquired about the significant reduction in activity in the course of 1984 of agencies within certain Code-covered entities, notably the Department of Defense (e.g. the United States Army Communications Electronics Command). He would submit his detailed questions in writing.

(ii) Norway

28. The representative of Norway informed the Committee of the proposed compensatory adjustment following the decentralization of purchasing by the Central Government Purchasing Office. The proposal aimed to keep Code-covered above-threshold purchases stable over time. In view of the small size of most Norwegian entities and the high proportion of their contracts below threshold, the proposal was in terms of certain product groups procured by the National Railways, amounting to some SDR18 million per year above threshold, as compared to the SDR15 million of the Central Government Purchasing Office. The full notification would be made in writing to the secretariat.

29. The representative of Switzerland noted that the procedure to be followed in the case of modifications, other than purely formal rectifications or minor amendments, was governed by the provisions of Article IX:5(b) and had to be decided on a case-by-case basis.

30. The Committee agreed that in this instance the compensatory adjustment would be deemed agreed upon provided no objections were received within thirty days of written notification.

¹ Subsequently published as GPR/29.

(iii) Japan

31. The Chairman noted that, no objection having been made by 2 June 1985 to the Article IX:5(a) rectification (GPR/28), the rectification was accepted.

32. The representative of Japan replied to previous questions by the representative of the European Economic Community. Procurement was to be completed within the fiscal year, which ran from April to March, and most new purchases were to be published in the first half thereof. The frequency of occurrence of single tendering was accounted for by administrative reasons within the procuring entities and by the choice of period, namely the second half of the fiscal year. With reference to short bid deadlines, since new purchases were to be published in the first half of the fiscal year, the second half saw a relative preponderance of recurring purchases, for which short bid deadlines were tolerated. Bid bonds, required where qualification procedures were not applicable, strengthened the contractual relationship with suppliers and as they were part of the guaranteed payment for the contract, were not considered as barriers to the suppliers who wished to take part in the tendering. The qualification procedures were aimed at avoiding arbitrary judgement by procurement officers. They were fundamental to the Japanese system, but ways would be examined making improvements.

33. The representative of the European Economic Community noted that short bid deadlines also occurred frequently at the beginning of the fiscal year and he would revert to the question later. According to published notices, bid bonds appeared not to be an alternative to qualification, but an additional burden; he felt qualification should suffice.

34. The representative of the United States enquired, in relation to Japan National Railways, why so few notices were published for the purchase of telecommunications equipment, and why there had been a substantial decrease in the number of notices published in April and May 1985; she also expressed concern over the number of notices by this entity requiring the posting of performance bonds. She further enquired about the high proportion of short bid deadlines in notices published by the Ministry of Finance in this same period.

35. The representative of Japan, in reply to the first question, stated that the telecommunications network of JNR, which had been developed within JNR, was complete and no new equipment was required. Furthermore as this equipment related to operational safety, it was not covered by the Agreement, as noted at Annex I. He would reply to other questions at the next meeting. The representative of the United States stated that she would follow up on the question of JNR's telecommunications equipment at a later date.

(iv) Finland

36. The Chairman noted that, no objection having been made by 2 June 1985 to the Article IX:5(b) compensatory adjustment (GPR/19/Add.1), the adjustment was accepted.

37. The representative of the United States stated that the compensatory adjustment had been deemed acceptable as the quality of the commercial opportunities it provided offset the disparity in procurement levels.

(v) European Economic Community

38. The Chairman recalled that the Article IX:5(a) rectifications concerning Annex I in respect of France and the Netherlands (GPR/22) were still subject to a United States reservation.

39. The representative of the European Economic Community stated that he would be providing in writing a clarification on the recent rectification to the entity list¹ of the Netherlands and a rectification to the entity list for France.

40. The representative of the United States enquired about steps being taken to remedy the continuing high proportion of short bid deadlines and about the reduction in notices published by France and Italy in April-May 1985.

41. The representative of the European Economic Community stated 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. The situations with respect to France and Italy were most probably due to budgetary constraints, but he would revert to the questions later.

42. The representative of Japan enquired about the bid bonds required by Greece, about the non-publication of qualification criteria by the United Kingdom, about the reasons for the high proportion of single tendering under Article V:15(c), and about the kinds of goods procured under Article V:15(b) and (d).

43. The representative of the European Economic Community recalled that Greece was not yet a Party to the Agreement and that the notices referred to must have been published under the EC's Public Works Directive and not its Supply Directive. He undertook to look into the other questions. However, he believed that steps currently being taken would lead to a reduction in the use of single tendering in the European Economic Community and he hoped for equally serious intentions in Japan to reduce single tendering.

C. The Procurement by the United States General Services Administration of Strategic Materials for National Defense Stockpiles

44. The representative of Canada, who had requested that this item be placed on the agenda (GPR/M/16, paragraphs 63 and 81), asked what steps the United States was taking to meet the obligations under the GATT which are now being abrogated by the GSA National Defense Stockpile of Strategic Materials Procurement Regulation.

45. The representative of the United States stated full awareness of the abrogation of GATT obligations. The issue was under consideration and she would report back to the Committee in due time.

¹ Subsequently issued as GPR/22/Rev.1.

D. Other Business

(i) 1983 Statistics

46. The representative of the United States reminded the representative of the European Economic Community of the questions outstanding.

47. The Chairman recalled that the deadline for submission of the 1984 statistics was 30 September 1985 and that these had already been received from the United Kingdom on behalf of Hong Kong and from Singapore.

(ii) Computer Procurement Practices

48. The representative of the United States referred to the computer purchases made by the French Code-covered entity UGAP and to the importance of ensuring that all procedures laid down in the Agreement were followed. Throughout the procurement process, the French authorities had shown questionable regard for the open and non-discriminatory procedures required by the Agreement. However, dispute settlement seemed of little use since all commercial opportunities had been lost. The case called into question the adequacy of the Agreement in its present form, namely in opening up commercial opportunities for foreign suppliers. Since the last meeting of the Committee, the United States and the European Communities Commission had held two rounds of formal consultations; some of the information received then had differed considerably from that received on earlier occasions in the Committee and in bilateral contacts. His authorities believed that a working party should be established under Article VII:2 to examine the implications for the Agreement of the questions raised by this case, particularly in regard to interpretations of the provisions of the Agreement. These included questions relating to the award of annual contracts in excess of the amounts advertized, the converting of procurement into leasing, the use of options contracts and short bid deadlines, the adequacy of often lengthy dispute settlement procedures where commercial decisions were made before the procedures could be completed, and the treatment of computer contracts which often included a hardware and a software component. Given the renegotiation of the Agreement currently underway and the opportunity it provided for improvements, he thought this was an opportune moment for such a working party. It should be open to all interested parties and aim to feed the results of its work into that of the Informal Working Group. The Chairman might, as was normal practice, establish its terms of reference in consultation with delegations, and a first meeting might be held in conjunction with the Committee's next meeting in September.

49. The representative of the European Economic Community disputed that there had been any breach of the Agreement in the case of the French Computer Literacy Programme. This was not a case of old contracts being used to satisfy new requirements. The original programme had merely been accelerated. After the bilateral consultations the establishment of a Panel had not been deemed necessary. He could, therefore, agree to a working party being set up on condition that it was not to be a substitute for a Panel. It would be useful to look at the area of computer procurement, in which there was much activity, but little of it under the provisions of the Agreement. To his knowledge only three countries, France, Sweden and the United Kingdom, published significant volumes of computer procurement. A working party might be able to contribute improvements to the Agreement. The mandate of such a working party would need to be discussed in consultations over the next months.

50. The representative of Finland, also on behalf of Norway and Sweden, felt that the questions raised by the representative of the United States would be more appropriately discussed in the Informal Working Group. The representatives of Canada, Switzerland and the United Kingdom on behalf of Hong Kong accepted the idea of a working party but emphasized the need to feed the results of its work into that of the Informal Working Group. The representative of Switzerland thought that some of the questions raised need not be included in the mandate of the working party as they might already be covered by the work of the Informal Working Group.

51. The representative of the United States stated that her delegation's intention was not to find a substitute for dispute settlement but to make a contribution to the improvements drafting exercise. She felt it would be more efficient to include all points in the mandate of the working party and allow it to sort them.

52. The Committee agreed to the establishment of a working party on computer procurement practices, its mandate to be agreed in consultations co-ordinated by the Chairman.

(iii) Follow-up on VAT Panel Report

53. The representative of the European Economic Community recalled that his delegation had made clear, when the report was adopted, that it had difficulties with the definition of "contract value". It had not felt that the Report preserved a proper balance of rights and obligations of all Parties. Nevertheless it had sought to find a way of adjusting what others saw as an imbalance of rights and obligations. Information from foreign entities on how other Parties treated indirect taxes in the calculation of the threshold had yielded no clear picture. In the absence of any new information to contribute to an acceptance of the Panel's interpretation of "contract value", the member States were nevertheless prepared to offer a solution by way of a unilateral reduction of the threshold applicable to the European Economic Community. In view of the estimated 13 per cent effective rate of VAT in the European Economic Community and of the lack of clarity in the practices of other Parties, a 6.5 per cent reduction in the threshold was being offered as a fair compromise between member States and between Parties. Contacts with other delegations would be continued on this subject.

54. The representative of the United States expressed concern about what was a "fair compromise" and how it was determined. She recalled that the Panel Report contained an unambiguous finding that Parties may not unilaterally make deductions from contract value in determining whether purchases fell below the threshold. The European Economic Community 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 in principles in the interests of finding a practical economic solution. She emphasized that such a compromise, to be acceptable, would have to be fully equivalent in economic effect to a solution consistent with the letter of the Panel's findings.

55. The Committee took note of the statements made.

(iv) Dates of Next Meeting. Agenda of Next Meeting

56. The Committee agreed that 26-27 September 1985 be set aside for the next meeting.

57. The preliminary agenda would include: (i) Article IX:6(b) negotiations; (ii) Implementation and administration of the Agreement; (iii) Other business.

58. A further meeting was scheduled for 12-13 December 1985.

59. The Committee noted that the Informal Working Group would meet on 23-24 September, 6-8 November, 9-11 December 1985.