

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

MTN/NTM/W/152

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Limited Distribution

Multilateral Trade Negotiations

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Group "Non-Tariff Measures"

Sub-Group "Government Procurement"

DRAFT INTEGRATED TEXT FOR NEGOTIATION ON GOVERNMENT PROCUREMENT

Communication from Japan

In drawing attention to the cover note¹ to document MTN/NTM/W/133/Rev.1, the delegation of Japan has requested that, subsequent to the understanding contained therein, the attached draft suggestion relating to Part IV of the integrated text be circulated to delegations for their consideration. It is the hope of the delegation of Japan that such a draft contribution will help clarify its position and thereby assist the work of the Sub-Group. The contribution is without prejudice to the final position of the delegation of Japan in the negotiations or to the possibility of submitting additional comments as the negotiations proceed.

¹This states, inter alia, "that the availability of such draft provisions (on government procurement) would not prejudice the negotiating position of any delegation in any area of the negotiations on government procurement nor would it prejudice the possibility of submitting additional proposals as the negotiations proceed".

PART IV

Tendering Procedures

1. Signatories shall ensure that the tendering procedures of their entities are consistent with the provisions below. They shall use either open or selective tendering procedures, unless the conditions specified in paragraph 13 below apply.

Qualification of suppliers

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

- (a) any conditions for participation in qualification procedures shall be made known to interested suppliers in adequate time to enable them to participate in the qualification procedures to the extent that it is compatible with efficient operation of the procedures;
- (b) any conditions for participation required from suppliers, including financial guarantees, technical qualifications, 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;
- (c) the process of, and the time required for, the qualification procedures shall not be used to keep a foreign supplier off a suppliers' list or from being considered for a particular proposed purchase. Entities shall recognize as qualified suppliers such domestic or foreign suppliers which meet the conditions for participation in a particular proposed purchase. /Suppliers requesting to participate in a particular proposed purchase who may not yet be qualified may also be considered, pending completion of the qualification procedure.7;
- (d) 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;

- (e) any supplier having requested to become a qualified supplier shall be advised upon request of the decision of the entities concerned as to whether or not he has been recognized as a qualified supplier. Qualified suppliers included on permanent lists by entities shall also be notified of the termination of any such lists or of their removal from them;
- (f) nothing in sub-paragraphs (a) to (e) above shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

Notice of proposed purchase and explanatory documents of tender

3. Entities shall make known each proposed purchase by the appropriate means of notice listed in Annex in the case of open tendering procedures, and shall send notifications of selective tender to qualified suppliers selected by entities in the case of selective tendering procedures. Such notice and notification of selective tender shall constitute an invitation to tender.

4. Each notice and notification of selective tender of proposed purchase shall contain the following information: (a) the nature and quantity of the products to be supplied; (b) whether the procedure is open or selective; (c) any delivery date; (d) the address and final date 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 requirement, financial guarantees and information required from suppliers; (g) the amount and terms of payment of any sum payable for the explanatory documents of tender.

The content of the notice and the notification of selective tender shall be made known in the language chosen by the entity.

5. Entities maintaining permanent lists of qualified suppliers /for specific products or groups of products/, shall be deemed to have met the provisions of paragraphs 3 and 4 above providing they publish the existence of their /specific or grouped product/ lists by the relevant means of notice in Annex, together with sufficient information to enable potential suppliers to initiate the qualification process.

6. To ensure maximum effective international competition under selective tendering procedures, entities shall send invitations to tender to the maximum practicable number of qualified domestic and foreign suppliers, consistent with the economic and practical considerations related to the proposed purchase. They shall select the suppliers to be invited to tender from among those who are registered in the lists of qualified suppliers. /Suppliers requesting to participate in a particular proposed purchase who may not yet be qualified may also be considered, pending completion of the qualification procedure./

7. If before the time set for opening or receipt of tenders, it becomes necessary to amend conditions of tender, the amendment shall be made known. Any significant information given to a supplier in respect of a particular proposed purchase shall be made known simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.

8. Any time-limit for submission of tenders shall be adequate to allow foreign as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time-limit, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the proposed purchase, the extent of sub-contracting anticipated, and the normal time for transmitting tenders by mail from foreign as well as domestic points.

9. 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.

10. Entities shall prepare explanatory documents of tender which contain information necessary for submission of tender other than that contained in the notice or the notification of selective tender, when they deem it necessary in order to permit suppliers to submit tenders responsively.

11. (a) Entities shall reply to any reasonable request for explanations relating to notice, notification of selective tender, or explanatory documents of tender promptly.

(b) Entities shall reply to any reasonable request for relevant information submitted by a supplier participating in the tendering procedure promptly following receipt thereof, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract, and to the extent that entities consider that such notification is not detrimental to the proper functioning of the procedure.

Submission, receipt and opening of tenders and awarding of contracts

12. The submission, receipt and opening of tenders and awarding of contracts shall be consistent with the following:

- (a) Tenders shall normally be submitted directly or by mail. If tenders by telex, telegram or telecopy are permitted, the tender made thereby must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the tenderer and a statement that the tenderer agrees to all the terms, conditions and provisions of the invitation to tender. Any tender that does not include such a statement /may, nonetheless/ /shall not/, be taken into consideration. The tender must be confirmed by letter posted on the day on which the telex, telegram or telecopy is sent or by the despatch of a signed copy of the telex, telegram or telecopy. Tenders presented by telephone shall not be permitted. The content of the telex, telegram or telecopy shall prevail where there is a difference or conflict between that content and any documentation received after the time-limit;
- (b) The opportunities that may be given to tenderers to correct unintentional errors between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice;
- (c) All tenders solicited under open and selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings as well as the availability of information from the openings; to this effect, entities shall establish provisions for the public openings of tenders, where tenders are opened in the presence of the tenderers or their representatives, and for the disclosure of the names of the tenderers and prices of tenders. If tenderers are not present the opening must be conducted in the presence of an appropriate witness or witnesses;

A report on the opening of the tenders shall be drawn up in writing. This document shall not be published. It shall remain with the entities concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required at the bilateral phase of the settlement of disputes.

The receipt and opening of tenders shall also be consistent with the national treatment and non-discrimination provisions of this Agreement;

- (d) To be considered for award, a tender must, at the time of opening, conform to the essential requirements prescribed by the entity and be from suppliers which comply with the conditions for participation;
 - (e) Unless in the public interest all tenders are rejected, entities shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic or foreign products, is either the lowest tender or the tender which in terms of the specific evaluation criteria prescribed by the entity is determined to be the most advantageous for the contract in question;
 - (f) If it appears from evaluation in selective tendering that no single tender is obviously the most advantageous in terms of the specific evaluation criteria prescribed by the entity, the entity shall, in any subsequent negotiations, give equal consideration and treatment to all tenders within the competitive range;
 - (g) Confidential information provided by a supplier at any stage of the procurement process shall not be revealed to any other supplier;
 - (h) /In no case shall the award of a contract be made on the condition that the supplier licence the technology involved, provide offset procurement opportunities, or on any other condition inconsistent with the provisions of national treatment and non-discrimination./
- /Except in the case of international collaborative projects, the award of contracts shall not be made on the condition that the supplier licence the technology involved to another firm or provide offset procurement opportunities, or on any similar conditions, if these conditions are inconsistent with the principle of non-discrimination./

Use of single tendering

13. The provisions of paragraphs 1-12 above governing open and selective tendering procedures need not apply in the following conditions, provided that single tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among foreign suppliers or protection to domestic producers:

- (a) Where a specified proprietary product or a product with highly specialized technical characteristics is required for which no reasonable alternative or substitute exists;

- (b) Where, due to highly specialized technical requirements, the proposed purchase is for products or replacement parts having to meet requirements of interchangeability with already existing equipment or a change of supplier would result in the purchase of equipment having different technical characteristics causing incompatibility or disproportionate technical difficulties of operation or maintenance;
- (c) When only one qualified source is known to the entity;
- (d) When, in reply to an open or selective tender, no tenders have been submitted or tenders submitted have been either collusive or irregular or not conforming to the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Agreement on condition, however, that the requirements of the initial tender are not substantially modified in the contract awarded;
- (e) Where, owing to circumstances that could not have been reasonably foreseen by the entity, there is serious urgency for the purchase in question, and the products could not be obtained in time by means of open or selective tendering procedures;
- (f) Where the products concerned are purchased in connexion with or following research, experiments, study, design or development, and it is impracticable to seek completion;
- (g) When competitive tenders result in disadvantages for purchasing entities because of possible speculation, hoarding and missed purchasing opportunities;
- (h) Where a successful tenderer fails to conclude a contract.