

CHAPTER 24

Transparency in government procurement practices

As noted in chapter 18, the Agreement on Government Procurement negotiated in the Uruguay Round is a plurilateral Agreement. In other words, unlike the other associated Agreements, which are binding on all WTO Members, the Agreement is binding only on the countries that have acceded to it.

While most developed countries are members, only three developing countries/areas, all at a higher stage of development, have acceded to it. These are Hong Kong (China), the Republic of Korea and Singapore. Most developing and transition countries are therefore not bound by the substantive and procedural obligations the Agreement imposes, but they are bound by GATT 1994.

GATT excludes "procurement by government agencies of goods for their own use and not intended for commercial sale" from the application of the MFN and national treatment rules. However, it stipulates that while countries are not expected to abide fully by the MFN principle, they should, when purchasing from other countries, extend to suppliers from different countries "treatment that is fair and equitable".

In order to bring the practices of all countries under international rule, the Singapore Ministerial Conference decided, as a result of an initiative taken by the United States and the European Communities, to establish in WTO a Working Group on Transparency in Government Procurement "to conduct a study on transparency in government procurement practices ... to develop elements for inclusion in an appropriate agreement". Membership of such an agreement would be obligatory for all WTO Members. It would not, however, require purchasing agencies to accept the substantive obligations to extend MFN and national treatment which the Agreement on Government Procurement imposes. According to the proponents of the proposal, the main advantage of such an agreement would be improved transparency in government procurement practices.

This chapter is divided into two sections. The first provides a brief description of the main provisions of the Agreement on Government Procurement and outlines the reasons for the reluctance of developing countries to accede to it. The second focuses on the discussions that took place in the Working Group in 1997-1998.

Agreement on Government Procurement

Coverage and obligations

The Agreement applies to trade in both goods and services. However, its coverage is limited to the procurement of the goods and services and by the procuring entities each Member has specified in its schedule in the Annexes to Appendix I of the Agreement. These Annexes form an integral part of the Agreement.

The obligations which the Agreement imposes can be broadly divided into two categories: substantive and procedural.

Agreement on Government Procurement, Article I.4

Among the important substantive obligations are those which require purchasing agencies to apply MFN and national treatment to goods and to services contracts above the value thresholds specified in Annexes 1 to 3 of Appendix I of the Agreement. By requiring purchasing agencies to extend national treatment to foreign suppliers, the Agreement prevents them from extending to domestic suppliers price or other types of preferences.

The procedural obligations aim at ensuring that:

Agreement on Government Procurement, Article VII-XVI

Tendering procedures (open, selective and limited) remain open and transparent and provide an opportunity to all interested foreign suppliers to participate;

Agreement on Government Procurement, Article XVIII.1
Agreement on Government Procurement, Article XX

There is transparency in post-award information; and

Challenge procedures providing remedies are available to unsuccessful domestic and foreign suppliers as well as to foreign suppliers which consider that the contract has been awarded in violation of the Agreement.

Reasons for the reluctance of developing countries to accede to the Agreement

Three of the many reasons for the reluctance of developing countries to accede to the Agreement are noted below.

First, in their view, membership of the Agreement will bring about only marginal export gains for them. The major gains will accrue to the developed countries' manufacturing and service industries able to take advantage of the improved access to developing country markets under the Agreement.

Second, there is a potential for the development of regional trade among developing countries in the procurement sector. But for the development of this trade, membership of the Agreement is not necessary as liberalization measures can be taken at the regional level.

Third, for most developing countries, the efficiency gains to procurement agencies from the application of the Agreement may not be significant in view of the following:

The purchase of goods through tenders is widely prevalent.

In low-income and least developed countries, where a high proportion of government expenditure is financed by international financial institutions and donor countries, purchases are made according to World Bank guidelines, which are similar in many respects to the provisions of the Agreement on Government Procurement. Furthermore, the Agreement is not applicable to tied purchases from donor countries. The share of tied aid in total bilateral assistance is high.

In addition, while membership of the Agreement will not necessarily result in higher exports or efficiency gains, it will oblige developing countries to eliminate policies requiring purchasing agencies to give price preferences to domestic suppliers. Such policies aim, *inter alia*, to encourage the development of small-scale industries and backward regions.

Working Group on Transparency in Government Procurement

In 1997-1998, the Working Group identified the possible main elements of an agreement on transparency in government procurement. In addition to the

relevant provisions of the Agreement on Government Procurement, the Group took into account the World Bank Guidelines on Government Procurement, the UNCITRAL Model Law on Procurement of Goods, Construction and Services, and national laws.

Possible main elements of an agreement on transparency in government procurement

An attempt is made here to present the main points made during the Group's discussions in 1997-1998 on the possible elements of an agreement to ensure transparency before and after a procurement contract is awarded.

It needs to be emphasized that the overall picture given in this section does not go into the detail of the widely differing views expressed on both the desirability of including a particular element and its scope and content.

Elements for ensuring transparency before a contract is awarded

Scope and coverage

Coverage of entities. Entities at all levels of government, including subcentral levels of government and enterprises owned or influenced by government, might be covered by a transparency agreement.

Coverage of products. The scope of a transparency agreement might extend to all goods and services and any combination of goods and services.

Threshold values. In principle, the coverage of a transparency agreement should not be limited to contracts above a certain threshold level, but certain provisions might be more flexibly applied to smaller contracts.

Coverage of transactions. Acquisition by any contractual means, including, for example, lease or rental, might be covered.

Procurement methods

Any provisions on procurement methods should be flexible enough to accommodate the differing procurement methods used in national practices, and should allow for the possibility of using methods not based on tendering. While the methods employed by member countries of the Agreement on Government Procurement were generally based on tendering for high-value contracts (open, selective, limited), they also used other methods (e.g. purchase cards, electronic catalogues) for low-value contracts.

According to one view on the main procurement methods, open or international bidding with no limitations on the number of potential bidders was the most transparent method. Selective procedures were justifiable where it was not feasible or efficient to consider and evaluate a large number of potential bids, as long as all potentially interested suppliers were given the same opportunity to access information on procurement and to seek to be invited to bid.

Another view held that open and selective tendering should be considered equally transparent, provided selective tendering was conducted in accordance with appropriate principles. Open tendering was not always the most cost-effective method, particularly for complex procurements.

On the third main procurement method, limited tendering (e.g. individual, sole-source, single-source or direct tendering), it was suggested that, since information and selection criteria were not made publicly available, this method should be used only in justified and exceptional circumstances.

International instruments and national practice accepted a common range of circumstances and conditions under which the use of limited tendering was warranted.

Decisions on qualifications of suppliers

Registration and qualification systems had a useful role in the procurement process provided they were fully transparent. The key principle of transparency as regards this issue was that decisions on registration and qualification of suppliers should be taken only on the basis of criteria that had been identified early in the process and predisclosed to suppliers sufficiently in advance. Any changes in qualification requirements should be made known to all interested suppliers.

Publication of laws and procedures

The publication of national legislation provided not only a clear road map for potential suppliers but also a check against arbitrary practices within procurement regimes. The resulting procedural certainty reduced the costs of the procurement cycle.

Notice of invitation to tender

Information on procurement opportunities in notices of invitations to tender should be sufficient to allow potential suppliers to assess their interest in participating in the proposed procurement procedure and to seek tender documents. National practices on the amount of detail to be included in initial tender notices and in the subsequent tender documentation varied considerably, and it might not be necessary to have precise minimum requirements on their specific contents or to seek harmonization on this point. It would be sufficient for a transparency agreement to develop elements in the form of general principles.

Information on tender opportunities

On advance information on tender opportunities, there were two issues: where the information could be found and its content.

Publications. With regard to where the information could be found by potential suppliers, the following points were made:

- Procurement opportunities and the related procedural requirements should be made known and be generally available to interested parties through an accessible source;
- Information on tender opportunities should be published in the printed and/or electronic media. The printed media could be an official gazette or a national newspaper of wide circulation;
- Electronic publications should be used where feasible, taking into account the level of development of individual WTO Members. The Internet addresses of electronic publications could be made available. As electronic publication offered significant benefits in terms of both time and costs, it would be increasingly used in the coming years.

Information content. While national practices diverged on the extent of information provided, information on procurement opportunities in notices of invitation to tender and notices of tender documents should be sufficient to allow potential suppliers to assess their interest in participating in the proposed procurement or qualification system and enable them to prepare adequate bids or proposals for qualification. Members should be able to decide whether

information on procurement opportunities should be disseminated solely by means of tender notices, or whether the bulk of the information should be contained in the tender documentation or be made available by other means.

Information on preferences accorded to domestic suppliers. Transparency on the existence of preferences or other discriminatory requirements would enable potential foreign tenderers to determine whether they had an interest in entering a specific procurement process in spite of discriminatory national policies. Interested suppliers would be able to distinguish between procurement opportunities reserved for domestic suppliers and those open to international competition only if information on any discriminatory policies was made available to them in advance. The provision of information on price preferences or qualification requirements favouring domestic suppliers would enable suppliers to gauge their interest and assess their real chances of winning a contract.

Language. The language requirement for the publication of notices of invitation to tender should be limited to an official national language. Translation into a WTO language could become too burdensome.

Time limits

On the minimum time limits made available to potential suppliers for fulfilling requirements at different stages of the procurement process, a suggestion was made that, rather than establishing specific minimum time periods in a transparency agreement, the Group might agree on a general principle, as in the UNCITRAL Model Law or in Article XI:1 of the Agreement on Government Procurement.

Elements for ensuring transparency after the procurement contract is awarded

Transparency of decisions on contract awards

For transparency in decision-making on the award of procurement contracts, it was essential that decisions should be taken strictly on the basis of the evaluation criteria (including criteria on technical specifications) set out in advance in the tender documents, and on the basis of the information provided on how the criteria were to be applied. Furthermore, in order to ensure that decisions were seen to be taken in this way, the criteria should be set out so as to ensure that they could be applied objectively.

While it might not be necessary to require the public opening of tenders to ensure transparency, procuring entities should have procedures in place to ensure the impartiality of the procurement process.

Ex post information to be sent to unsuccessful bidders

As to the purpose and operation of *ex post* information, the following points were made:

- ❑ This type of information was made available to tenderers who had failed to win a bid to provide them with an opportunity to ascertain that they had been treated equitably according to the requirements and the criteria set out in the tender documentation, and that applicable rules and practices had been followed during the procurement process.
- ❑ The means by which such information was to be given should be a matter of choice for Members, but it should be known to interested parties. In this connection, the view was expressed that it would be time-consuming and burdensome to inform unsuccessful bidders individually of the outcome of their bids.

Domestic review procedures

The imposition of rules was not enough to obtain transparency in government procurement. There must also be a domestic review mechanism to introduce accountability into the process and to ensure that the rules were respected by everyone involved in a procurement process. The availability of an avenue for reviewing procurement processes was a key element of transparency. A mechanism for reviewing complaints from suppliers or a bid challenge system guaranteed due process and public accountability throughout a procurement process, and established the transparency of the process. The existence of a review mechanism might make public procurement authorities more aware of the need to make sure that the procedures used in particular procurements were in conformity with applicable laws and regulations.

Such review or appeal mechanisms could be based on the review procedures of the WTO Agreements, for example the Agreements on Anti-dumping Practices, Customs Valuation, Preshipment Inspection and TRIPS.

The other view was that the issue of review went beyond that of transparency and was therefore not within the mandate of the Working Group. It was also premature to take up the question. Furthermore, review provisions in a transparency agreement could bring about an increase in the number of challenges on flimsy grounds, increasing costs and delaying the award of contracts.

Moreover, domestic procedures in many countries provided for a review to ascertain whether procurements had been made in accordance with domestic law and procedures. As they would have a wider scope than any obligations that might be agreed in a transparency agreement, it might not be feasible to limit the application of review procedures to specific transparency obligations in a WTO agreement on transparency.

Application of WTO dispute settlement procedures

With regard to dispute settlement between governments, the general view was that it would be premature to consider the applicability of provisions on dispute settlement before the elements of a transparency agreement had been more clearly identified. Furthermore, the Group's mandate was to discuss the elements of an appropriate agreement on transparency which could take the form of a binding agreement or a code urging countries to use their best endeavours to abide by its guidelines; only an agreement with binding obligations could be subject to WTO dispute settlement procedures.

Technical cooperation, and special and differential treatment of developing countries

Technical cooperation would be important in ensuring the successful implementation of a future transparency agreement. It could also help Members in developing domestic procurement regimes and in taking practical steps to enhance the transparency of their procurement policies and practices. Specific suggestions on the types of assistance that could be provided are listed in box 59.

Ongoing work

The Working Group is continuing its work on developing elements for inclusion in an agreement on transparency in government procurement. It has scheduled three meetings for 1999. Decisions on how further work on the development of the agreement should be carried out – including whether it should be fully binding or whether it should take the form of a code requiring Members only to undertake 'best endeavours' to implement it – are expected to be taken at the third Ministerial Conference, scheduled for November 1999.

Box 59***Types of assistance that could be provided to developing countries under an agreement on transparency in government procurement******Development of national legislation and procedures***

- Legal advice on, and assistance in, drawing up national legislation;*
- Analysis of, and guidance on, administrative and policy options;*
- Drawing up procedures for publication;*
- Establishment and implementation of bid challenge systems;*
- Practical steps to make procurement more user-friendly, such as developing standard forms for tender notices and fill-in bid forms, as well as developing a common procurement vocabulary.*

Training

- Training for those who have to implement, use or enforce new legislation, procedures and/or practices;*
- Training the judiciary;*
- Training trainers to enable them to run training programmes in, for example, business schools or colleges of public administration in beneficiary countries;*
- Training purchasers and suppliers;*
- Exchange of officers.*

Institution building

- Administrative cooperation to enhance institution building and the exchange of information.*

Access to information by suppliers

- Workshops, seminars and the production of user guides, including the development of Internet Web sites, search engines and databases, to provide information on opportunities for doing business with governments at home and abroad, and to facilitate access to that information. Such assistance could benefit small and medium-sized enterprises, by increasing their confidence and effectiveness in entering procurement markets at home and abroad.*

Use of information technology

- The development of information technology tools for the dissemination of information on procurement opportunities and practices, and/or the establishment of full electronic tendering, as well as to facilitate the collection of relevant economic data and statistics.*
- The provision of office, information technology and other equipment necessary for the implementation and enforcement of legislation, procedures and practices.*