

**General Council  
Working Group on Transparency  
in Government Procurement**

Original: English

## **PREPARATIONS FOR THE 1999 MINISTERIAL CONFERENCE**

### The WTO's Contribution to Transparency in Government Procurement

#### *Communication from Hungary, Korea, Singapore and the United States*

The following communication has been received from the Permanent Mission of the United States with the request that it be circulated to the General Council and the Working Group on Transparency in Government Procurement.

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Attached<sup>1</sup> please find a submission made by the United States on behalf of the delegations of Hungary, Korea and Singapore of a draft consolidated text for an agreement on transparency in government procurement. This text is the result of ongoing informal consultations with a number of delegations, drawing upon the four draft texts that have been submitted to the Working Group on Transparency in Government Procurement and the discussions that have occurred in the Working Group to date. It is submitted by the delegations of Hungary, Korea, Singapore and the United States with a view to early conclusion of a WTO agreement on transparency in government procurement and in light of paragraph 76 of the revised draft of the Ministerial Declaration and with the hope that it may provide a useful basis for further Working Group discussions.

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### **Proposal**

That Members use the attached<sup>1</sup> text as the basis for continued efforts to conclude an agreement on transparency in government procurement at the Third Ministerial Conference. In the view of the Members making this submission, this draft text reflects the tremendous progress that Members have already made in this area, building on the comprehensive study and consultations in the Working Group on Transparency in Government Procurement, and provides a strong basis for advancing these efforts. This submission is without prejudice to individual Members' views on the specific elements of the attached text.

### **Rationale**

Recent instability in global financial markets has underscored the importance of capacity building in the public sector and, in particular, of continuing to improve economic management. Members recognize that transparent and predictable procurement procedures are a critical element of

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<sup>1</sup> Reproduced in the Annex.

good economic governance, and help to build public confidence, encourage long-term business commitments, and provide a solid foundation for sustained economic growth and development.

Transparency in procurement also helps to ensure that governments obtain the best value for the money they spend, freeing up resources to address pressing economic and social needs. For example, the Ministry of Health of one Member recently reported that it was able to reduce by 20 per cent the price of medicines supplied to patients as a result of the introduction of transparent procurement procedures. All Members can clearly benefit, often on an even greater scale, from the consistent use of such procedures.

Achieving concrete results in this area at the Third Ministerial Conference provides an important opportunity for the WTO to demonstrate that it can respond promptly and flexibly to the needs and interests of all Members. In the view of the delegations making this submission, the achievement of concrete results in this area at the Ministerial Conference can make an important contribution to Members' efforts to strengthen the rules-based international trading system.

## ANNEX

### DRAFT TEXT FOR AN AGREEMENT ON TRANSPARENCY IN GOVERNMENT PROCUREMENT

*Members,*

*Recognizing* that government procurement may provide a means of achieving or supporting Governments' social, environmental and economic objectives for the betterment of their communities,

*Recognizing* that efficient, effective and appropriate government procurement enhances the management of government resources, the quality of governance and the economic performance of the community as a whole,

*Recognizing* that transparency, integrity and predictability are integral to efficient and effective government procurement and to the functioning of the multilateral trading system, and

*Desiring* to establish a multilateral framework of transparency obligations to assure all parties that government procurement shall be conducted fairly, ethically and predictably,

Hereby *agree* as follows:

#### **I. GENERAL OBJECTIVE**

This Agreement aims at ensuring transparency [, integrity and predictability] in government procurement. Each Member shall adopt and apply its procurement laws, regulations and requirements in good faith and in a manner that does not undermine the aims of this Agreement.

#### **II. NON-DISCRIMINATION IN TRANSPARENCY**

In carrying out its obligations under this Agreement, each Member shall accord to suppliers from any other Member treatment no less favorable than that which it accords to its own suppliers or to suppliers from any other country.

#### **III. SCOPE AND APPLICATION**

1. This Agreement shall apply to any law, regulation or requirement governing the procurement by governmental agencies of goods and services purchased for governmental purposes and not with a view to commercial resale nor to use in the production of goods or services for commercial sale.

[2. This Agreement

*Option 1:* [applies to all procurement [within the jurisdiction] of a Member]

*Option 2:* [does not apply to procurement by government agencies other than those of a Member's central or Federal government and the highest level of sub-central government]

*Option 3:* [applies to all procurement of a Member's central or Federal government [including departments that perform administrative, research, supervisory, advisory or regulatory functions of a governmental nature]].<sup>1</sup>]

3. This Agreement shall not apply to a procurement contract with a value of less than [the *de minimus* threshold specified in domestic procurement rules, which shall in no case be greater than]

*Option 1:* [... SDRs]

*Option 2:* [... SDRs for goods and services and ... SDRs for construction services].

3.1 Each Member shall ensure that its procuring entities do not divide intended procurements for the purposes of avoiding application of this Agreement.

#### **IV. EXCEPTIONS**

Nothing in this Agreement shall prevent any Member and its procuring entities from taking any action which that Member considers necessary for the protection of its essential security interests or any action which is necessary under GATT Article XX or GATS Article XIV. Any Member and its procuring entities may refrain from disclosing confidential business information or information that would impede law enforcement.

#### **V. TRANSPARENCY OF PROCUREMENT RULES**

1. Without prejudice to the obligations of Article X:1 of GATT and Article III:1 and 2 of GATS, each Member shall publish in a timely manner all laws, regulations, and requirements that specifically relate to government procurement and are of general application (hereinafter collectively referred to as "procurement rules") in officially designated media which are readily accessible to the public. Each Member shall publish in the same media and in a timely manner all additions and changes to its procurement rules.

[1.1 Members' procuring entities shall not be required to publish materials which could be prejudicial to the objective and non-discriminatory evaluation of bids or applications for qualification.]

2. *Option 1:* [Such procurement rules shall describe the conditions under which it is appropriate to use different procurement methods. A procuring entity's choice of procurement method shall be in accordance with those conditions.

2.1 When a procuring entity uses a procurement method in which information on the procurement is provided only to one supplier or to a limited number of suppliers who are selected in advance by the procuring entity through a selection process other than a qualification process, it may depart from the provisions of Articles VI and VII [and VIII] of this Agreement.]

*Option 2:* [In selecting a procurement method, which may include open, sole source, pre-qualification arrangements, short-listing, staged procurement and other methods of procurement, entities may select the most efficient and effective method to achieve their procurement objective, taking into account market circumstances and the costs and benefits of each procurement method.]

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<sup>1</sup> [This Agreement shall not apply to the granting of exclusive rights by a Member.]

3. Each Member shall, upon request by another Member, provide in a timely manner, information and explanations of their procurement rules, procedures, practices and policies, affecting the implementation and operation of this Agreement.

[4. Within one year from the date on which this Agreement takes effect, each Member shall notify to the WTO Committee on Transparency in Government Procurement a list of the titles of its laws, regulations and administrative rulings of general application specifically relating to government procurement [and its officially designated media for publishing information]. Such notifications shall be made in an official WTO language.]

[5. Each Member shall establish an enquiry point which shall disseminate information and provide answers to all reasonable questions from other Members and interested parties in other Members' countries or territories relating to government procurement policies and procedures. Each Member shall notify to the Committee on Transparency in Government Procurement, established in accordance with Article XI of this Agreement, the name, address and other appropriate contact information for this enquiry point.]

## **VI. TRANSPARENCY OF INFORMATION ON PROCUREMENT OPPORTUNITIES**

### Invitations to participate in the procurement process

1. Whenever a procuring entity issues an open invitation for bids, or, where appropriate, an invitation to participate in a qualification process, it shall publish the invitation in a medium of general distribution which is readily accessible to the public.

1.1 Where an invitation for bids is extended only to suppliers that the entity has pre-qualified or selected in advance, it shall ensure that the invitation is provided to all such suppliers.

2. The invitations shall include sufficient information to allow suppliers to assess their potential interest in a particular procurement process and to submit responsive bids, and shall include at least the following:

2.1 a description of the proposed procurement, including the nature of the goods and services to be procured and all relevant time-periods;

2.2 the procurement method to be used and information on any applicable preferences or other conditions for participation [, or an explicit reference to procurement rules setting out applicable preferences or other conditions for participation]; and

2.3 information on how to contact the procuring entity to obtain relevant information on the bidding or qualification process and requirements.

### Time-periods

3. Procuring entities shall disseminate such invitations in sufficient time to enable interested suppliers to obtain qualification documentation, where appropriate, and tender documentation, and to prepare and transmit responsive submissions.

3.1 Procuring entities shall ensure that such time-periods are the same for all suppliers.

- 3.2 Entities shall ensure that time-periods for the receipt of bids are determined with due consideration of the particular circumstances of the procurement, including the conditions and the complexity of the procurement.

Invitations relating to closed lists of qualified suppliers

4. Whenever a qualification process covers multiple procurements over a period of time and is not open at all times to applications from interested suppliers:

- [4.1 an invitation to apply for qualification shall be published [at least once a year] [regularly]];
- 4.2 current lists of qualified suppliers shall, on request, be made available in a timely manner; and
- 4.3 each invitation to apply for qualification shall include the date and time for receipt of applications for qualification.

Changes to information provided

5. Procuring entities shall disseminate any changes to information provided in an invitation for bids or an invitation to participate in a qualification process in the same medium in which the invitation was provided.

**VII. TRANSPARENCY IN QUALIFICATION AND BID DOCUMENTATION**

1. With regard to qualification and bid documentation, procuring entities shall provide complete documentation in a timely manner to any interested supplier, upon request, and inform participating suppliers in a timely manner of any changes to the documentation.

2. Where a procuring entity uses a qualification process, qualification documentation shall clearly set out all the criteria that the entity will use to evaluate a supplier's qualifications to participate in the procurement process.

3. Bid documentation shall specify all the information necessary for an interested supplier to prepare and submit responsive bids. Such information, if not already provided in a prior invitation to participate, shall include:

- 3.1 all specifications and criteria the entity will use to evaluate the offered goods or services; and
- 3.2 the date and time for the receipt of tenders and, where appropriate, the date and time for the opening of tenders.

4. Procuring entities shall specify explicit and objective requirements that are, to the greatest extent possible, defined in terms of required functional performance.

5. *Option 1:* [Whenever a procuring entity obtains advice or assistance in the preparation or development of specifications from a supplier [that has a potential interest in the relevant procurement, the entity shall inform suppliers participating in the procurement of such advice or assistance and] [, such supplier shall not be eligible to participate in the relevant procurement].]

*Option 2:* [When an entity obtains advice or assistance on the development of specifications from a potential supplier, the entity shall apply that advice in a non-discriminatory manner.]

## **VIII. TRANSPARENCY OF DECISIONS ON QUALIFICATION AND CONTRACT AWARDS**

1. Procuring entities shall base contract award decisions and qualification decisions solely on the criteria and other requirements that have been specified in the bid or qualification documentation or other information that has been provided to all participating suppliers.
2. Having awarded a contract, entities shall:
  - 2.1 inform suppliers that have submitted bids of the contract award decision;
  - 2.2 provide suppliers, upon request, with information as to why their bid was rejected or, where applicable, the reasons for the denial of their request to become a qualified supplier; and
  - 2.3 ensure that any debriefing provided by the entity is available to all participating suppliers.

### Other post-award information

3. Each entity shall make information on contract awards [publicly available] [available to participating suppliers] for a reasonable period of time. Such information shall include the name of the procuring entity, a description of the goods and services procured, [and] the name of the winning supplier [, and the value of the contract award].
  - [3.1 In cases where procurements are conducted under conditions set forth in Article V:2.1, the entity shall cite in such information the condition in its procurement rules allowing the use of that procurement method.]

## **IX. OTHER PROVISIONS ON INFORMATION RELATING TO PROCUREMENTS**

1. Procuring entities shall maintain [, and make available upon request by another Member,] records of tendering procedures relating to procurements subject to this Agreement. Such records shall be maintained for a period of at least three years.
  - [1.1 In cases where procurements are conducted under conditions set forth in Article V:2.1, the entity shall include in the records the condition in its procurement rules allowing the use of that procurement method.]
2. Members and procuring entities may utilise electronic or paper-based communication methods in all stages of the procurement process, provided that whatever media is chosen complies with the requirements of this Agreement. Members and procuring entities are encouraged to use, to the extent possible, electronic communications at all stages of the procurement process, provided that it complies with the requirements of this Agreement.
3. Except as provided for in Article V.4 of this Agreement, information required under this Agreement shall be provided either in an official national language or in an official WTO language.

## **X. DOMESTIC REVIEW PROCEDURES**

1. Members shall encourage the resolution of procurement disputes relating to the implementation of this Agreement, in the first instance, through consultations between the procuring entity and suppliers.
2. Each Member shall maintain fair and transparent judicial, arbitral or administrative bodies or procedures for the purpose of the prompt review of procurement practices or actions that may be inconsistent with the requirements of this Agreement, as implemented by the Member.
3. Such bodies or procedures shall be operated independently of the procuring entities and shall provide all interested parties who participated in the procurement process and are affected by the practice or action with access to review and timely decisions [that, as appropriate, can address any inconsistent practice or action].
4. Each Member shall ensure that information about domestic review bodies, procedures and decisions is publicly available. Each Member shall maintain an administrative record of the review proceeding for a three-year period.

## **XI. REVIEW AND INSTITUTIONAL PROVISIONS**

1. A Committee on Transparency in Government Procurement (hereinafter referred to as "the Committee") shall oversee the functioning of this Agreement and perform such additional functions related to government procurement as assigned by the General Council.
2. The Committee shall review the implementation of this Agreement [two] years from the date on which it enters into force.

## **XII. DISPUTE SETTLEMENT**

1. Consultations and the settlement of disputes among Members regarding the implementation [in domestic procurement rules] of this Agreement shall be in accordance with Articles XXII and XXIII of GATT 1994 [and Articles XXII and XXIII of GATS], as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement [, except as otherwise specifically provided below].
2. Panels established by the Dispute Settlement Body to examine disputes under this Agreement shall include persons qualified in the area of government procurement.
3. [With regard to any dispute relating to the implementation of this Agreement, each Member should, as appropriate, encourage its interested parties to use the domestic review procedures provided for in Article IX of this Agreement before the Member invokes the provisions of Article XII:1.] [Members recognize that there must be no further judicial remedies available under domestic law against the inconsistent measure before the provision of Article XII:1 is invoked.]
4. [If a panel or the Appellate Body concludes that a measure is inconsistent with this Agreement, it shall only make recommendations that do not affect prior contract awards.]

## **XIII. TECHNICAL COOPERATION**

1. In order to facilitate the implementation of this Agreement, Members shall provide, on request and on mutually agreed terms and conditions, technical cooperation in favour of developing and least developed country Members.



2. In order to ensure the greatest possible efficiency of such technical cooperation, the Committee on Transparency in Government Procurement shall identify specific priorities for individual Members, including with respect to the following areas:

- 2.1 development of national legislation and procedures;
- 2.2 training;
- 2.3 institution building;
- 2.4 access to information by suppliers [, including establishment of enquiry points]; and
- 2.5 the use of information technology.

3. The Committee on Transparency in Government Procurement shall develop a plan to assess and monitor assistance on an ongoing basis, and to coordinate such efforts with other relevant organizations.

#### **XIV. FINAL PROVISIONS**

##### Acceptance and entry into force

- [1. Subject to Article X of the Marrakesh Agreement Establishing the World Trade Organization, this Agreement shall enter into force on 1 January 2001 for those Members which have ratified the Agreement by that date.]

##### Reservations

2. Reservations may not be entered in respect of any of the provisions of this Agreement.

##### [Transitional provisions]

##### Operation of other agreements

- [3. Members' implementation of the provisions of this Agreement shall not affect their rights and obligations under the WTO Agreement on Government Procurement or any other international agreement covering government procurement.] [The rights and obligations of a Member under the WTO Agreement on Government Procurement or any other international agreement relating to government procurement to which a Member is a party shall prevail to the extent of any inconsistency between the rights and obligations of a Member under this Agreement and the rights and obligations of a Member under the WTO Agreement on Government Procurement or those other international agreements.]
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