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**Committee on Government Procurement  
Negotiations under Article XXIV:7 of the GPA 1994  
Comité des marchés publics  
Négociations au titre de l'article XXIV:7 de l'AMP 1994  
Comité de Contratación Pública  
Negociaciones en el marco del párrafo 7 del artículo XXIV  
del ACP 1994**

**SUGGESTED DRAFTING CHANGES TO THE 1994 AGREEMENT<sup>\*,\*\*</sup>**

**NOTE BY THE SECRETARIAT**

*Revision*

At the informal meeting of 30 May 2002, it was agreed that the note by the Secretariat on the article-by-article examination of the Agreement at the informal meetings held from February 1999 to February 2002 (Job No. 3576) would be updated to reflect the discussions and proposals made at that meeting.

The views expressed so far regarding the simplification and improvement of the Appendices are summarized on the attachment.

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\* English only.

\*\* Pursuant to the relevant Decision of the Committee on Government Procurement ([GPA/CD/5](#) (16/11/2023)), this document (informal document symbol: negs65) was derestricted on 8 November 2023.

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**Comment**

- The table of contents facilitates reference to the text and is more presentable.  
*[Hong Kong, China]*

**PREAMBLE***Preamble*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
<i>Parties to this Agreement</i> (hereinafter referred to as "Parties"),	<b>Parties to this Agreement</b> (hereinafter referred to as "Parties"),
<i>Recognizing</i> the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade;	<b>Recognizing the need for an effective multilateral framework of rights and obligations with respect to measures regarding government procurement, with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade;</b> [US – Job No. 2867]
	<b>Recognizing that laws, regulations, procedures and practices regarding government procurement should not be adopted or applied so as to afford protection to domestic suppliers, products or services or discriminate among foreign suppliers, products or services;</b> [EC; Job No. 4312]

**Comment**

- In the US proposal, "measures" is used instead of "laws, regulations, procedures and practices". The word "measures" is too general and not defined in Article 1. Therefore, it may be subject to different interpretation. The implications of the use of this term instead of the current terminology needs to be considered. The wording in the existing Agreement seems better. [Hong Kong, China]

<b>Recognizing that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement;</b>	<b>Recognizing that the transparency, integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the overall quality of governance, the economic performance of the Parties' societies, and the functioning of the multilateral trading system;</b>
	<b>Recognizing that the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party and limited to what is necessary to achieve the Parties' objectives of this Agreement;</b> [US – Job No. 2867]

**Comment**

- It is not clear how "procedural commitments" would be related to "flexibility to accommodate the specific circumstances of each Party"? [Hong Kong, China]

*Preamble*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p><i>Recognizing</i> that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers;</p>	<p><b>Recognizing the need for an effective multilateral framework for government procurement with a view to achieving greater liberalization and expansion of international trade and improving the framework for the conduct of international trade; [EC; Job No. 4312]</b></p>
<p><i>Recognizing</i> the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintain the balance of rights and obligations at the highest possible level;</p>	
<p><i>Recognizing</i> the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries;</p>	
<p><i>Desiring</i>, in accordance with paragraph 6(b) of Article IX of the Agreement on Government Procurement done on 12 April 1979, as amended on 2 February 1987, to broaden and improve the Agreement on the basis of mutual reciprocity and to expand the coverage of the Agreement to include service contracts;</p>	

**Comments**

- Clarification is needed in relation to the rationale regarding the US proposal to drop the 5<sup>th</sup> paragraph of the current preamble, which refers to special and differential treatment and the 6<sup>th</sup> paragraph, which refers to the need to broaden and improve the Agreement on the basis of mutual reciprocity. *[Canada; EC; Israel]*
- Since one of the aims of the review is to encourage and to create a situation where developing countries will be more motivated to become a Party to the Agreement, the importance of development and the needs of developing countries is an issue that deserves recognition in the preambular language. *[Israel]*
- Developing countries would prefer to see concrete provisions in the text of the Agreement rather than a general statement of interest or intent where it is unclear what is meant by such statements. It is more important to consider what the Agreement does as compared to what it says it does in the Preamble. It is necessary to make sure that the preambular paragraphs make sense and there is not necessarily a need to carry a paragraph over to the new agreement just because it is contained in the existing Agreement. However, it is true that the fact that a paragraph in the existing agreement is dropped could send a signal and that fact should be taken into account. *[US]*

*Preamble*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<i>Desiring</i> to encourage acceptance of and accession to this Agreement by governments not party to it;	<b><i>Desiring</i> to encourage acceptance of and accession to this Agreement by governments not party to it;</b>
<i>Having undertaken</i> further negotiations in pursuance of these objectives;	<b><i>Having undertaken further negotiations in pursuance of these objectives;</i></b>
Hereby <i>agree</i> as follows:	<b>Hereby <i>agree</i> as follows: [US – Job No. 2867]</b>

**General Comments**

- It is doubted whether the review of the Agreement should attempt to revamp the Preamble. The original Preamble covers a much wider perspective and adheres more closely to the fundamental principles of the WTO. In particular, the language on non-discrimination is the cornerstone of the Agreement and should not be removed or undermined. [*Hong Kong, China; EC*]
- All the issues that have been removed from the existing preamble are addressed in the text of the Agreement itself. To what extent is it necessary to make a general statement in the Preamble for every element contained in the text of the Agreement? [*US*]

**DEFINITIONS**

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>Article I Definitions</b>
	<b>For purposes of this Agreement:</b>
	<b>build-operate-transfer contracts and public works concession contracts mean any contractual arrangement the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plant, buildings, facilities or other government-owned works and under which, as consideration for a supplier's execution of a contract, an entity grants to the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of such works for the duration of the contract;</b>
	<b>[US – Job No. 1051]</b>

**Comments**

- The language in the US proposal is broad and is intended to reflect that, in some systems, works that are constructed under a BOT contract or public works concession contract are often publicly owned as soon as they exist or shortly thereafter. *[US]*
- Regarding the reference in the US definition to "public works concession contracts," details are required as to how these concessions would operate. *[Switzerland; Jordan]* Given the broad range of public works, does this term include contracts for the maintenance of public works? *[Jordan]*
- Explanatory Note with examples of BOT "Contracts and Concessions for Public Works" (Job 1043) seeks to clarify the various types of contractual modalities that would fall within the definition that has been proposed. *[US]*
- The US list of contractual modalities that would fall within the definition of BOT contracts refers to some elements of the definition of government procurement but does not constitute a comprehensive definition of government procurement. A comprehensive definition of "government procurement" does not currently exist. *[Switzerland]*

## Comments regarding whether a definition is necessary

- Although Parties may not have the same understanding of what is meant by build-operate-transfer contracts, a simple text defining such contracts is not necessarily an appropriate solution. A dilemma exists in choosing between having a simple, streamlined text and seeking to clarify the situation in a particular area. *[EC, Switzerland]*
- While there is a broad range of range of contractual arrangements and it is necessary to clearly understand what Parties' expectations are with respect to the GPA, the US paper seeks to make a first step in considering what should be included and what should be excluded from a definition of BOT contracts. *[US]*
- Among the Parties to the GPA and also outside the Agreement, there has been a significant increase in the use of BOT contracts. The use of such contracts appears to be for the purpose of replacing traditional contractual procurement. Governments that do not have sufficient

funds are increasingly using BOT contracts for the same purpose as traditional methods, although they involve different procedures, particularly in relation to compensation of the contractor. If this issue is not dealt with in the Agreement, there may be more uncertainty or a reduction in the effective coverage of the Agreement, particularly with respect to construction services. [US]

Comments regarding characteristics of concessions for public works and BOT contracts

- The US proposal focuses on determining whether the primary purpose of the contract is the acquisition or use of a public work by the government. If the primary purpose of the contract from the point of view of the government is the acquisition of a public work, it would fall within the definition of a BOT contract. In some cases, the contractor that performs a construction service may have commercial considerations in mind and there may be incidental commercial activities associated with the contract, particularly when a concession is involved. However, any private sector contractor that enters into a contract with the government will be doing so for commercial reasons. Accordingly, it is necessary to consider what the commercial activity is and who is undertaking that activity. [US]
- If the primary purpose of a contract is the acquisition of ownership by the government after a certain period of time, there is a strong presumption that such a transaction should be considered to be government procurement, even if such acquisition involves the granting of a short-term concession instead of direct payment for acquisition. [US]
- Public work contracts and BOT contracts are not the same, even if it is recognised that there are similarities. In particular, the level of economic risk that the private contractor bears differs under the two different types of contracts. [EC] The issue of the degree of risk assumed by the private contractor is of interest and should be explored in more detail. [US]
- If the underlying purpose of a contract is not the acquisition of a public work - e.g. the granting of a concession to operate a commercial facility on government property or on government land where the government does not obtain anything through such a contract - that would not be considered to be a BOT contract, nor would it be considered to be government procurement. [US]
- There may be cases in which services contracts or concessions may involve some incidental improvement of public facilities. In such cases, it is necessary to focus on the primary purpose of a contract. If the primary purpose is the construction or rehabilitation of public works, it should be considered to be a construction services contract or a BOT contract. However, if the primary purpose was to grant a concession or to award a services contract and in either case there is some incidental improvement of public facilities, such incidental improvement should not be considered to be defining in terms of how the contract should be categorized. [US]
- The term "BOT" includes a large variety of contracts. Experience has indicated that some contracts that have been labelled as BOT contracts are actually public work contracts, concessions of public works or public services concessions. [EC]
- Concrete examples are needed to determine how the proposed definition would work, under what conditions BOT contracts are used, and the conditions under which the public work is returned to the government. [Switzerland; EC; US]

See the explanatory note by the US on Job No. 1043.

- See also the communication from the United States in Job No. 6800.
- How can BOT contracts and services contracts be distinguished? The Explanatory Note (Job No.6772) indicates that there is an emphasis on the creation of fixed assets or public works. [Canada]
- There are a number of features that distinguish procurement from concessions for public works or BOT contracts. First, the concessionaire does not receive a sum of money in exchange for the building works performed but, rather, receives the right to operate the infrastructure.

Secondly, concessions or BOT contracts may involve funds being transferred from the private sector to the public sector. Thirdly, a concession or BOT contract which entails the right to operate infrastructure is, in substance, a transfer or delegation of power from the entity that would have ordinarily carried out the activity. These differences mean that it is necessary to separate the concept of procurement from concessions and BOT contracts. Further, the issue of coverage of concessions and BOT contracts relates more to the issue of the expansion of the coverage of the Agreement and is not merely a clarification of the existing text. *[EC]*

- Contracts other than concessions for public works, including procurement contracts, may entail a delegation of powers that entities would ordinarily possess. *[Canada]*
- The awarding of public works contracts usually entails delegations of power over long periods of time. During such periods, the private concessionaire operates the infrastructure in the place of the public authority. *[EC]*
- The GPA is not concerned with the content and terms of procurement contracts but rather with the procurement process. However, the distinctions made by the EC such as those relating to the allocation of risk or financing, concern more the content of procurement of contracts and the allocation of risk between the government entity/buyer and the private sector supplier rather than the procurement process. Contracts where the government essentially acquires a public construction for its own use and its own purposes has the characteristics of procurement within the expression "procurement by any contractual means" in the GPA. *[US]*
- While the comments that have been made relate to the content of the contract, they are relevant to the process adopted by the public authority in choosing a private contractor. *[EC]*
- The proposal suggests that management contracts and the sale of government shares in public companies are covered under the Agreement. However, neither is mentioned in the definition of "build-operate-transfer". *[Jordan]*
- Paragraph 11 of the Explanatory Note in Job No. 1043 indicates that contracts for the management and operation of facilities are a form of "PPP" or public-private partnership that is separate from BOT. Are contracts for the management and operation of facilities considered to be services contracts within the context of the GPA? *[Canada]*.
- Such management and operation contracts would not be BOT contracts or construction services contracts. They are management contracts which entail the provision of services. *[US]*

#### Other comments

- What would the situation be when the government contracts, for example, for cafeteria services that are provided on government land? *[Canada]* Such contracts are services contracts and do not involve the construction of any public works, facilities etc. Therefore, they are unlikely to be categorised as BOT contracts. *[US]*
- In cases whether the central or local government procures land or buildings but nothing more, would the GPA apply? *[Japan]*
- In cases where the central or local government provides subsidies for suppliers but nothing is procured from suppliers, would the GPA apply? *[Japan]* It is important to avoid defining BOT contracts too broadly in the GPA so that it would include transactions that are not government procurement, such as subsidies. *[US]*
- There are an increasing number of variations of BOT contracts and it is likely that more varieties will emerge in the future. Since how and to what extent the government is involved in BOT projects depends on the type of BOT, there is need for more discussion on what types of BOT are appropriately treated as government procurement. It is unclear whether future forms of BOT contracts would be caught by the definition contained in the US proposal. *[Japan]*



- The US definition attempts to clarify the meaning of the term "BOT" in a way that ensures that it is not too wide. [US]
- Is the scope of procurements covered by the GPA likely to expand in accordance with the definition of the BOT contracts and the public works concession contracts under the U.S. proposal? [**Country**]
- Are contracts subject to the GPA in the cases where: projects are conducted independently in terms of financing (i.e. all project costs are fully covered by fees charged by the private sector contractor and paid by the users of the facilities); and facilities are transferred to public entities without compensation? In the affirmative, how should the value of the contract be determined [Japan; Job No. 5474]
- See also the comments on the proposed amendments to Article I:2 on Scope and Coverage.

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>international standard means a standard that is developed in a manner consistent with the decisions of the WTO Committee on Technical Barriers to Trade, as elaborated in "Decisions and Recommendations adopted by the Committee since 1 January 1995, "GB/TBT/1/Rev7, 28 November 2000, Section IX ("Decision of the Committee on Principles for the Development of International Standard, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement").</b></p> <p><b>[US – Job No. 1051]</b></p>

- Document GB/TBT/1/Rev.7 contains guidelines for entities or institutes that are responsible for developing international standards. There is a risk that international standards that are being developed do not conform to that document. How would procuring entities know which international standards conform? [Japan]
- The GPA committee is not the body to decide international standards. However, some reference point is needed and the most logical one is the TBT document to which reference has been made. [US]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>construction services contract means a contract that has as its objective the realization by whatever means of civil or building works, in the sense of Division 51 of the Central Product Classification (CPC); [US – Job No. 2867]</b>
	<b>country or countries include any separate customs territory Party to this Agreement. In the case of a separate customs territory Party to this Agreement, where an expression in this Agreement is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified; [US – Job No. 2867]</b>
	<b>government is deemed to include the competent authorities of the European Communities; [US – Job No. 2867]</b>
	<b>in writing or written means any expression of information in words, numbers or other symbols, including electronic expressions, that can be read, reproduced, and stored; [US – Job No. 2867]</b>

#### Comments

- The definition of "in writing" or "written" is contained in a proposed revision to the US Federal Acquisition Regulation (FAR), which was published in the US Federal Register on 1 November 2000. As of 30 March 2001, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council continue to review this regulatory proposal. The United States reserves its right to modify the language of this submission, based on ongoing internal consultations. *[US]*
- We support the definition of "in writing or written" as it recognizes electronic expressions, that can be read, reproduced, and stored. *[Hong Kong, China]*

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AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>limited tendering procedures are those procedures that the entity makes no public invitation for participation in the tendering exercise; [Hong Kong, China]</b>

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>procurement means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or resale</b> [US – Job No. 1051]

#### Comments concerning a definition of government procurement

- The proposed definition of procurement is based upon the Agreement's existing definition of scope and definitions of government procurement contained in the GATT and the GATS. It is considered useful to define "procurement" in the GPA so that all Parties understand their specific commitments. [US]
- There is a risk that if a definition of "government procurement" is included in the GPA, the scope and coverage of the current GPA offers could be expanded or, at least, that impression could be conveyed to outsiders. [EC]
- Including a definition in the GPA would be useful to non-Parties who may be considering accession in so far as it might assist them to understand what the major commitments under the Agreement would be. [US]
- This Article should contain a definition of the term "government procurement" which focuses on the status of the end-users rather than on the purchasing agent. [Hong Kong, China] Some specific suggestions with respect to this comment should be provided. [US; Canada]
- The proposed US text uses four terms, seemingly interchangeably – namely, "contract", "procurement", "procurement contract" and "intended procurement". "Procurement" is the process of procurement which results in one or more contracts being entered into. Therefore, the term "procurement" should be used in relation to the procurement process. In turn, "contract" should be used in relation to the outcome of the process of procurement. It is unclear how the term "measures" fits in relation to the other terms that have been referred to. [Canada]
- Further examination may be needed of the EC's decision to withdraw its proposed definition of "government procurement." It may be necessary to determine whether the EC's concerns are addressed in the definition of "government procurement" that has been proposed by the US. [US]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>measure means any law, regulation, procedure, requirement, administrative guidance or practice</b> [US – Job No. 1051]

- The proposed definition of "measure" is deliberately intended to be broad. [US]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>procuring entity means an entity covered under Annexes 1, 2 and 3 of Appendix I of each Party;</b> [US – Job No. 2867]

**Comment**

- If "procuring entity" is a defined term, it should be consistently used throughout the text instead of using the term "entity" or "entities" elsewhere in the text. *[Hong Kong, China]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>services includes construction services contracts, unless otherwise specified; [US – Job No. 2867]</b>

**Comments**

- Clarification is sought as to why "services" has been defined to include construction service contracts "unless otherwise specified." Where should reference be made to determine whether something has been "otherwise specified" as per this definition? *[Japan]*
- Most of the Annexes already contain the definition of "services" that has been included in the definition that has been proposed by the US. In the interests of consolidating the Agreement and making it easier to understand, the definition has been included in the proposed article on definitions that it can be referred to when interpreting the Agreement and the Annexes. *[US]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	supplier means a natural person or enterprise that has provided or could provide goods or services in response to a procuring entity's call for tenders; and [US – Job No. 2867]
	technical specification means a tendering requirement that lays down the characteristic of goods to be procured or their related processes and production methods or the characteristics of services to be procured or their related operating methods, including any applicable administrative provisions. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a good, process, or production or operating method. [US – Job No. 2867]

#### General comments on a new article in the Agreement on definitions

- An article containing definitions may be useful to ensure that all Parties understand the terms that are being used in making commitments *vis-à-vis* other Parties. [US]
- We have no strong view on whether to have an article on definitions or to define terms individually by means of footnotes or otherwise. However it is done, the terms to be defined should be kept to the minimum necessary, e.g. confining definitions to technical terms or terms having a meaning other than the literal one. In this regard, we have doubts on whether "construction services contract", "procuring entity" and "supplier" need to be defined. [Hong Kong, China]

**ARTICLE I: SCOPE AND COVERAGE***Article I:1**Scope and Coverage*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>1. This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I.</p> <p><u>Footnote 1:</u></p> <p>1. For each Party, Appendix I is divided into five Annexes:</p> <ul style="list-style-type: none"> <li>- Annex 1 contains central government entities.</li> <li>- Annex 2 contains sub-central government entities.</li> <li>- Annex 3 contains all other entities that procure in accordance with the provisions of this Agreement.</li> <li>- Annex 4 specifies services, whether listed positively or negatively, covered by this Agreement.</li> <li>- Annex 5 specifies covered construction services.</li> </ul> <p>Relevant thresholds are specified in each Party's Annexes.</p>	<p>1. This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I, except procurements with a view to commercial resale or with a view to use in the production of goods or supply of services for commercial sale. [Chinese Taipei – Job No. 3193]</p>

**Comments**

- Would the elimination of the footnote listing the Annexes in Appendix I and its replacement by the words "as specified in Appendix I", imply a different structure for Appendix I? [Canada]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p>1. This Agreement applies to any measure specifically governing an entity's procurement, by any contractual means, including purchase; lease; rental or hire purchase, with or without an option to buy; and build-operate-transfer and concessions for public works contracts. [US – Job No. 1051]</p>

### Comments on "entity"

- The definition of "procurement" in the proposed definition section is a broad one that is not specifically related to the scope of the Agreement. In particular, it defines procurement regardless of whether or not it is covered under the Agreement. *[US]*
- The proposed Article I refers to an "entity" but not to Appendix I. "Entity" is defined in the proposed definitions section as an entity listed in Appendix I. Therefore, Article I would effectively refer to Appendix I through the reference to "entity." The objective of this change is to simplify language through the incorporation of some concepts into the proposed definitions section. *[US]*
- Article I refers to "entity" whereas the definition of "procurement" refers to the term "government" which, in turn, is defined to mean central and local government entities. The entities listed in Annex 3 of Appendix I are not government agencies and, therefore, do not fall within the definition of "government." *[Japan]*

### Comments on "any measure"

- Paragraph 1(a) of the US proposal seems to suggest that the scope of the Agreement should be both measures-based and procurement-based. Perhaps a measures-based approach is more consistent with other trade obligations. Will the Agreement apply to "measures" and to "procurement"? The Agreement should apply to one or the other. *[Canada]*
- It is understood that the term "measure" includes "laws, regulations, procedures or practices" and that "practices" can mean almost any decision that a government takes during a procurement process. For example, a contract award decision would be a "practice" as well as a "measure" that would be governed by the GPA. *[US]*
- Given the explanation provided in relation to the meaning of the word "measure" in the US proposal, it may be preferable to include a definition of that term referring to "laws, regulations, procedures or practices" in the proposed Article containing definitions since the word "measure" may be defined more broadly in other jurisdictions. *[Hong Kong, China]*
- Do some Parties consider that some "measures" that have not been included in the list currently contained in the GPA should not be made subject to the GPA? *[US]*
- What kind of "measures" does the US have in mind? In addition to the measures that are covered under the existing Agreement, does the US proposal seek to cover any additional measures? If so, such an approach might affect the mutually agreed coverage under the existing Agreement. *[Japan]*
- The word "measure" has often been used in many WTO agreements. The term "measure" is much broader than "law, regulation, procedure or practice". If this term is to be used, clarification is needed as to whether a definition similar to the word "measure" in Article XXVIII(a) of the GATS is preferred? *[Hong Kong, China]*
- Why is there no reference to procuring entities specified in Appendix I in paragraph 1 of it's the US proposal given that there is such a reference in paragraph 2 of the proposal? *[Japan]*

### Comments on GATT and GATS definitions

- A reference to definitions contained in the GATT and GATS is necessary to ensure that the inclusion of a definition of "government procurement" in the GPA does not lead to a situation in which government procurement is not covered by any WTO rules. *[EC]*
- In terms of covered procurement, it is necessary to avoid the possibility of there being any gaps between what is covered by GATT Article III:8 and GATS Article XIII and what is covered under the GPA. *[EC; US]*



- What are the potential gaps between the GPA on the one hand and the GATT and GATS on the other? *[Switzerland]*
- Consideration should be given to whether the current definitions in the GATT and the GATS are adequate or whether a further definition of "government procurement" should be developed in the Agreement. *[US]*
- If a definition of "government procurement" is to be developed, such a definition should be included in a multilateral instrument otherwise there is a risk that there will be two definitions of government procurement - one in the exceptions to the GATT and the GATS and the other in the GPA. *[EC]*
- Is it necessary to cover procurement excluded from the GATT and the GATS? *[Canada]*
- What is covered in the GPA Annexes is within the framework of the general exceptions to the GATT and GATS, otherwise there would be no point in coverage under the GPA. *[EC]*
- It is necessary to look at the significance of the term "commercial sale" in the definition in GATT Article III:8. The term "commercial" is intended to narrow the exception to the definition of government procurement.

#### **Other Comments**

- It is unclear whether the reference to build-operate-transfer contracts in this Article is merely a clarification of the existing article. The proposal could be considered to be an extension of coverage. *[EC]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities 1 covered by this Agreement, as specified in Appendix I.2</b></p> <p><b>Note 1: For the purpose of this Agreement, "entities" are understood to exclude those entities for which government control or influence has been effectively eliminated through privatization. [Korea, Job No.?? ?]</b></p>
	<p><b>Note 2: For each Party Appendix I is divided into five Annexes:</b></p> <ul style="list-style-type: none"> <li>- <b>Annex 1 contains central government entities.</b></li> <li>- <b>Annex 2 contains sub-central government entities.</b></li> <li>- <b>Annex 3 contains all other entities that procure in accordance with the provisions of this Agreement.</b></li> <li>- <b>Annex 4 specifies services, whether listed positively or negatively, covered by this Agreement.</b></li> <li>- <b>Annex 5 specifies covered construction services.</b></li> </ul> <p><b>Relevant thresholds are specified in each Party's Annexes.</b></p>

- With respect to Korea's proposed amendment to Articles I and XXIV:6(b) of the GPA, Korea considers that applying the GPA to privatized entities is neither legally consistent nor practically desirable. Therefore, Korea's proposed amendment seeks to exclude privatized entities from the scope of the GPA. The proposal involves the insertion of a new note – Note 1 – to Article I in addition to an amendment of Article XXIV:6(b). *[Korea]*
- With respect to the use of the term "eliminated through privatization" in the proposed Note1, guidance is needed as to what is meant by "privatization". *[US; EC]*
- Should "privatization" be defined in terms of the level of competition in the area in which the privatized entity will be operating? Alternatively, what other criteria would apply? *[Switzerland]*
- The relevant Chinese Taipei law states that if the government owns less than 50% of a formerly government-owned enterprise, the enterprise is considered to be privatized. *[Chinese Taipei]*

*Article I**Scope and Coverage*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>2. For each Party, Appendix I shall be divided into five Annexes:</b></p> <p>(a) <b>Annex 1 specifies the central government entities whose procurement is covered by this Agreement;</b></p> <p>(b) <b>Annex 2 specifies the sub-central government entities whose procurement is covered by this Agreement;</b></p> <p>(c) <b>Annex 3 specifies all other entities whose procurement is covered by this Agreement;</b></p> <p>(d) <b>Annex 4 specifies the services covered by this Agreement; and</b></p> <p>(e) <b>Annex 5 specifies the construction services covered by this Agreement.</b></p> <p><b>[US – Job No. 2867]</b></p>

**Comments**

- Paragraphs 1(a) and (b) of the US proposal are considered to be cumulative and together constitute a definition of government procurement, paragraph (a) addressing measures and paragraph (b) addressing the entities that take those measures. [US]

## Article I:2

## Scope and Coverage

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
2. This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.	(see definition of procurement under "definitions").

## Comments on reference to BOT contracts

- A reference to forms of procurement under new phenomena (partnerships between private and public sectors, multiplication of "Build Operate Transfer" (BOT) operations, joint ventures) should be included in this paragraph with an exact definition of these terms given in the text of the Agreement or in footnotes. [*Korea*]
- To what extent should public procurement contracts that are based upon public/private partnerships be covered by the GPA? [*Japan*]
- The note by the Secretariat on "Concessions and BOT Contracts" ([JOB\(00\)/5657](#)) points out that there may be a relationship between BOT-type contracts and the definition of government procurement in the GATT and the GATS. [*US*]
- The existing Agreement refers to procurement by "any contractual means". Therefore, the question arises as to whether a build-operate-transfer contract constitutes a "contractual means". The US considers that it does. Therefore, the next question is whether such contracts constitute procurement. The US tends to the view that it does. There are many different types of contractual relationships that governments have with the private sector beyond build-operate-transfer contracts and including other types of procurement contracts. For example, there are a series of contracts including BOT, BOOT and BOO contracts, that are contractual means, some of which do not involve ownership of any property by the government and some of which may be very similar to licensing or other types of operations. The reference to build-operate-transfer contracts does not necessarily mean that those types of contractual means are considered to be procurement. The reference to BOT contracts is a fairly narrow range of contractual means and there is a much broader range of government activities that would not be covered by that term. [*United States*]
- Reservations exist regarding the extension of coverage of the Agreement to BOT contracts because it is unclear whether such contracts can be regarded as government procurement. They are a hybrid of "concessions" (whereby the government gives an exclusive right to an entity to operate a service) and "procurement"; and BOT contracts often last for many years and may involve some kind of franchise arrangement. Concern exists regarding the implications of this extension as parties may later request further extension of the Agreement to cover other concessions such as franchise and licensing agreements which are currently not covered under the GPA. [*Hong Kong China; EC*]
- See also the US' communication on Job No. 6800 and the proposed definition of BOT in the proposed new article on definitions.
- Why is there a need to insert BOT as a form of contractual means? The US explanatory note has not explained the rationale for including BOT contracts. [*Hong Kong, China*]
- The illustrative list of contractual means contained in the current Article I:2 of the GPA - namely, purchase, lease, rental or hire purchase - refers to transactions of a general nature applicable to procurement of any types of goods or services. However, the revised definition of BOT contracts indicates that it now refers to particular types of works contracts. Is such a restricted application possible? [*Hong Kong, China*]

- There is a grey area between what constitutes a clarification of the existing text and what amounts to an addition to the existing text. [EC]
- The issue of whether or not BOT contracts should be covered under the GPA is relevant to the issue of coverage and should be preceded by identification and clarification of the relevant issues in order to come to a common understanding as to what should be covered by the GPA. [EC]
- Does the US proposal regarding BOT contracts represent a new approach to the issue of coverage? [Canada] The question posed by Canada is a broad one and does not specifically relate to BOT contracts but is more related to the issue of definitions and how the GPA relates to the WTO system as a whole. [US]
- It is unclear whether proposed subparagraph 1(b) is needed since it extends the definition contained in the GATT, which is essentially captured in proposed subparagraph (a). [EC]

## Article I:3, 4

## Scope and Coverage

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>3. Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply <i>mutatis mutandis</i> to such requirements.</p>	<p><b>3. Where procuring entities, in the context of procurement covered by this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III of this Agreement shall apply <i>mutatis mutandis</i> to such requirements.</b> [US – Job No. 2867]</p>
<p>4. This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.</p>	<p><b>4. This Agreement applies to any procurement contract for which the value of the contract is estimated, at the time of publication of the notice of intended procurement, in accordance with Article V of this Agreement, to equal or exceed the relevant threshold specified in Appendix I. The value of a contract shall be estimated in accordance with the provisions of paragraph 5 of this Article.</b> [US – Job No. 2867]</p>
	<p><b>4. Without prejudice to Article XXIII, this Agreement applies to any procurement contract:</b></p> <ul style="list-style-type: none"> <li><b>(a) of central government entities of a value of not less than</b> <ul style="list-style-type: none"> <li>- 130,000 SDR for contracts for supply of and services</li> <li>- 5,000,000 SDR for contracts for public works</li> </ul> </li> <li><b>(b) of sub-central government entities of a value of not less than</b> <ul style="list-style-type: none"> <li>- 200,000 SDR for contracts for supply of and services</li> <li>- 5,000,000 SDR for contracts for public works</li> </ul> </li> <li><b>(c) of entities according to Appendix I, Annex 3 of a value of not less than</b> <ul style="list-style-type: none"> <li>- 400,000 SDR for contracts for supply of products and services</li> <li>- 5,000,000 SDR for contracts for public works</li> </ul> </li> </ul> <p>[EC – <a href="#">GPA/W/87</a>]</p>

**Comments on common thresholds**

- It would be premature to amend the approach in the existing text without consideration of the broader range of issues that are involved with respect to coverage and elimination of discriminatory provisions. *[Canada]*
- Harmonization of thresholds should not be stipulated in the Agreement. It would be inappropriate to include harmonized thresholds in the main body of the Agreement in view of the balance of commitments in Appendix I between Parties in relation to the coverage of entities, goods and services as well as thresholds. *[Japan; Korea]* Nevertheless, the introduction of common thresholds in the text of the Agreement may be acceptable at a later stage in the light of the outcome of the work regarding the elimination of discriminatory measures. *[Korea]*
- While harmonization of thresholds furthers the Committee's aim to streamline the Agreement and may enhance the clarity of the Agreement, it does affect the balance of concessions contained in the Appendices and cannot be dealt with simply through amendments to the text. *[US]*
- The adoption of common thresholds should not inhibit Members' ability to tailor their offers to maintain a balance of interests. *[Canada]*
- Common thresholds would make the Agreement more readable and understandable by third parties. *[EC]*
- Although there may be a link between thresholds and coverage, there is not necessarily a clear effect on the balance of offers that have been negotiated because offers relate more to the entities that are covered and not necessarily to the thresholds. *[EC]*
- The adoption of common thresholds is consistent with attempts to expand coverage of the Agreement in the future and to make the Agreement more user-friendly. *[EC]*

**Other comments**

- "Public works" is merely another way of naming "construction services". There is no substantive difference between the terms used in the proposal. *[EC in response to clarification sought by Japan and Canada]*

**ARTICLE II: VALUATION OF CONTRACTS***Article II:1**Valuation of Contracts*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
1. The following provisions shall apply in determining the value of contracts <sup>2</sup> for purposes of implementing this Agreement.	<b>5. In determining whether a contract is covered under this Agreement, procuring entities shall apply the following provisions: [US – Job No. 2867]</b>

**Drafting suggestion**

- It is too broad to say that the provisions of paragraph 5 of the US proposal shall apply in determining whether a contract is covered under the Agreement. There are other elements which affect whether or not a contract is covered. It is for the purpose of determining the value of a contract that one should apply paragraph 5. Hence, it is suggested that the chapeau should be reworded as follows: "In determining the value of a contract for the purpose of ascertaining whether that contract is covered under this Agreement, procuring entities shall apply the following provisions." *[Hong Kong, China]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>This Agreement shall apply to any procurement contract for which the contract value is estimated to equal or exceed the threshold at the time of publication of the notice in accordance with Article IX or, in cases where such notice is not required, at the moment at which the procuring entity commences the procurement procedure. [EC; Job No. 4312]</b>

**Comments**

- Clarification is sought as to why reference is made to a "moment" in time in relation to cases where an Article IX notice is not required (i.e. in cases of limited tendering) since the Agreement only requires the publication of a contract award notice in those cases. At the time of publication of such a notice, the value of the contract is already known. Further, why has reference been made to the "moment at which the procuring entity commences the procurement procedure." *[Canada]*
- The intention underlying the EC proposal was to cover limited tendering. There was a concern that limited tendering for which there is no publication might not be covered by the Agreement. *[EC]*
- Why is there a reference to "equal or exceed" rather than just to "exceed"? *[Jordan]*
- Given that the objective of the review of the Agreement is to extend coverage, a reference to "exceed" would limit coverage rather than extend it although in practice it is unclear whether a reference to "equal or exceed" rather than just "exceed" would not make a significant difference. *[EC]*



AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>Footnote 2:</p> <p><sup>2</sup> This Agreement shall apply to any procurement contract for which the contract value is estimated to equal or exceed the threshold at the time of publication of the notice in accordance with Article IX.</p>	<p><sup>2</sup> <b>This Agreement shall apply to any procurement contract for which the contract value is estimated to equal or exceed the threshold at the time of the publication of the notice in accordance with Article IX or at the time of first contact with the supplier in the case of limited tendering. [Japan]</b></p>

#### Comment

- What is meant by the term "first contact" and what is the rationale for the approach proposed by Japan in the case of limited tendering? *[Canada]*

## Article II:2, 3

## Valuation of Contracts

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
2. Valuation shall take into account all forms of remuneration, including any premiums, fees, commissions and interest receivable.	<b>2. Valuation shall take into account all forms of remuneration, including any premiums, fees, commissions and interest to be paid.</b> <b>[Chinese Taipei – Job No. 3193]</b>
	<b>(b) In calculating the value of a contract, an entity shall take into account all forms of remuneration, including premiums, fees, commissions, interest, other revenue streams provided for under the contract and the value of the maximum permissible options provided for by the contract.</b> <b>[US – Job No. 2867]</b>
3. The selection of the valuation method by the entity shall not be used, nor shall any procurement requirement be divided, with the intention of avoiding the application of this Agreement.	<b>(a) Procuring entities shall not divide an intended procurement into separate contracts or otherwise use a particular method for estimating the value of a contract for the purpose of avoiding the application of this Agreement.</b> <b>[US – Job No. 2867]</b>
	<b>Procuring entities shall neither divide a procurement nor select or use a valuation method in order to circumvent the application of the Agreement.</b> <b>[EC; Job No. 4312]</b>

## Comments

- Do Parties include "value-added" tax in calculating the contract value? Should the bidder also include value-added tax in its bid? *[Chinese Taipei]*
- Further consideration is needed in relation to the issue of whether value-added tax should be included in determining the contract value. *[US]*
- The meaning of "other revenue streams provided for under the contract" in paragraph 2(b) is not clear. The meanings of "intention" and "purpose" seem interchangeable and both imply a subjective element. Clarification is sought from the US as to why it has been proposed to replace "with the intention of" with "for the purpose of". *[Hong Kong, China]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>Valuation shall take into account all forms of remuneration, including any premiums, fees, commissions, interest and, where the procurement provides for the possibility of option clauses, the total value of the maximum permissible procurement, inclusive of optional purchases. the calculation of the value of framework agreements or similar arrangements shall be based on the maximum estimated value of all the contracts envisaged for the total term of the framework agreement or arrangement.</b>  <b>[EC; Job No. 4312]</b></p>
	<p><b>Procuring entities shall neither divide a procurement nor select or use a valuation method in order to circumvent the application of the Agreement.</b>  <b>[EC; Job No. 4312]</b></p>

#### Comments

- It is important to incorporate provisions on valuations that relate to the many new modalities of procurement that are being increasingly used by the GPA Parties and have been discussed extensively in the Committee. At the same time, these provisions must be as simple as possible, understandable, and flexible enough to apply to a wide range of emerging procurement modalities. [US]

## Article II:4

## Valuation of Contracts

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
4. If an individual requirement for a procurement results in the award of more than one contract, or in contracts being awarded in separate parts, the basis for valuation shall be either:	<p><b>(c) Except as provided for in subparagraph (d) of this Paragraph, a procurement that is conducted in multiple parts, that is for an indefinite quantity, that may result in the award of contracts to more than one supplier, or that may result in the awarding of recurring contracts to a single supplier, shall be valued at the total estimated cost of the procurement over its entire duration.</b></p> <p><b>[US – Job No. 1051]</b></p>

## Comments

- In relation to construction projects that can be regarded as one procurement but may be procured pursuant to more than two contracts spanning several years, it may be impossible to estimate the value of the contract at the point when the first contract is entered into. Accordingly, the current text contained in paragraphs 4(a) and (b) is preferable to the language proposed by the US. *[Japan]*
- Article II:4 of the GPA refers to an "individual requirement" being awarded in separate parts whereas the US draft talks about "contracts". It is fair to take into account the value of recurring contracts if an individual requirement is awarded in separate parts. However, the scope of the word "contracts" in the US proposal is so wide that it can encompass contracts for different requirements. Why should contracts that are awarded to more than one supplier be valued at the total estimated value if these contracts are for different requirements or in relation to different subject-matters? *[Hong Kong, China]*
- The use of the word "procurement" would appear to be more appropriate than the term "contract" since valuation takes place before the procurement process commences. It is impractical to revisit the results of the valuation exercise once the procurement process has been completed and contracts have been issued. In order to ensure consistency with the current wording of the Agreement and in light of the fact that a contract will not actually exist at the time when the valuation takes place, except in the case of limited tendering, the term "procurements" rather than "contracts" should be used. *[Canada]*
- How would the proposed provision apply to low-value contracts, for example those entered into by small local authorities? Under such contracts, even over a period of several years, the threshold values stipulated in the Agreement may not be exceeded. *[Norway; Canada]*
- It might be possible to make a determination that the total estimated value of small-value contracts would not exceed the GPA thresholds. *[US]*
- In response to a suggestion for further simplification of paragraph (c) *[Canada]*, there may be some situations where more detail is necessary, for example in the case of multiple award or framework contracts. *[US; EC]*
- Japan is concerned about the definition of, "a (i.e. single) procurement", which is not clear, especially as the U.S. proposal provides that "a procurement..... shall be valued at the total estimated cost of the procurement over its entire duration". Concrete examples illustrating our concerns are as follows: With respect to the construction of a facility, there are cases where a considerable portion of the work for this facility is expected to be procured pursuant

to another contract in the future, at an interval of more than two or three years. Thus, the contract amount for this portion (to be procured in the future) is difficult to estimate at the time of the initial contract. (This case may arise when a part of the facility can perform its function to some extent.) If "a procurement" refers to "procurement of a whole facility", procuring entities would face some practical difficulties. Regarding the timing of the future procurement of the portion mentioned, and where the estimated contract amount is small (less than the threshold), if "a procurement" means "procurement of a whole facility", then the procurement costs should be valued according to the amount totalled in past contracts. Such contracts with a small amount of procurement would fall under the coverage of the current GPA, thus imposing a heavy administrative burden on procurement entities. Certain types of maintenance and repair services (painting, planting, corrosion/deterioration inspection, etc.) are often procured in adjacent areas, one after another, over the years, or are repeatedly executed in the same area at an interval of several years. If these types of arrangements correspond to "a procurement that is conducted in multiple parts", as mentioned in the U.S. proposals, similar difficulties will arise. [*Japan; Job No. 5474*]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(a) the actual value of similar recurring contracts concluded over the previous fiscal year or 12 months adjusted, where possible, for anticipated changes in quantity and value over the subsequent 12 months; or	
(b) the estimated value of recurring contracts in the fiscal year or 12 months subsequent to the initial contract.	
	<p><b>(d) Contracts for which the duration is not known shall be valued at the actual value of similar previous contracts awarded over the most recent two-year period, adjusting for any anticipated changes in the quantity and prices of the goods or services to be supplied.</b>  <b>[US – Job No. 2867]</b></p>

### Comments

- What is meant by the reference in the current Agreement to a 12 month period? If the final value of a contract which runs for more than one year, for example, a road maintenance contract, is unknown until the works have been completed, should the basis of coverage be the estimated value for one year or the value for the full period of the contract? Should the contract be broken down into one-year periods because of the reference to 12 months in subparagraphs (a) and (b)? *[Hong Kong, China]*

In relation to paragraph 5(d) of the US proposal:

- Paragraph (d) of the US proposal is unclear. It appears to narrow the application of subparagraphs (a) – (c). Is such a provision necessary? *[Canada]*
- This valuation method is problematic if there are no "previous contracts awarded over the most recent two-year period". *[Hong Kong, China]*
- The proposed subparagraph (d) refers to similar previous contracts that have been awarded. Therefore, there would not necessarily be cases where valuation was based on a contract that was identical to the current contract. An entity may need to identify a contract that was previously awarded that was similar in nature and use that as a basis for valuation. *[US]*
- The GPA covers a wide variety of activities. Therefore, it is necessary to strike the right balance between specificity and breadth without describing valuation procedures for each and every type of contract covered by the Agreement. *[US]*
- See also the Explanatory Notes in Job No. 6772, page 3.
- The deletion of sub-paragraphs (a) and (b) would cause problems in some types of procurement. For instance with respect to the construction of a large-scale facility when a half or considerable portion of the works is to be procured at an interval of more than two years. This case may arise where part of the facility fulfils its function to some extent and the entity will procure the remaining works when the demand increases. Under Article II of the current GPA, if separate contracts for one procurement have been awarded at long intervals (more than 12 months, etc.), there are practical reasons that these contracts could not be put together into one contract, and that such a case is not regarded as division of contracts with the intention of avoiding the application of the GPA. It is very difficult for procuring entities to

estimate the contract value of the portion executed in the distant future even though the works of this portion of the contract are also for the same facility. [Japan]

- In the US proposal, the value of the remote past contract(s) should be added together with small contracts (less than the threshold) for the same facility to be executed in future. If we apply this rule, such small contracts become subject to the GPA. This would impose too much of an administrative burden on procurement entities, as compared with the provisions of Article II of the current GPA. Other examples are certain types of maintenance and repair services (painting, planting, corrosion/deterioration inspection, etc.). These services are often procured in adjacent areas one after another over years or repeatedly procured in the same area at an interval of some years. Such services contracts should be regarded as different procurements with considerably different timings of the contract. However, the US proposal, which does not contain provisions like 4(a) and (b) of Article II of the current GPA, causes concern that the basis of judgement on the period, in which the contract value should be added together, would become unclear with regard to these kinds of procurements. [Japan]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>In the case of procurement which is regular in nature or which is intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:</b></p> <p><b>(i) either the total actual value of successive contracts with similar characteristics awarded during the preceding twelve months or financial year, adjusted where possible to take account of anticipated changes in quantity or value over the subsequent twelve months following the initial contracts; or</b></p>
	<p><b>(ii) the total estimated value of successive contracts awarded during the twelve months following the first delivery, or during the financial year if that is longer than twelve months.</b></p>
	<p><b>Where a proposed procurement may result in contracts being awarded at the same time in the form of separate parts, account must be taken of the total estimated value of all such parts.</b> [EC; Job 4312]</p>

## Article II:5, 6

## Valuation of Contracts

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
5. In cases of contracts for the lease, rental or hire purchase of products or services, or in the case of contracts which do not specify a total price, the basis for valuation shall be:	
(a) in the case of fixed-term contracts, where their term is 12 months or less, the total contract value for their duration, or, where their term exceeds 12 months, their total value including the estimated residual value;	(a) <b>in the case of fixed-term contracts, where their term is 12 months or less, the total or estimated total contract value for their duration, or, where their term exceeds 12 months, their total or estimated total value;</b> [Chinese Taipei – Job No. 3193]
(b) in the case of contracts for an indefinite period, the monthly instalment multiplied by 48.	(b) <b>in the case of contracts for an indefinite period, the monthly instalment or estimated value of monthly procurement multiplied by 48.</b> [Chinese Taipei – Job No. 3193]
If there is any doubt, the second basis for valuation, namely (b), is to be used.	
6. In cases where an intended procurement specifies the need for option clauses, the basis for valuation shall be the total value of the maximum permissible procurement, inclusive of optional purchases.	



**ARTICLE III: NATIONAL TREATMENT AND NON-DISCRIMINATION***Article III**National Treatment and Non-discrimination*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
<i>Article III</i>  <i>National Treatment and Non-discrimination</i>	<b><i>Article III</i></b>  <b><i>Principal Obligations</i></b>
	<u>new paragraph</u>  <b>Each Party shall ensure that the procurement of its covered entities takes place in a transparent, reasonable and non-discriminatory manner, treating any supplier of any Party equally, and ensuring the principle of open and effective competition.</b> <b>[EC – <a href="#">GPA/W/87</a>]</b>

**Comments**

- The thrust of the proposed obligations appear to be inconsistent with the contents of Appendix I. Would the proposed provision still allow for the reciprocity provisions in Annex 1? The existing provisions of Article III should be fully implemented before introducing new obligations. *[Hong Kong, China]*
- It is important to include a reference to the principle of "open and effective competition" in the Agreement even though this principle is not reflected in all the Annexes to the Agreement. The principle of "open and effective competition" is not a new concept but, rather, is implicit in the GPA. The fact that there are many such exceptions contained in the Annexes makes it necessary to spell out the basic objectives of the Agreement. The proposal makes it clear that, unless there is an explicit exception, the general principles of transparency and open competition should be applied. *[EC]*
- The principle of "open and effective competition" needs to be applied broadly rather than in a selective way to avoid undermining principles underlying the agreement such as the principle of non-discrimination and to avoid *a contrario* interpretations. *[EC]*
- Selectively citing the principle of non-discrimination in other provisions of the Agreement might create interpretation difficulties. *[US]*
- The principle of "open and effective competition" should be applied in a general manner. *[US]*
- The reciprocity provisions would not be affected as implied by the wording "treating any supplier of any Party equally". *[EC]*
- The rationale behind the reference to the general principles of "open and effective competition" is that market forces are working and that suppliers can openly compete. *[EC in response to clarification sought by Japan; the US; Canada; and Hong Kong, China]*
- The consistency of term "open and effective competition" with the use of selective and limited tendering procedures should also be clarified. Would any adjustments need to be made in other specific provisions of the Agreement? *[US]*
- Article XV is an exception to the general principle of open and effective competition. There may be other exceptions to the operation of the principle. *[EC]*

- The terms "reasonable", "non-discriminatory" and "open competition" are not intended to be precise rules. Rather, they are general principles that should influence the application of the provisions of the GPA. The meaning of these terms will vary depending upon the procedures to which they are applied. *[EC in response to a question from Canada requesting clarification of the term "reasonable"]*
- It may be useful to clearly state the principles that underlie the Agreement. This would, for instance, help address issues such as non-discrimination in the context of framework contracts. The proposal merely increases the visibility of the core principles of the Agreement. *[EC in response to a question from Canada]*

**Drafting suggestion**

- Perhaps the words "Except otherwise provided for in the Agreement," should be added to the beginning of the EC proposal to take account of the exceptions to the general principle of open and effective competition. *[Chinese Taipei]*

## Article III:1, 2

## National Treatment and Non-discrimination

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>Article III Non-discrimination</b>
	<b>Basic Principles</b>
1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:	<b>1. With respect to any measure specifically governing procurement covered by this Agreement, each Party shall accord to the goods and services of another Party and to the suppliers of another Party offering the goods or services of another Party, treatment no less favorable than the most favorable treatment the Party accords to:</b>
(a) that accorded to domestic products, services and suppliers; and	<b>(a) its own goods, services and suppliers; and</b>
(b) that accorded to products, services and suppliers of any other Party.	<b>(b) goods, services and suppliers of another Party.</b>  <b>[US – Job No. 2867]</b>
2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:	<b>2. With respect to any measure governing procurement covered by this Agreement, each Party shall ensure that:</b>
(a) that its entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership; and	<b>(a) its entities do not treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; and</b>
(b) that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV.	<b>(b) its entities do not discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of another Party.</b>  <b>[US – Job No. 1051]</b>

**Comments**

In relation to the US proposal:

- The title "National Treatment" should be retained since it is an important aspect of WTO rules. *[Switzerland]*
- The reference to "measure" should be replaced with the reference to "laws, regulations etc.", which is contained in the existing text, since the latter formulation is more comprehensive. *[Switzerland]*

- It is not obvious that the word "measure" is narrower than the existing text, which lists specific measures in an exhaustive fashion. In fact, "measures" might be a broader term. *[US]*
- Clarification is sought as to whether there are measures that have not been referred to in the existing text, which might be a vehicle for discrimination. *[US]*
- Clarification is sought as to the reason for and significance of the replacement of the word "products," which appears in the current text, with the word "goods," which is contained in proposed paragraph 1(a)? *[Switzerland]*
- The word "products" is ambiguous and can often mean services as well as goods. *[US; Canada]*
- The reference to "products" should be replaced with a reference to "goods." *[EC]*
- What is meant by "own goods, services and suppliers" and how does that differ from the reference in the existing text to "domestic products, services and suppliers"? *[Switzerland]*

### **General comments**

- Further clarification is needed in relation to the meaning of the term "foreign affiliation or ownership" in paragraph 2(a). *[Hong Kong, China; US]* This term seems to apply both to Parties and non-Parties to the Agreement. The consistency of the scope of this provision with that of paragraph 1 should be reviewed. *[Hong Kong, China]*
- Clarification is sought in relation to Hong Kong, China's concerns in relation to the meaning of "foreign affiliation or ownership" in paragraph 2(a). *[Canada]*
- There may be scope for inclusion of a provision on denial of benefits to non-Parties similar to that contained in Article 11 of the NAFTA Agreement. It could be useful to clarify Members' obligations under the Agreement in relation to benefits to be accorded to non-Parties. *[US]* More detail is required in this respect. *[EC]* Article 11 of the NAFTA Agreement merely clarifies parties' rights. *[US]*
- GATS Article XXVII deals with the denial of benefits in relation to services. *[Secretariat]*
- Given that the GPA is a plurilateral agreement, it is implicit that a non-signatory cannot avail itself of its benefits under the GPA. *[Singapore]*
- It is necessary to consider whether, because of the plurilateral nature of the GPA, it is necessary to adopt a different approach from, for example, the GATS. *[US]*

*Article III:3**National Treatment and Non-discrimination*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>3. The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement.</p>	<p><b>3. This Article shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement.</b> [EC – <a href="#">GPA/W/87</a>]</p>
	<p><i>Measures Not Specific to Procurement</i></p>
	<p><b>6. The provisions of paragraphs 1 and 2 of this Article do not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations or formalities, and measures affecting trade in services other than measures specifically governing procurement covered by this Agreement.</b> [US – Job No. 2867]</p>

**ARTICLE IV: RULES OF ORIGIN***Article IV:1, 2**Rules of Origin*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
1. A Party shall not apply rules of origin to products or services imported or supplied for purposes of government procurement covered by this Agreement from other Parties, which are different from the rules of origin applied in the normal course of trade and at the time of the transaction in question to imports or supplies of the same products or services from the same Parties.	<b>3. For purposes of procurement covered by this Agreement, no Party may apply rules of origin to goods imported from another Party that are different from or inconsistent with the rules of origin the Party applies in the normal course of trade. [US – Job No. 2867]</b>
2. Following the conclusion of the work programme for the harmonization of rules of origin for goods to be undertaken under the Agreement on Rules of Origin in Annex 1A of the Agreement Establishing the World Trade Organization (hereinafter referred to as "WTO Agreement") and negotiations regarding trade in services, Parties shall take the results of that work programme and those negotiations into account in amending paragraph 1 as appropriate.	

**Comment**

- Since the negotiations on harmonization of rules of origin will take more time, the relevance of Article IV:2 is questionable. [US]

**ARTICLE V: SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES***Article V**Special and Differential Treatment for Developing Countries*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
<p align="center"><i>Article V</i></p> <p align="center"><i>Special and Differential Treatment for Developing Countries</i></p>	<p align="center"><b><i>Article V</i></b></p> <p align="center"><b><i>Developing Countries</i></b></p> <p><b>Upon accession to the Agreement, a developing country shall enjoy all the benefits of the Agreement.</b></p> <p><b>It shall be obliged to comply with the obligations under this Agreement:</b></p> <ul style="list-style-type: none"> <li>- at central government level X years after accession</li> <li>- at sub-central government level Y years after accession</li> <li>- as far as entities under Appendix I, Annex 3 are concerned Z years after accession.</li> </ul> <p><b>[EC – <a href="#">GPA/W/87</a>]</b></p>

**Comments**

Regarding the EC proposal:

- The EC proposal represents a new approach, which attempts to facilitate the entry of developing countries into the GPA by simplifying and making less technical what is currently a complicated set of provisions. *[EC]*
- A possible effect of the proposed amendment, in particular the reference to transitional periods, could be that developing countries are deterred from acceding to the Agreement. *[Korea; Hong Kong, China]*
- The provisions of the existing Article are complicated and the Article has not served its intended purpose. The current text of Article V is more likely to deter developing countries from joining the Agreement. *[EC]*
- The reference to compliance with "the obligations under this Agreement" might mean that an acceding country would be required to cover all sub-central entities at a certain point in time. *[US]* It should mean that only the negotiated coverage would come into effect at that point in time. *[US; EC]*
- Transitional periods are simply a way of accommodating developing country concerns as far as possible without putting the logic of the Agreement at risk. The provisions on developing countries should not lead to the creation of two or three types of Members in the long term. At the end of the day, all Parties to the GPA should be full Parties and should have similar levels of obligations, taking into account their circumstances. *[EC]*
- Would the same transitional period apply to all developing countries regardless of their specific circumstances? Providing a generic transitional period for central or sub-central government coverage for every developing country Party might not be appropriate. *[US]*
- How long should the transitional periods be? *[US]*

- Would the Annex 2 and Annex 3 commitments be negotiated and finalized prior to accession of a developing country or would the implementation of those commitments be simply delayed? *[US]*
- Obligations in relation to central government entities of developing countries that join the GPA would start from the date of accession. However, in the case of sub-central entities as well as entities under Annex 3, there is a link to the provisions on "financial, trade and development" objectives of those countries, which are currently contained in paragraphs (a), (b), (c) and (d) of Article V:1. *[Switzerland]*



## Article V:1

*Special and Differential Treatment for Developing Countries*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<i>Objectives</i>	<b>Article ZZI</b>  <b><i>Treatment for non-parties developing and least-developed countries</i></b>
1. Parties shall, in the implementation and administration of this Agreement, through the provisions set out in this Article, duly take into account the development, financial and trade needs of developing countries, in particular least-developed countries, in their need to:	<b>ZZI:1. Parties shall, in the implementation and administration of this Agreement, duly take into account the development, financial and trade needs of developing countries, in particular least-developed countries. [Switzerland – Job No. 1274]</b>
(a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;	
(b) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy;	
(c) support industrial units so long as they are wholly or substantially dependent on government procurement; and	
(d) encourage their economic development through regional or global arrangements among developing countries presented to the Ministerial Conference of the World Trade Organization (hereinafter referred to as the "WTO") and not disapproved by it.	

**General Comments**

In relation to the Swiss proposal:

- Paragraph ZZI of the Swiss proposal attempts to consolidate existing GPA provisions dealing with non-Parties, developing and least-developed countries that were previously spread throughout the Agreement. *[Switzerland]*
- Support was expressed for simplifying the current provisions relating to developing countries. The Swiss proposal aims to clarify issues that are important to developing and least-developed

countries. The proposal also seeks to streamline, re-organize and delete existing provisions that have proven not to be of particular use. *[Switzerland]*

- The existing Article V:1 is lengthy and contains a number provisions that probably do not have as much practical relevance as hoped for. For example, in relation to the reference to balance-of-payments, it might not be easy to identify cases where Swiss procurement has an impact on the balance-of-payments of some developing or least-developed countries. It might be more appropriate to replace the existing provisions with fewer words that refer to the development, financial and trade needs of developing countries. *[Switzerland]*
- Aruba, as a very small economy, is subject to heavy fluctuations in foreign exchange incomes. Therefore, sub-paragraph 1(a) should not be deleted. *[The Netherlands with respect to Aruba]*
- Changes that are made should be consistent with the objectives of the Agreement. They should also be realistic and operational. *[US]*
- The existing Article V does not make clear how or whether it addresses non-Parties whereas the Swiss proposal applies specifically to non-Parties. *[US]*
- Article ZZI is applied to non-Parties in response to the fact that the existing text of Article V contains a few sentences that refer to non-Parties but it is difficult to clearly establish the position in relation to such non-Parties. *[Switzerland]*
- With regard to accessions, it is important to provide flexibility to developing countries as appropriate in order to encourage and facilitate their participation in the Agreement as extensively as possible. Flexibility should come in the form of market-access commitments and transitional periods rather than procedural flexibility. In order to enjoy the benefits of the Agreement, it is necessary to have transparent procedures, due process and competition etc. Therefore, any exceptions to those basic procedural commitments need to be considered carefully. *[US]*

In relation to the US Proposal (Job No. 1235):

- The US proposal seeks to make the language used in Article V more precise and operational and seeks to make Article V more flexible so as to allow the specific needs of developing countries to be addressed, taking into account the specific circumstances or needs of a particular country. The objective of the proposal is to ensure that developing countries are able to fully participate in and benefit from the GPA. *[US]*
- The existing Article V contains provisions that are favourable to LDCs. Caution should be exercised with respect to the deletion of such provisions from the new GPA. *[Switzerland]*
- The US proposal shortens, simplifies and clarifies the provision relating to developing countries. *[Switzerland]*
- The US shares the objective of responding to the needs, in particular, of LDCs and of doing everything possible to provide opportunities for such countries. Existing Parties have already fulfilled the current GPA provisions relating to LDCs. Therefore, it is questioned whether the current provision in the GPA needs to be retained or is part of a more general issue of more favourable treatment for LDCs. *[US]*
- It is difficult to establish criteria regarding how treatment should differ as between developing and least developed countries. *[EC]*
- The US proposal does not deal with adaptation of existing legislation to bring it into conformity with the GPA. *[Switzerland]*

## Article V:2

*Special and Differential Treatment for Developing Countries*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
2. Consistently with the provisions of this Agreement, each Party shall, in the preparation and application of laws, regulations and procedures affecting government procurement, facilitate increased imports from developing countries,	<b>ZZI:2. Consistently with the provisions of this Agreement, each Party shall, in the preparation and application of laws, regulations and procedures affecting public procurement facilitate access to information on tendering opportunities for developing and least-developed countries. [Switzerland – Job No. 1274]</b>
bearing in mind the special problems of least-developed countries and of those countries at low stages of economic development.	<b>ZZI:3. Bearing in mind the economic development needs of developing and least-developed countries, the Parties shall facilitate increased imports for products representing particular export interests to these countries. [Switzerland – Job No. 1274]</b>

**Comments**

In relation to the Swiss proposal:

- Subparagraph 3 of Article ZZI may violate the principle of non-discrimination, which underlies the Agreement. *[EC]*
- The idea underlying this proposed provision is to enable potential suppliers from developing or least-developed countries to, for instance, have a much better access to tender notices and contracts that are going to be awarded. This will help to increase imports from such countries. However, the language needs to be further sharpened to ensure that there is no ambiguity regarding treatment that ought to be given to non-Parties, developing and least-developed countries. *[Switzerland]*

*Article V:3**Special and Differential Treatment for Developing Countries*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p><i>Coverage</i></p> <p>3. With a view to ensuring that developing countries are able to adhere to this Agreement on terms consistent with their development, financial and trade needs, the objectives listed in paragraph 1 shall be duly taken into account in the course of negotiations with respect to the procurement of developing countries to be covered by the provisions of this Agreement.</p> <p>Developed countries, in the preparation of their coverage lists under the provisions of this Agreement, shall endeavour to include entities procuring products and services of export interest to developing countries.</p>	<p><b>ZZII:3. In the course of accession negotiations, due account shall be taken of the development, financial and trade situation of acceding countries.</b>  <b>[Switzerland – Job No. 1274]</b></p>

**Comments**

- With regard to the issue of granting developing countries non-reciprocal access to procurement markets of Parties, should there be flexibility in offers of coverage by prospective Parties or should there be special provisions associated with the evaluation of offers under individual procurements by Parties? *[Canada]*

*Article V**Special and Differential Treatment for Developing Countries*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p align="center"><b>Article ZZII</b></p> <p align="center"><b><i>Accession by developing and least-developed countries</i></b></p>
	<p><b>1. Parties shall encourage countries acceding to the WTO as well as non-Parties developing and least-developed countries to accede to the Agreement on Government Procurement (GPA) and establish competitive public procurement regimes based on transparency, non-discrimination and national treatment.</b></p>
	<p><b>2. Upon accession to the Agreement, an acceding country shall enjoy all the benefits of the Agreement on the basis of reciprocity.</b></p>
	<p><b>3. In the course of accession negotiations, due account shall be taken of the development, financial and trade situation of acceding countries.</b></p>
	<p><b>4. An acceding country shall adapt its national legislation on public procurement to make it compatible with this Agreement with, if necessary, transitional periods and review provisions linked with economic development.</b></p>
	<p><b>5. An acceding country shall submit to the Agreement its central level government entities upon accession for goods and services under Appendix I, Annex 1.</b></p>
	<p><b>6. An acceding country shall submit to the Agreement its sub-central level government entities for goods and services under Appendix I, Annex 2, and its entities covered under Appendix I, Annex 3 for goods and services with, if necessary, transitional periods and review provisions linked with economic development.</b></p>

**Comments**

- The objective of the Article ZZII is to articulate concisely some key elements associated with accession and to invite developing and least developed countries to seek membership. *[Switzerland]*
- Proposed subparagraph 4 suggests that transitional periods apply in relation to substantive provisions of the Agreement, rather than just coverage. The flexibility provided should be more in terms of coverage. *[EC]*

- Subparagraph 4 of the proposal is intended to be linked to coverage. If a country needs to retain domestic preferences for a certain period of time because of the existence of development programmes, it is possible to achieve that by not listing entities involved in such development programmes. *[Switzerland]*
- A number of the proposed provisions send some interesting signals but may have limited legal impact. *[EC]*
- It is hoped that there are some non-Parties who may consider acceding to the Agreement who are not necessarily developing or least-developed countries. It is unclear whether having a separate provision on accessions is intended in any way to address such countries since the title refers to accession by developing and least-developed countries. Article ZZIII refers to developing or least-developed countries which seems to confirm the impression that Article ZZII applies only to those types of countries. *[Canada]*
- It is proposed that the provision on accessions will be contained in the part of the Agreement that deals with developing and least developed countries. This part clearly will not apply to developed countries that wish to accede to the Agreement. *[Switzerland]*
- There are a wide range of circumstances in which developing countries find themselves and they have a wide range of needs and capabilities. It is necessary to consider whether it is possible or appropriate to develop specific provisions that apply equally to that very broad and diverse group of countries. *[US; Canada]*
- While it is appropriate to acknowledge that there are circumstances where special and differential treatment is warranted, the specifics for special and differential treatment for acceding countries should be a matter of negotiation and the Agreement should not become too prescriptive in this respect. Given the scope of paragraph 7, it is questioned whether the level of detail in paragraphs 4, 5 and 6 is necessary. *[Canada]*
- It is unclear what paragraph 2 is intended to mean and how this paragraph will work in conjunction with negotiated provisions. *[Canada]*

## Article V:4

*Special and Differential Treatment for Developing Countries*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p><i>Agreed Exclusions</i></p> <p>4. A developing country may negotiate with other participants in negotiations under this Agreement mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case. In such negotiations, the considerations mentioned in subparagraphs 1(a) through 1(c) shall be duly taken into account.</p> <p>A developing country participating in regional or global arrangements among developing countries referred to in subparagraph 1(d) may also negotiate exclusions to its lists, having regard to the particular circumstances of each case, taking into account, <i>inter alia</i>, the provisions on government procurement provided for in the regional or global arrangements concerned and, in particular, products or services which may be subject to common industrial development programmes.</p>	<p><b>ZZII:7. Mutually acceptable temporary exclusions from the rules on national treatment with respect to certain entities, products or services that are included in the coverage lists of an acceding country can be negotiated in particular circumstances linked with economic development.</b>  <b>[Switzerland – Job No. 1274]</b></p>

## Article V:5, 6, 7, 8

## Special and Differential Treatment for Developing Countries

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>5. After entry into force of this Agreement, a developing country Party may modify its coverage lists in accordance with the provisions for modification of such lists contained in paragraph 6 of Article XXIV, having regard to its development, financial and trade needs, or may request the Committee on Government Procurement (hereinafter referred to as "the Committee") to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraphs 1(a) through 1(c). After entry into force of this Agreement, a developing country Party may also request the Committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraph 1(d). Each request to the Committee by a developing country Party relating to modification of a list shall be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter.</p>	<p style="text-align: center;"><b>Article ZZIII</b></p> <p style="text-align: center;"><b><i>Temporary exemptions to coverage for developing and least-developed countries</i></b> <b><i>Parties and further negotiations</i></b></p> <p><b>ZZIII:1. In accordance with paragraph 6 of article XXIV, a developing or least-developed country Party may modify its coverage lists or may request the Committee on Government Procurement to grant temporary exemptions from the rules on national treatment for certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case and taking duly into account its development, financial and trade situation. [Switzerland – Job No. 1274]</b></p>
<p>6 Paragraphs 4 and 5 shall apply <i>mutatis mutandis</i> to developing countries acceding to this Agreement after its entry into force.</p>	
<p>7. Such agreed exclusions as mentioned in paragraphs 4, 5 and 6 shall be subject to review in accordance with the provisions of paragraph 14 below.</p>	<p><b>ZZIII:2. Temporary exemptions shall be temporary, reviewed every two years, subject to compensations negotiations with other Parties and eliminated with the re-establishment of the previous situation. [Switzerland – Job No. 1274]</b></p>

## Comments

- Proposed paragraph ZZIII refers to temporary exemptions to coverage, such as those that can be sought during the implementation of the Agreement. It consolidates and simplifies elements contained in Article V:7, 14 and 15 of the existing text. [Switzerland]



AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>1. In negotiations on accession to this Agreement and in the implementation and administration of this Agreement, the Parties shall take due account of developing countries' particular needs and circumstances, recognizing that such needs and circumstances may differ significantly from country to country. In this context, the Parties shall give due consideration to a request by a developing country to incorporate within its market-access commitments in Appendix I of this Agreement a transitional measure that addresses its particular needs and circumstances in relation to:</b></p> <p style="padding-left: 40px;"><b>(a) goods or services sectors in which the commercial viability of it's domestic suppliers of such goods and services depends on their competitiveness in the country's procurement markets; and</b></p> <p style="padding-left: 40px;"><b>(b) procurement by entities whose procurements are not regulated by the procurement measures of the country's central government.</b></p> <p><b>[US – Job No. 1235]</b></p>

### Comments

In relation to paragraph 1 of the US proposal:

- Paragraphs 1 and 2 refer to "transitional measures." The intention is to ensure that in cases where exceptions are negotiated, there should be a transitional mechanism which allows for a country's particular needs to be addressed within a particular time-frame, but that such a country should fully participate as soon as possible. The paragraph describes two situations in which such transitional measures might be appropriate. The first, described in sub-paragraph (a), is similar to the situation described in Article V:1(c) which concerns the commercial viability of domestic suppliers in developing country markets. The second attempts to accommodate systems where there are differences in the organisation of entities at all levels. *[US]*
- Paragraph 1 combines language from Article V:I and 3 so that it would apply both to the implementation of the Agreement and to accession negotiations whereas those issues are dealt with separately in the existing Article. *[US]*
- With respect to paragraph 1(a), any company's commercial viability depends upon competitiveness in the market. *[Switzerland]*
- The reference to "viability" in paragraph 1(a) is intended to relate to the existence or non-existence of a company rather than its level of commercial success. Paragraph 1(a) is intended to deal with a situation where, for example, there is a rapid increase of competition in a market that might threaten to put a large proportion or all suppliers in the market out of business. *[US]*

- With respect to paragraph 1(b), given that the GPA has been successful in stimulating open procurement between internal states, it might not be advisable to allow for the creation of a special regime for such procurement. *[Switzerland]*
- This aspect of the proposal is closely related to Article ZZI:6 of the Swiss proposal. It envisages flexibility for entities covered by the proposal. *[US]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>2. For least developed countries, Article III:I(a) of this Agreement notwithstanding, such requests for transitional measures may include a request to apply procurement price preferences in favour of domestic suppliers in goods or services sectors identified in subparagraph 1(a) of this Article. Any such transitional measure shall be applied for a limited period of time which, taking into account the acceding country's particular needs and circumstances, shall in no case exceed ten years. Where the Parties agree to such a transitional measure:</b></p> <p style="padding-left: 40px;"><b>(a) all provisions of this Agreement except Article III:1(a) shall apply to procurement affected by such measures, and</b></p> <p style="padding-left: 40px;"><b>(b) in particular, the acceding country shall ensure that such transitional measures are applied to all other Parties to this Agreement in accordance with Article III:1(b) of this Agreement.</b></p> <p><b>[US – Job No. 1235]</b></p>

### Comments

In relation to paragraph 2 of the US proposal:

- Paragraph 2 of the US proposal, which relates to LDCs, is an extension of paragraph 1 and contains exceptions to the principle of national treatment. The proposal states explicitly that Parties may consider price preferences in favour of LDC enterprises during transitional periods to address specific needs in situations where the domestic suppliers may be vulnerable to rapid changes in the competitive situation. Paragraph 2 also tries to make the relationship between this Article and the Article of the Agreement on national treatment more explicit. *[US]*
- The allowance of price preferences is not a substantial deviation from what is already envisaged in Article V:7. Given the departures from commitments in the GPA that may potentially be allowed under the GPA, the transitional application of price preferences may be preferable to other types of exceptions and may also be more transparent. *[US]*
- Price preferences is amongst the most transparent mechanisms with which to introduce flexibility into this Article. *[EC]*
- Why is paragraph 2 limited to LDCs and not extended to developing countries? *[Switzerland; EC]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>3. Where, in the course of accession negotiations, the Parties agree to a transitional measure provided for in paragraphs 1 or 2 of this Article, each Party shall give due consideration to the possibility of applying this Agreement, immediately upon accession, to the goods, services and suppliers of the acceding country with respect to all procurement covered by Appendix I of the Agreement. However, taking due account of the scope of any transitional measures requested and with a view to maintaining appropriate reciprocal trade opportunities under this Agreement, any Party may agree with the acceding country to limit the scope of coverage of that Party's Appendix I that is provided to the acceding country during the agreed transition period. Any such limitations shall be clearly identified in the Committee's relevant accession decision and in each Party's relevant annexes or notes to Appendix I.</b>  <b>[US – Job No. 1235]</b></p>
	<p><b>4. A request for a transitional measure provided for under paragraphs 1 or 2 of this Article may be made by a developing country during negotiations on accession to this Agreement or by a developing country Party after the Agreement has entered into force for that Party.</b>  <b>[US – Job No. 1235]</b></p>

#### Comment

- Paragraph 3 of the US proposal addresses the issue reflected in part by Article ZZII:2 of the Swiss proposal which contains a reference to reciprocal treatment. Notwithstanding any transitional measures that may be agreed to, Parties should consider the possibility of offering their entire existing coverage to the relevant acceding country. However, there should also be the possibility for appropriate reciprocal arrangements to maintain a balance of interests during the transitional period. *[US]*

	<p><b>5. Upon accession, a Party benefiting from a transitional measure provided for under paragraphs 1 or 2 of this Article shall take such steps as may be necessary, including notifying the Committee of any specific technical cooperation needs, to ensure that the particular needs and circumstances warranting the transitional measure are appropriately addressed during the agreed transition period.</b>  <b>[US – Job No. 1235]</b></p>
<p><i>Technical Assistance for Developing Country Parties</i></p>	<p><b>Article ZZIV</b></p> <p><b>Technical assistance and information centres</b></p>
<p>8. Each developed country Party shall, upon request, provide all technical assistance which it may deem appropriate to developing country Parties in resolving their problems in the field of government procurement.</p>	<p><b>ZZIV:1. Each Member shall, upon request, provide all technical assistance which it may deem appropriate to acceding Parties and upon request to Parties which demonstrate need for capacity building.</b>  <b>[Switzerland – Job No. 1274]</b></p>

### Comments

#### In relation to the US proposal:

- Paragraph 4 of the US proposal is a streamlined version of GPA Articles V:5 and 6. *[US]*
- Paragraph 5 of the US proposal specifically states that countries that benefit from exceptions to the Agreement should take steps to ensure that their needs are being met during the transitional period. This is to reflect the more general discussion that transitional measures should be needs-based. *[US]*
- While technical cooperation is important, it is unclear what technical cooperation can do in circumstances where the transitional measure is linked to the competitiveness of a part of an industry that may one day be able to become more through an increase in technological levels or becoming more price competitive. *[Switzerland]*
- The provision on technical assistance in the US proposal is a restatement of Article V:8. *[US]*

#### In relation to the Swiss proposal:

- Paragraph ZZIV contains elements from Article V:8, 9, and 11 of the existing Agreement. The proposed paragraphs contains a number of additions in relation to tender procedures and documentation. *[Switzerland]*

## Article V:9, 10, 11

*Special and Differential Treatment for Developing Countries*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>9. This assistance, which shall be provided on the basis of non-discrimination among developing country Parties, shall relate, <i>inter alia</i>, to:</p> <ul style="list-style-type: none"> <li>- the solution of particular technical problems relating to the award of a specific contract; and</li> <li>- any other problem which the Party making the request and another Party agree to deal with in the context of this assistance.</li> </ul>	<p><b>ZZIV:2. Technical assistance shall relate, <i>inter alia</i>, to:</b></p> <ul style="list-style-type: none"> <li>- the solution of particular technical problems relating to publications of tender and award notices, tender procedures, tender documentation, award procedures, remedy systems;</li> <li>- training of local purchasing entities.</li> </ul>
<p>10. Technical assistance referred to in paragraphs 8 and 9 would include translation of qualification documentation and tenders made by suppliers of developing country Parties into an official language of the WTO designated by the entity, unless developed country Parties deem translation to be burdensome, and in that case explanation shall be given to developing country Parties upon their request addressed either to the developed country Parties or to their entities.</p>	<p><b>[Switzerland – Job No. 1274]</b></p>
	<p><b>6. During a developing country's accession process or after the entry into force of this Agreement for a developing country Party, the Parties shall give due consideration to any request by such a developing country for technical cooperation to address that country's specific needs and circumstances in relation to the implementation of this Agreement and the exercise of the rights under this Agreement, including drawing on the benefits of such participation.</b></p> <p><b>[US – Job No. 1235]</b></p>

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<i>Information Centres</i>	
<p>11. Developed country Parties shall establish, individually or jointly, information centres to respond to reasonable requests from developing country Parties for information relating to, <i>inter alia</i>, laws, regulations, procedures and practices regarding government procurement, notices about intended procurements which have been published, addresses of the entities covered by this Agreement, and the nature and volume of products or services procured or to be procured, including available information about future tenders. The Committee may also set up an information centre.</p>	<p><b>ZZIV:3. Developed country Parties shall establish, individually or jointly, information centres to respond to reasonable requests from all Parties for information relating to, <i>inter alia</i>, laws, regulations, procedures and practices regarding government procurement, notices about intended procurements which have been published, addresses of the entities covered by this Agreement, and the nature and volume of products or services procured or to be procured, including available information about future tenders. The Committee may also set up an information centre.</b>  <b>[Switzerland – Job No. 1274]</b></p>
	<p><b>7. Each Party shall establish an information centre to respond to reasonable requests from developing country Parties for information related to those Parties' efforts to fully enjoy the benefits of participation in this Agreement. Such information may include information relating to procurement plans, procedures or requirements with respect to procurement covered by this Agreement.</b>  <b>[US – Job No. 1235]</b></p>

### Comments

In relation to paragraph 6 of the US proposal:

- How will this paragraph be implemented given that the provision of technical assistance will take time and that there are many countries that would like to expedite their accession to the GPA? *[Jordan]*
- The application of paragraph 6 would depend upon the particular needs of specific acceding countries. It is difficult to anticipate what needs might exist in order to fully participate in the Agreement. *[US]*

In relation to paragraph 7 of the US proposal:

- What is the purpose of the changes to the existing Article V:11, namely: changing the reference to developed country Parties with "each Party;" deleting the last sentence relating to the establishment of an information center; and deleting the words "independently or jointly." *[Japan]*
- With respect to the establishment of an information center by Parties, a developing country would be just as likely to be interested in procurement opportunities in another developing country as procurement opportunities in a developed country. Therefore, it would be useful for developing and developed countries alike to establish information centers. This might be an issue to be addressed in the context of the provision of technical assistance in some cases. *[US]*
- With respect to the establishment of an information center by the GPA Committee, this has not yet been created although it is an existing obligation under Article V:11 of the GPA. If the Parties intend to create the center, then it should be created. However, if there is no intention to do so, such an obligation should be removed from the Agreement. *[US]*

## Article V:12, 13

*Special and Differential Treatment for Developing Countries*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<i>Special Treatment for Least-Developed Countries</i>	
<p>12. Having regard to paragraph 6 of the Decision of the CONTRACTING PARTIES to GATT 1947 of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (BISD 26S/203-205), special treatment shall be granted to least-developed country Parties and to the suppliers in those Parties with respect to products or services originating in those Parties, in the context of any general or specific measures in favour of developing country Parties.</p>	
<p>A Party may also grant the benefits of this Agreement to suppliers in least-developed countries which are not Parties, with respect to products or services originating in those countries.</p>	<p><b>ZZI:4. Having regard to paragraph 6 of the Decision of the CONTRACTING PARTIES to GATT 1947 of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (BISD 26S/203-205), a Party may grant the benefits of this Agreement to suppliers in least-developed countries, with respect to products or services originating in those countries.</b> [Switzerland – Job No. 1274]</p>
<p>13. Each developed country Party shall, upon request, provide assistance which it may deem appropriate to potential tenderers in least-developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers in least-developed countries, and likewise assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.</p>	<p><b>ZZI:5. Each developed country Party shall, upon request, provide assistance which it may deem appropriate to potential tenderers in least-developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers in least-developed countries, and likewise assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.</b> [Switzerland – Job No. 1274]</p>



## Article V:14, 15

*Special and Differential Treatment for Developing Countries*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<i>Review</i>	<b>Article ZZV</b>  <b>Review</b>
<p>14. The Committee shall review annually the operation and effectiveness of this Article and, after each three years of its operation on the basis of reports to be submitted by Parties, shall carry out a major review in order to evaluate its effects. As part of the three-yearly reviews and with a view to achieving the maximum implementation of the provisions of this Agreement, including in particular Article III, and having regard to the development, financial and trade situation of the developing countries concerned, the Committee shall examine whether exclusions provided for in accordance with the provisions of paragraphs 4 through 6 of this Article shall be modified or extended.</p>	<p><b>ZZV:1. The Committee shall review on a two-year basis the operation and effectiveness of Articles ZZI to ZZIV and, after each four years of its operation on the basis of reports to be submitted by Parties, shall carry out a major review in order to evaluate its effects. As part of the four-year reviews and with a view to achieving the maximum implementation of the provisions of this Agreement, including in particular Article III, and having regard to the development, financial and trade situation of the developing countries concerned, the Committee shall examine whether exclusions provided for in accordance with the provisions of Articles ZZII and ZZIII shall be modified or extended.</b> [Switzerland – Job No. 1274]</p>
<p>15. In the course of further rounds of negotiations in accordance with the provisions of paragraph 7 of Article XXIV, each developing country Party shall give consideration to the possibility of enlarging its coverage lists, having regard to its economic, financial and trade situation.</p>	<p><b>ZZIII:3. In the course of further negotiations in accordance with paragraph 7 of Article XXIV, each developing and least-developed country Party shall give consideration to the possibility of enlarging its coverage lists, having regard to its development, financial and trade situation.</b> [Switzerland – Job No. 1274]</p>

**Comment**

- The proposed paragraph ZZV deals with reviews of the provisions on special and differential treatment. Provisions dealing with review of the whole Agreement could be placed elsewhere in the Agreement. [Switzerland]

**ARTICLE VI: TECHNICAL SPECIFICATIONS***Article VI:1**Technical Specifications*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
<p>1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.</p>	<p><b>1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.</b> [EC – Job No. 876]</p>

**Comments**

In relation to paragraph 1 of the EC proposal:

- Is the word "unnecessary" needed in relation to "obstacles to international trade". If open competition is sought to be achieved, any obstacle is unnecessary. [Switzerland]

## Article VI:2

## Technical Specifications

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>2. Technical specifications prescribed by procuring entities shall:</p> <p>(a) be in terms of performance and functional requirements rather than design or descriptive characteristics; and/or</p> <p>(b) be based on international standards, where such exist; otherwise, on national technical regulations<sup>3</sup>, recognized national standards<sup>4</sup>, or building codes.</p> <p><sup>3</sup>For the purpose of this Agreement, a technical regulation is a document which lays down characteristics of a product or a service or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, service, process or production method.</p> <p><sup>4</sup>For the purpose of this Agreement, a standard is a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or services or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, service, process or production method.</p>	<p><b>2. Technical specifications prescribed by procuring entities shall:</b></p> <p><b>(a) be in terms of performance rather than design or descriptive characteristics; and</b></p> <p><b>(b) be based on international standards, where such exist; otherwise, on technical regulations<sup>3</sup>, recognized national standards<sup>4</sup>, or building codes.</b></p> <p><b><sup>3</sup> For the purpose of this Agreement, a technical regulation is a document which lays down characteristics of a product or a service or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, service, process or production method.</b></p> <p><b><sup>4</sup> For the purpose of this Agreement, a standard is a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or services or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, service, process or production method.</b></p> <p><b>[EC – Job No. 876]</b></p>

## Comments

- The EC proposal refers to technical specifications in terms of performance standards and international standards and this is a warranty for the competitive use of specifications. Any departure from those standards should be fully justified. However, since an overly formalistic approach could also be restrictive and impose an unnecessary burden on entities, technical specifications that are not fully compatible with all the details of international standards that nevertheless meet the "essential requirements" of the procuring entity should also be considered in the tendering process. Such an approach strikes a fair balance between the need to facilitate competition and the need to allow for innovative solutions while preserving what has been achieved in the field of international standardisation. *[EC]*
- The current text of the Agreement promoting the use of performance-based specifications where possible, provides scope for procuring organisations to seek innovation solutions. Performance specifications that focus on the purpose or outcomes sought by government could be sufficiently broad to permit suppliers to propose innovative solutions. It is unclear that any change to the Article is needed to achieve that objective. *[Canada]*

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- The difficulty is how to make sure that the provision that is already in the Agreement on the promotion of performance-based standards is implemented. *[EC]*
  - "Technical specifications" are not the same thing as "technical standards". The former is the complete definition of the entity's requirements that are needed for the procurement. In the majority of procurements, especially high dollar value procurements that are covered by the GPA, purpose-built specifications would be relevant rather than choosing amongst different standards off-the-shelf although those could be used for parts of a technical specification. However, it would be rare that there would be something off-the-shelf for everything associated with a covered procurement. On that basis, when the requirements for procurement are being defined, it is a question of whether those requirements are defined on the basis of the performance that is needed for that particular requirement rather than pulling out some sort of defined requirement for a particular product. *[Canada]*
  - The EC does not associate "technical specifications" with "technical standards". In its view, technical specifications could be achieved in different ways and one possibility is that an existing standard could be used for the whole of a technical specification. In most cases, the Party would define technical specification for its own purposes and this is precisely the objective of having a reference to performance-based standards. This Article exists because Parties recognize that, because of inertia or tradition, when a Party uses traditional solutions there is a risk that that might block innovative solutions and might also block participation by suppliers from other Parties. The basis for the solution to a real problem is already contained in the Agreement. The challenge is how to make the provision effective without unnecessarily restricting the freedom of the entities. *[EC]*
  - Unlike the EC proposal, the US proposal excludes references to mandatory regulations and building codes as it is unclear whether it is necessary to state that a procurement has to be consistent with mandatory requirements. *[US]*
  - It is important that technical specifications are developed in a way that ensures, to the extent possible, that they focus on the end-needs of the procuring entity rather than use designed-based specifications which would limit competition. *[US]*
  - The EC proposal states that specifications should be based on international standards, where they exist. The US had previously suggested that there should be a reference to international standards that are applicable to a Party. *[US]*
  - The implication of the hierarchy in paragraph 2(b) of the EC proposal, and more specifically, the use of the words "otherwise, on" is that technical specifications would be based on international standards. If such standards do not exist, then the specifications would be based on national, technical regulations and recognised national standards of building codes. It is unclear whether such a hierarchy makes sense in practice since national technical regulations are usually mandatory and there would be an expectation that entities would base any specification on technical regulations that are mandatory in the system in which they are operating. *[US]*
  - The phrase "recognised national standards" may cause some difficulty because in the US, standards are not "recognised." *[US]*
  - Standards change and evolve rapidly. Usually, existing standards do not cover all technical aspects of a good that is to be purchased. The objective of the proposal is to oblige the procuring entity to announce at the outset of the procurement process, the details of the good on the basis that it will accept and assess any solution provided the quality is the same as the quality it is has prescribed. *[EC]*
  - With respect to proposed paragraph 2(a) of the EC proposal, the objective of discouraging the use of complicated government specifications - particularly, design-based specifications - is shared. This paragraph should make it clear that performance standards should be used unless a government specification is needed *[US]*.

With respect to international standards:

- Reference to international standards may place excessive restrictions on procuring entities' exercise of discretion in formulating specifications to suit their needs. *[US]* There is still considerable ambiguity associated with what constitutes an "international standard" and the procedures according to which those standards are set. *[Korea; US]* The objections that have been raised regarding the definition of "international standards" also apply in relation to the current provisions. *[EC]*
- Clarification or elaboration is needed as to what is meant by "international standards" to avoid different interpretations among Members. *[Japan]*
- The reference to international standards is contained in the original text. The intention is to get a clearer view as to what is already contained in the Agreement. *[EC]*
- The issue of international standards is currently being discussed in the context of the triennial review of the TBT Agreement. *[EC; Canada]* Also, the GPA Committee should not duplicate the work being undertaken in the TBT Committee. *[EC; US]*
- Given that the GPA currently provides for a hierarchy with international standards taking precedence over national standards, what is the rationale for treating all standards as having equal footing, as appears to be the case under the US proposal? *[Canada]*
- If a standard is developed in an appropriate way, whether international or domestic, it should be considered to be a legitimate standard and, therefore, there is not a need to establish a hierarchy amongst standards. *[US]*
- Subparagraph (b) of the Agreement should make reference to voluntary compliance with market-based standards instead of international standards. *[US]*
- The proposal should be clarified whether an implication of a requirement on procuring entities to accept specifications that comply with international standards would be the delegation of the certification process to an independent expert. *[Japan]*

## Article VI

## Technical Specifications

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>2. Each Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade.</b>  <b>[US – Job No. 2867]</b></p>
	<p><b>3. In establishing the technical specifications for each good or service being procured, each Party shall ensure that its entities specify, whenever available and applicable to that Party, an existing domestic or international consensus standard, except where the use of a consensus standard would fail to meet the entity's program requirements or would impose more burdens than the use of a government-unique standard.</b>  <b>[US – Job No. 2867]</b></p>
	<p><b>4. Each Party shall ensure that, wherever appropriate, any technical specification prescribed by its entities is specified in terms of performance requirements for the good or service being procured rather than design or descriptive characteristics.</b>  <b>[US – Job No. 2867]</b></p>

**Comments**

With respect to consensus standards:

- The concept of consensus standard was introduced as an attempt to ensure that a standard is not used or given a special status under the Agreement if it has not been adopted through a process that is transparent and that takes into account the views of all parties. The proposal addresses the process for development of such standards rather than specifying the type of body that would be involved in developing the standards. *[US in response to a request for further clarification from the EC]*
- Disagreements can arise as to what is an appropriate standard and whether or not a standard is an international standard. There are situations where the use of standards that are described as being international could be used to restrict competition in inappropriate ways. The concept of consensus standards ensures that standards are developed through an open and transparent process and enable all Parties to participate in the setting of standards. *[US]*
- How long would a consensus standard be considered a consensus standard? For example, if a consensus exists at the time of the development of a standard but a long time elapses without review, would the consensus be considered to continue to exist? *[Canada]*
- A standard could not be considered to be a consensus standard if only domestic interests participate in the development of the standard. The US expects that the process of development of a domestic consensus standard by, for example, a domestic standard setting body, would be open to participation by suppliers from other Parties or other standard setting

bodies. The term "domestic" refers to the location or the status of the body but not necessarily to the process. *[US in response to a question by Canada]*

- Should the body that develops the consensus standard be independent of government? Would a standard be a consensus standard only if it is developed in a manner that produces a result independent of government? *[Canada]*
- A consensus standard does not necessarily need to be a non-governmental standard. A governmental standard-setting body could set standards in an open and transparent process and those standards could be considered to be consensus standards. The US proposal related more to the process of setting standard. *[US]*
- The concept of consensus standards will complicate the debate in the GPA and TBT contexts. There should not be two sets of characterisations of standards in an area that is already very complicated. Since international standards are already being used in the WTO, reference to them should not be changed unless there are good reasons for doing so. *[EC]*
- The US proposal allows an entity to use an existing consensus standard regardless of whether or not it conflicts with another consensus standard. The relevant provision would only apply when an entity has available to it one or more consensus standards and, nevertheless, chooses to use a government-unique standard. *[US]*
- National standards may directly conflict with those in another country. The existing formulation of this Article allows the procuring entity to choose between conflicting national standards. *[Singapore]*
- It is important to refer to use technical specifications that have been agreed by the largest possible number of potential users and buyers. The use of traditional techniques for standardization may not be sufficient or optimal in some cases. Accordingly, some flexibility has to be provided. *[EC]*
- A standard should be openly and fairly developed with input from any interested Party. *[Canada]*

With respect to "wherever appropriate":

(NB, the following comments were made in relation to an EC proposal that has subsequently been amended. However, they may be relevant in relation to paragraph 4 of the US proposal)

- The proposal tries to clarify the meaning of what is meant by the term "where appropriate" in the current text. The proposal allows some flexibility for procuring entities when setting up technical specifications while ensuring compliance with the non-discrimination principle. *[Japan]*
- The words "where appropriate" in the chapeau paragraph are too flexible and have been deleted in order to clarify what is meant by the exception. *[EC]*
- Further consideration of the meaning of "appropriate" is required. Deletion of the words "where appropriate" may raise the question of burden of proof in terms of what is and what is not appropriate. Should flexibility be restricted further by defining more clearly what situations are "appropriate" and which are not? *[US]*

## Article VI

## Technical Specifications

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>3. The provisions of paragraph 2 would not apply when the procuring entity may objectively demonstrate that this would be ineffective or inappropriate for the fulfilment of the legitimate objectives pursued. Procuring entities relying on this exception shall maintain an official record explaining why these conditions apply. [EC – Job No. 876]</b></p>

## Comments

- The proposed paragraph 3 makes it clear that when the requirements in paragraph 2 of the proposal are departed from, an entity should be prepared to provide an objective justification for such a departure. *[EC]*
- Would this requirement raise the burden of proof on procuring entities in relation to use of the exception and, if so, what would the implications of that be? *[US; Hong Kong, China]*
- The priority accorded to performance-based standards and international standards is already contained in the GPA. The EC proposal attempts to clarify what that hierarchy means in practice. An exemption mechanism is not being proposed where entities have to first ask for permission. However, it is necessary to impose a minimum requirement in the Agreement to entities who consider it necessary to depart from the relevant principles to provide an objective explanation. *[EC]*
- Should records of why a particular available standard was not used in relation to every single procurement decision be kept or would it be possible to keep records of the decision taken as a general matter, that a particular standard would not meet an entity's needs? Would it be possible to record that once and not have the administrative burden of going through that process every time a procurement decision is made? *[US]*
- If the explanation given in the broader decision applies to a specific procurement, then there is not a significant difference between having a record of the broad decision and having records of decisions that are made every time a procurement is made. *[EC]*
- Repeated references to record-keeping in other Articles of the Agreement could call into question its interpretation in this Article. *[Canada]*
- The requirement on record-keeping is midway between the current situation which is flexible and the compulsory use of a certain specification which might be counterproductive in some cases. *[EC]*
- With respect to the requirement to maintain official records, does this mean that entities are required to record why they use design or descriptive specifications as opposed to performance-based specifications? If so, it is unclear whether this is necessary or appropriate. *[US]*



## Article VI

## Technical Specifications

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>4. In all the cases procuring entities shall consider bids which do not comply with the provisions of the technical specifications but do demonstrably meet the essential requirements thereof and are fit for the purpose intended. The reference to the technical specifications in the tender documents must include words such as "or equivalent".</b></p> <p><b>[EC – Job No. 876]</b></p>

## Comments

- The EC proposal attempts to introduce the notion of flexibility. Technical specifications, either when defined in terms of performance standards or defined in terms of international standards, should not be absolute requirements but rather a benchmark against which solutions have to be measured. *[EC; Japan]*
- The distinction between essential requirements, that is, the basic objectives of a procurement, and items that are ancillary should be integrated into the Agreement. If suppliers are required to comply with every detail contained in a technical specification, this could be considered to be a barrier to trade in most cases. *[EC]*
- How will bids which do not comply with the technical specifications but do demonstrably meet the essential requirements be treated? *[Jordan]*
- Bids that meet the essential requirements will be treated on an equal footing with all other bids. The solutions that will be accepted must be indicated at the inception of the tendering procedure. *[EC]*
- Bids that fulfil the "essential requirements" of international standards should be considered equally with other bids. Further, bids that are based on international standards should be considered even when technical specifications are formulated as performance requirements, provided that the bids fully address the essential requirements of the specifications. *[EC]*
- What would be the implications of proving that a bid meets the "essential requirements"? *[US]*
- The reference to "essential requirements" is a reference to core objectives underlying technical specifications irrespective of whether they were based on an international standard or a domestic standard. This principle achieves a balance between providing competitive conditions and allowing the procuring entity to achieve its objectives. The burden of proof involved would only require the supplier to show that its solution can work. *[EC]*
- The current language could potentially allow an entity to construe the term "essential requirements" narrowly and award a contract to a supplier that offers a product that appears to be inferior to other offered products. There is a concern that contracts would not be awarded in a transparent way. *[US]*

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- If a tenderer would like to offer an alternative solution, that is, a solution that does not meet the requirements of the tender documents, or is not in conformity with the tender documents, the supplier should request the procurement entity to revise the documents. If the procurement entity does not accept such a suggestion, then the supplier should use the challenge procedure mechanism to ask for a revision to the tender documents instead of submitting a proposal or offer that is not in conformity with the tender documents. *[Chinese Taipei]*
  - There is a concern that the tender documents should be clear and legally certain. It would be unacceptable to allow a party to submit any offer, regardless of what is contained in the technical specification. Any solution has to fulfil the essential needs of the entity but there is also the possibility for new suppliers to submit alternative proposals that perhaps the contracting entity is not accustomed to or aware of. Such flexibility preserves legal certainty and allows for new opportunities within the framework of the Agreement. *[EC]*
  - Is Article VI the appropriate location for the consideration of the issues related to the evaluation of bids? Is the proposal consistent with the existing provisions in the Agreement relating to the evaluation of bids? *[Canada]* The proposed paragraph could be placed in another part of the Agreement as long as an agreement on the substance can be reached. However, since the existing Article deals with technical specifications as does the proposed paragraph, this is probably the appropriate place for its inclusion. *[EC]*
  - The words "or equivalent" may cause difficulties for those that have to assess whether a bid is "equivalent" to another. *[Japan]*
  - The first sentence of paragraph 4 appears to entail an evaluation process and, further, to suggest that the specifications or the criteria that have been prescribed in advance could be changed during the evaluation process. It is also unclear whether this paragraph is consistent with the requirement in another EC proposal concerning the treatment of tenders and contract awards that "To be considered for an award, a tender must be in writing and must at the time of opening conform to the essential requirements of the notices and tender documentation." *[Canada]*
  - The first sentence of paragraph 4 is problematic since it may be subject to a subjective interpretation. It would also result in uncertainty which, in turn, could be abused by unsuccessful suppliers. *[Hong Kong, China]*
  - The reference to "or equivalent" is intended to address the issue of performance versus design-based specifications. It is unclear what the equivalent of a performance-based specification would be since a performance-based specification would state what should be achieved by a particular good or service without specifically stating how. Accordingly, an alternative should not be offered in relation to performance-based specifications. *[US]*
  - This Article seeks to ensure that the procuring entity keeps an open mind and considers bids that comply with all the "essential requirements." This provision does not impose upon entities the obligation to lower its requirements nor to accept designs of a lower quality. Rather, all solutions must be assessed and evaluated on an equal footing. *[EC]*

- It is an ideal conception to add the expression, or "equivalent", to each technical specification and to consider equivalent specifications in all tenders in accordance with Article VIII:4 of the EU proposal. However it would be difficult to decide the extent to which equivalent specifications should be considered. Furthermore, problems, such as the possible conflict of opinions between procuring entities and suppliers on the measures to recognize the equivalence, the possible delay in contracting procedures when the judgment of the equivalence takes some time, and the possible increase in burden to the procuring entities, could arise. What solutions does the EU envisage to overcome these problems? **[Country?]**
- While there are cases where it is generally feasible to consider equivalent specifications, there are, for example, cases where: complete conformance to the technical specifications is indispensable in order to secure safety and durability at a high level; and where the purposes of the procurement, which include the test on specific material(s) or method(s) of construction, are not fulfilled unless complete conformance to the technical specifications is secured. Taking into account the above cases, it is possible to apply the EU proposal to all procurements. Moreover, if one of the purposes of the EU proposal is to enhance the opportunities for new firms and foreign firms to participate in the tendering procedures, there would appear to exist, however, different approaches to improve transparency in the process for determining specifications. Among the approaches could be the system where the procuring entity finalizes the technical specifications, which are to be included in the tender documentation after giving all the interested suppliers an advance opportunity to present their opinions on, or the material for, technical specifications, provided that there is enough time and that it is technically feasible. *[Japan; Job No. 5474]*

## Article VI:3

## Technical Specifications

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
3. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tender documentation.	<b>5. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tender documentation.</b> [EC – Job No. 876]
	<b>5. Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or trade name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as "or equivalent" are included in the tender documentation.</b> [US – Job No. 2867]

## Comments

- The words "or equivalent" seem to suggest that a government can authorize the manufacture of a product of a similar design as the one specified. Would the words "or equivalent" have any implications under intellectual property law? [Hong Kong, China]
- The notion of "equivalence" is already contained in the existing paragraph 3 of Article VI and is aimed at ensuring that when contracting entities refer to a particular trademark in technical specifications because there is no other practical way of defining what is being sought, they should foresee the possibility of providing an opportunity to alternatives that do not infringe intellectual property rights but, nevertheless, provide the same kind of solution to the needs of the contracting entity. [EC]
- The words "or equivalent" deal with a real practical problem, are necessary and should be retained. Whereas theoretically, there may be a perception that there is an intellectual property problem, it is not a problem in practice. [US]

## Article VI:4

## Technical Specifications

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
4. Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.	<b>6. Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a person that may have a commercial interest in the procurement.</b> <b>[EC – Job No. 876]</b>
	<b>6. Each Party shall ensure that its entities do not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in that procurement.</b> <b>[US – Job No. 2867]</b>

**Drafting suggestion**

- Suggest replacing the word "person" by "supplier" as it is already defined to include both natural persons or enterprises. It would be very difficult and sometimes not practically feasible to identify a person as the person who actually provides advice on technical specifications.  
*[Hong Kong, China]*

**ARTICLE VII: TENDERING PROCEDURES***Article VII:1**Tendering Procedures*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
<i>Article VII</i>  <i>Tendering Procedures</i>	<b><i>Article VII</i></b>  <b><i>Methods of Procurement</i></b>
1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.	<b>1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI. [Singapore – Job No. 3772]</b>

**Comments**

- Because Article VII and all other provisions of the Agreement are subject to Article III, the repetition of the non-discriminatory rule in Article VII:1 does not appear to be necessary. Selective repetition of this rule may in fact raise unintended interpretative questions. [US; Canada]
- The provisions on tendering procedures should be reviewed to accommodate the use of two-stage tendering and electronic catalogues. [Singapore]

**General comments in relation to the EC Proposal (Job No. 876):**

- The proposal refers to the term "procurement process." For reasons of coherence, this term should be used throughout the text of the Agreement. [EC] The US proposal uses the term "procurement" throughout its text but defines "procurement" as a process. [US]
- The proposal does not attempt to alter the substance of Article VII. Rather, it suggests changes to the definitions of the three main categories of tendering procedures. These changes are aimed at explaining more clearly how the procurement process works. [EC]
- The changes regarding selective procurement attempt to focus attention on the essence of the selective tendering process. In particular, a selective tendering process involves a 2-stage process. The first stage involves the qualification of suppliers. The second stage involves the submission of tenders by the suppliers that have successfully qualified during the first stage. [EC]
- The definition of limited procurement should focus on the main feature of limited procurement, being the fact that the procuring entity contacts a supplier/s of its choice and the entity may or may not choose not to publish a notice. [EC]
- The EC proposal appears to alter the most important terms in the GPA, that is the names given to different kinds of tendering procedure. From a practical perspective, is there a need to amend those names? [Hong Kong, China]
- The proposal retains reference to the three main categories of tendering procedures. It is useful to retain the three categories since this familiarises users with the categorisation and enables countries to choose their own procurement methods. [EC]

**General comments in relation to US Proposal (Job No. 1051):**

- The proposal seeks to remove references to specific types of procedures – i.e. open, selective and limited tendering. The objective of this change is based primarily on a perception that seems to be prevalent among non-Parties to the Agreement that the GPA appears to dictate the kind of procedures that can be used in particular circumstances. Accordingly, the US proposal seeks to establish a basic framework of rules within the GPA that will apply to all covered procurement, regardless of the method of procurement used. Parties' entities are free to choose the appropriate method of procurement provided that any given procurement is within the framework of rules set out in the GPA. *[US]*
- Selective tendering is useful, for example, in relation to design consulting procurements for public works, where it is important to select a fixed, limited number of suppliers to submit bids after qualification to reduce the burden on the procurement officials. Therefore, the removal of a reference to selective tendering is of concern. *[Japan]*
- It is not being suggested that the GPA should be amended to disallow the use of selective tendering. However, it is not considered necessary to specifically state in the GPA that selective tendering is allowed. Further, it may not be appropriate or efficient to specify in the Agreement the various types of procurement procedures that may be allowed within the framework of the GPA since that could potentially lead to reference to a long list depending upon how tendering or procurement procedures are defined. *[US]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p align="center"><b>Article VII</b></p> <p align="center"><b>Methods of Procurement</b></p> <p><b>1. Each Party shall ensure that the procurement methods of its procuring entities comply with the principles of equality of treatment, transparency and non-discrimination, and are consistent with the provisions contained in Articles VII through XVI.</b></p> <p><b>[EC – Job No 876]</b></p>

**Comments**

- Article VII of the EC proposal restates the principle of non-discrimination. There are a number of other instances in the EC proposal where the principle is restated or interpreted. This should not be necessary in a streamlined and simplified text. *[Canada]*
- Paragraph 1 above and other provision contain references to the principle of non-discrimination to ensure that the principle applies to or is reflected in those provisions. Such references may not be necessary, depending upon how Article III which, contains the general obligation on non-discrimination is revised. *[EC]*
- EC proposed paragraphs 1 and 2 dealing with treatment of tenders and contract awards and 4 dealing with the qualification of suppliers contain various formulations of the principle on non-discrimination. The principle of non-discrimination is an overriding obligation and should apply to all of the Articles without qualification. *[Canada]*

- All references to the principle of non-discrimination will be re-examined. Specific references have been made in cases where the principle is considered to play a more critical role. For instance, the short-listing of qualified suppliers is a critical phase of the procurement process. Therefore, references to non-discrimination have been made in that sense. *[EC]*



## Article VII:2

## Tendering Procedures

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
2. Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.	<b>2. Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of negatively affecting competition. [Singapore – Job No. 3772]</b>

**Comments**

- The reference to "negatively affecting competition" in paragraph 2 of the Singaporean proposal is a useful concept. *[EC]*
- Should information with regard to a specific procurement be provided to all suppliers participating in a tender or only to those suppliers who have reached a certain stage in the procurement process? *[EC]*
- The EC proposal appears to have deleted paragraph 2 of the existing text. That paragraph permits the procuring entities to provide information to prospective suppliers, provided that they do not do so in a manner which would have the effect of precluding competition. *[Hong Kong, China]*
- The EC proposal has provisionally deleted this provision. While the provision of information to suppliers in way that does not harm competition is considered to be important, the provision should perhaps have a more general scope and perhaps should be located in a place other than Article VII. *[EC]*

## Article VII:3

## Tendering Procedures

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>3. For the purposes of this Agreement:</p> <p>(a) Open tendering procedures are those procedures under which all interested suppliers may submit a tender.</p>	<p><b>3. For the purposes of this Agreement:</b></p> <p><b>(a) Open tenders are those which are posted in a medium which is [in the public domain] [readily available to both local and foreign suppliers], and which all interested suppliers may submit a tender.</b>  <b>[Singapore – Job No. 3772]</b></p>
	<p><b>2. For the purposes of this Agreement:</b></p> <p><b>(a) Open procedures are those procurement processes under which all interested suppliers may submit a tender.</b>  <b>[EC – Job No. 876]</b></p>

## Comments

- The phrase "in the public domain" in the proposal by Singapore is not necessary. *[Korea]*
- Does the EC proposal attempt to alter the classification of open tendering procedures and selective tendering procedures? *[Japan]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>(b) Selective tendering procedures are those procedures under which, consistent with paragraph 3 of Article X and other relevant provisions of this Agreement, those suppliers invited to do so by the entity may submit a tender.</p>	<p><b>(b) Selective tenders are those which, consistent with paragraph 3 of Article X and other relevant provisions of this Agreement, selected suppliers are invited to do so by the entity, and the information on the tender is not posted in a medium which is [in the public domain] [readily available to both local and foreign suppliers].</b>  <b>[Singapore – Job No. 3772]</b></p>

## Comment

- It may not be appropriate to define the procedure in terms of the medium through which information on selective tendering opportunities is provided. In most cases, notices of selective tendering are published in the same way as for open tendering procedures. For transparency purposes, requirements for publication of notices of invitation to tender should also apply to selective tendering procedures. *[US]*

- With regard to the absence of a reference to selective tendering procedures in the US proposal, selective procedures may occur separately and independently of the qualification of suppliers (GPA Article VIII). The US assumes that selective tendering is feasible under the qualification provision of Article VIII without preparing separate provisions for selective tendering. Would the selection of a fixed number of participants (e.g. 10 participants), based on the Article X of the current GPA, be consistent with Article VIII:(b) of the current GPA or Article VIII:4 of the US proposal if the conditions for qualification provided in Article VIII were applied to selective tendering procedures as well? While simplification of the provisions of the GPA should be pursued, selective tendering procedures should be allowed, as under the current GPA, even if the provisions are reviewed and subsequently revised for the purpose of the simplification. *[Japan]*
- The US proposal does not include an equivalent to Article X because the US does not consider that it is necessary to list and define different types of tendering procedures in the Agreement. *[US]*
- Article VII:3(b), which relates to selective tendering, refers to suppliers "invited" to submit tenders. However, the EC proposal does not refer to this. Did the EC intend to change the nature of selective tendering through its proposal? *[Japan]*
- What is the link between Article VII, VIII and X? Is selective tendering essentially a qualification process? *[Japan]*
- For the EC, selection is related to qualification in that selection is based upon qualification. Selection pursuant to Article X must occur in a fair and non-discriminatory manner. It is difficult to see how selection can be a fair and non-discriminatory selection without the occurrence of a qualification procedure. *[EC]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p>(b) <b>Selective procurements are those procurement processes under which, in accordance with paragraphs 4 and 7 of Article XVI and other relevant provisions of this Agreement, only suppliers satisfying qualification requirements are invited by the procuring entity to submit a tender.</b></p> <p><b>[EC – Job No. 876]</b></p>

### Comments

- Does selective procurement mentioned in the EU proposal have the same scope of procurement as the selective tendering procedures mentioned in the current GPA or did the EC intend to change the scope of the Agreement in this respect. Is the relationship between qualification and open/selective tendering procedures under the current GPA the same as that between qualification and open/selective procurement under the EU proposal? *[Japan; Job No. 5474]*

## Article VII

## Tendering Procedures

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(c) Limited tendering procedures are those procedures where the entity contacts suppliers individually, only under the conditions specified in Article XV.	(c) <b>Limited tenders are those where the entity contacts suppliers individually, only under the conditions specified in Article XV.</b> [Singapore – Job No. 3772]
	(c) <b>Limited procurements are those procurement processes where the procuring entity contacts suppliers of its choice, only under the conditions specified in paragraph 4 of Article IX.</b> [EC – Job. No. 876]

## Comments

- The proposed inclusion of the words "of its choice" in the EC proposal is desirable. [Hong Kong, China]

*Article VIII**Qualification of Suppliers*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<i>Article VIII</i>  <i>Qualification of Suppliers</i>	<i>Article VIII</i>  <i>Qualification and Pre-qualification of Suppliers</i>
In the process of qualifying suppliers, entities shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties. Qualification procedures shall be consistent with the following:	<b>1. Entities maintaining permanent lists of qualified suppliers shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties. Qualification procedures shall be consistent with the following:</b>

**General Comments**

- The rules regarding qualification systems should be simplified and clarified. However, first, it is necessary to determine whether Parties have a common understanding of qualification systems. and what is meant by "qualification procedures". The current GPA primarily relates to situations involving pre-qualification - that is, situations where complex procurement is involved and there is a need to preview the abilities of suppliers to determine whether they are able to fulfill the conditions of the contract. The pre-qualification or pre-selection of suppliers might cause problems and, therefore might deserve particular attention under the GPA. [EC]
- The US proposal may send a signal encouraging increased use of qualification systems. Qualification should remain a possibility but it is necessary to strike the right balance. [EC]
- The US does not want to encourage the use of a qualification procedure when it is not appropriate. When appropriate and necessary, qualification procedures should be available. However, in other cases, the unnecessary use of qualification procedures might violate the basic obligations underlying the Agreement. The Agreement should address this concern. [US]
- Regarding the issue of whether there is a common understanding of what is meant by qualification procedures, it appears that sometimes references are made to "qualification procedures" whereas other times references are made to "pre-qualification" procedures. Some governments refer to those two terms as if they are synonymous. However, the US understands "qualification" to include any requirement that establishes the ability of the supplier to fulfil a contract. These requirements may be very complex in some cases, such as for construction projects and major consulting projects, so that pre-qualification is necessary to ensure an efficient process. At the same time, there are often situations where qualification requirements may be relatively simple so that pre-qualification is not required. Rather, tenderers may be required, as part of the tendering process itself, to indicate that certain qualification criteria have been fulfilled. There may be a range of qualification procedures. The most restrictive may involve lists of pre-qualified suppliers and the most liberal may involve situations where an open tendering procedure is used that requires demonstration of fulfilment certain "qualification" criteria in the tender documents. [US]
- Qualification is a crucial part of the tendering procedure, both when it takes place separately from the tendering procedure and when it takes place as part of a larger procurement procedure. In particular, qualification may take place simultaneously with the submission of tender offers or prior to the submission of offers. Some degree of detail is required in order to guarantee that qualification can take place without harming competition. The US proposal is not sufficient to guarantee that selective procedures can take place in a non-discriminatory and competitive manner. [EC]

- The interpretation that a notice is not required in relation to selective tendering is not shared, although the relevant Articles in the existing GPA are somewhat confusing. Streamlining is necessary. Qualification is important. Therefore, it is necessary to have appropriate disciplines for qualification regardless of the point when qualification actually occurs - whether it occurs in one or two stages or it occurs as part of the process of choosing between tenders in an open tendering situation. *[Canada]*
- The US proposal apparently does not reflect two stages that may be associated with a qualification procedure – namely, stage one which involves pre-qualification and stage two which may involve the application of additional selective procedures such as the application of non-discriminatory criteria such as the financial state of the company in question and its technical capabilities. *[Japan]*

**General comments in relation to the revised US Proposal on qualification (Job No. 1051):**

- The new US proposal attempts to clarify the scope of the application of Article VIII. The existing Article VIII is entitled "Qualification" whereas it might be more appropriate to refer to the broader term of "conditions for participation." For example, in many countries, including in the United States, there may be situations in which suppliers may be required to be included in a registry in order to participate in procurement. The normal purpose of a registry is to verify certain generic qualifications such as financial and legal status. Registration would seem to fall within the meaning of the term "conditions for participation." The new proposal repeats the phrase "registration, qualification or any other conditions for participation" to be as clear as possible. However, the final draft may include a definition of the term "conditions of participation" as meaning "registration, qualification or any other conditions for participation." *[US]*
- Registration lists appear to be a form of qualification for which the qualification requirements are not particularly significant, such as a requirement to register interest and/or certain minimum information. It is questioned whether a distinction should be drawn between minimum requirement qualification and more onerous forms of qualification. *[EC]*

**General comments in relation to the EC Proposal (Job No. 876):**

- Qualification may occur in the context of open, selective and limited tendering procedures. For example, it may occur as part of a single process of awarding a contract. Other times qualification may occur separately from the contract award process. The EC proposal attempts to reorganise Article VIII to make this distinction clear. The general rules are found in the first sub-paragraph and apply every time an entity has to verify that the conditions for participation are met by actual or potential bidders in the case of open procurement. A separate sub-paragraph has been proposed to deal with the use of a permanent list of qualified suppliers. A new provision has been inserted, which is based on the existing Article that deals with selective tendering, to deal with the case where selective tendering entails a two-stage procedure. During the first stage, qualification is verified. During the second stage, only qualified suppliers are allowed to submit bids. *[EC]*
- With respect to two-stage selective tendering, selection should be based upon criteria that are known in advance through publication in the notice of intended procurement. *[EC]*
- Regarding the use of permanent lists of qualified suppliers, this list must be open at all times so that any interested bidder is able to request inclusion in the list at any time even in cases where such lists are used in connection with a particular award process. Subsequent inclusion in the list should not be dependent upon whether or not the entity has time to qualify since this would make it too easy for the entity to say that it had no time. *[EC]*
- The proposal maintains the possibility to use permanent lists as a closed system for Annex 3 entities because it is believed that these entities are different in important respects from Annex 1 and Annex 2 entities. *[EC]*
- The EC's proposal helps to clarify the relationship between Article VIII and X of the existing GPA. *[US]*

**ARTICLE VIII: QUALIFICATION OF SUPPLIERS***Article VIII**Qualification of Suppliers*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
(a) any conditions for participation in tendering procedures shall be published in adequate time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures;	<b>1. Procuring entities shall ensure that any conditions for participation in a procurement covered by this Agreement are limited to those that are essential to ensure a potential supplier's ability to execute the contract in question. [EC – Job No. 876]</b>
	<b>7. Suppliers requesting to participate in a given intended procurement who are not on the permanent list of qualified suppliers shall be given the possibility to participate in the procurement by presenting the equivalent certifications and other means of proof requested from suppliers who are on the list, [EC – Job No. 876]</b>

**Comments**

- Consultations among the GPA Parties suggest there may not be consensus on the meaning, in GPA Article VIII, of the term "conditions for participation". It may be useful to clarify how the provisions of that Article apply to "conditions for participation" other than qualification requirements, such as supplier registries. This issue may be of particular importance to some countries who are in the process of acceding to the GPA or who may consider it in the future. Revision of the initial US proposed Article VIII would require technical modifications (mostly of terminology) elsewhere in the text. [US]
- The criteria for selection under Article X are not covered under Article VIII(a). The GPA should make clear that the Article X selection criteria is covered under Article VIII(a). [Japan]

**In relation to paragraph 7 of the EC proposal:**

- Paragraph 7 of the EC proposal is perhaps too ambitious in that it obliges entities to consider every new supplier that wants to be included in the list. The EC proposal should be modified to take account of the burden that would be imposed upon procuring entities. [Japan]
- It is important to ensure that suppliers are given the possibility to participate in a procurement even if they are not included in a permanent list and even if they are not registered on condition that they can prove that they are as capable and competent as those that have been included on the list. This ability is particularly important in cases where registries are used. In the EC's internal experience, registration should not be used as an exclusive means of deciding whether or not a supplier should be allowed to submit a bid. Further, there may be situations where suppliers are interested in a particular contract but are not necessarily interested in being included in a permanent list or registry, for instance in registries of local chambers of commerce which sometimes requires payment of sums and may entail cumbersome processes. [EC]
- The relationship between paragraph 7 and paragraph 4 of the EC proposal should be determined. [US]

- The EU proposal provides that procuring entities, other than those listed in Annex 3, shall always consider those suppliers not listed in the permanent list. However, in this case, the procuring entities need time to examine an applicant's eligibility. It would, therefore, seem clear that procurement entities, being short of time necessary to examine, cannot deal with applicants having applied just prior to the deadline for submitting tenders. In Japan, the entities listed in Annex 1 and Annex 2 have been using permanent lists in most procurement cases, and all central government entities have been using the common permanent lists for procurement of goods and general services. The possibility of application by email for enrolment in the lists has, for example, been made available for the convenience of suppliers. Regarding the procurement of construction services, enrolment in the lists is also executed reasonably and promptly. As long as a prompt enrolment in the permanent list is secured, it is not necessary to oblige procuring entities to consider those suppliers not listed in the permanent list. [*Japan; Job No. 5494*]
- The concern underlying the EC's proposal is that such lists will effectively operate in a closed way. The EC proposal seeks to ensure that the participation of foreign companies that may not have the resources to be on all the lists for all entities in a given area or country is not prevented. [*EC*]



AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>Registration, Qualification and Other Conditions for Participation</b></p> <p><b>1. Where an entity requires suppliers to satisfy registration or qualification requirements or any other conditions for participation in a procurement, the entity shall publish a notice inviting interested suppliers to apply for inclusion in a registry, qualification, or recognition of satisfaction of any other conditions for participation and shall provide no less than 15 calendar days prior to the final date for the submission of tenders for such suppliers to submit their applications. This notice may be the same as the notice of intended procurement required under Article V of this Agreement or a separate notification relating to such requirements or conditions.</b>  <b>[U.S. – Job No. 1051]</b></p>
	<p><b>2. Where, at any time within the 15-day period referred to in paragraph 1 of this Article, a supplier that has not previously registered, qualified or satisfied any conditions for participation submits an application, the entity shall promptly start the relevant procedures and shall allow such supplier to participate in the procurement, provided there is sufficient time to complete the procedures within the time-period established for the tendering process.</b>  <b>[US – Job. No. 1051]</b></p>
(b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question.	

### Comments

- With respect to Article VIII:(b) of the Agreement, ways should be found to reduce administrative burdens on suppliers, particularly SMEs, regarding the procedures for the proof of their technical, financial and commercial capacity. *[Korea]*
- In relation to Article VIII(b) of the Agreement, is it possible to have "blacklists" of suppliers and to provide for procedures that allow such lists to be passed between concerned entities? *[Jordan]*
- The Agreement allows each Party to disqualify suppliers that may, for some reason (for example fraud) warrant the use of a blacklist. However, it seems that Jordan is suggesting something beyond what is currently available under the Agreement. *[US]*

In relation to the reference to "registration" in paragraphs 1 and 2 of the US proposal:

- With respect to the introduction of the new concept of a "register," since qualification precedes registration, it is questioned whether reference to registration is needed and whether it helps to clarify. *[Switzerland]*
- While registration is normally based upon a qualification process, in some non-GPA countries, the registration process appears to entail more of a simple, administrative process without any clear relationship to qualification. Further, in some cases, it can constitute a serious barrier to trade. Therefore, the motivation for including this concept was to clarify that registration should serve the purpose of qualification. *[US]*
- The EC has an open mind with regard to a reference to registration requirements. The way in which the registry is used in the procurement process should be compatible with the EC proposal in paragraph 7. *[EC]*

In relation to paragraph 2 of the US proposal:

- Article VIII currently requires that a qualification process be open, including cases when a permanent list of suppliers is created under Article IX. There should be an opportunity for suppliers at all times to request qualification and if there is sufficient time during the tendering process, to qualify and participate in the procurement process. That principle should continue to apply in cases of open and selective tendering as currently defined in the Agreement. Paragraph 2 of the US proposal provides that if closed list of pre-qualified suppliers are used, that principle will not apply. *[US]*
- There may be cases where local knowledge or experience is important. Article VIII should be retained. The phrase "provided there is sufficient time to complete the qualification procedure within the time-period established for the tendering process" is problematic. Apart from creating operational difficulties, it will likely lead to dispute and bid challenges because a deadline is not set. To be fair to both procuring entities and suppliers and in order to be predictable as mentioned in paragraph 2 of the Preamble, it is strongly recommended that the phrase be amended as follows: "provided the qualification procedures can be completed by the final date for the submission of tenders, or a later date specified by the procuring entity in the notice referred to in paragraph 1 of this Article." *[Hong Kong, China]*
- Warranties should be introduced into the system to avoid the closing of qualification systems to newcomers. This could be a critical point in adapting the GPA to new electronic procurement methods. The new means offered by electronic systems to increase opportunities and to increase transparency should be taken into account *[EC]*
- Is it practically possible to qualify new suppliers while the tendering process is under way? Suppliers who fail to abide by the time-limits would have another opportunity to qualify, which seems unfair. If all suppliers have equal opportunity to participate, the practicality of including new suppliers in an ongoing qualification would be a secondary issue. There would be a rolling deadline so that suppliers could qualify at any time. *[Singapore]*
- An important provision contained in the GPA and in the US proposal is that even in the case where a pre-qualification process occurs and an invitation is sent to pre-qualified suppliers to submit tenders, the Agreement still requires publication of the invitation notice and requires entities to consider the possibility of qualifying suppliers who did not pre-qualify in time. *[US]*
- At some point in a qualification process for a particular procurement, an entity may establish a time-limit beyond which it will no longer accept applications. Both under the GPA and the US proposal, there should be an opportunity for interested suppliers who are not qualified to apply for qualification during the procurement process. However, at some point in time, the entity might state that it is no longer practical to receive applications. *[US]*

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**Comments concerning the 15-day period**

- Fifteen calendar days for the submission of an application for qualification might be too short a period for suppliers to estimate costs after they receive notices of the result of the qualification process. *[Switzerland; Japan]*
- While 15 days may be too short for many types of procurement, the reference to 15 days in paragraph 1 does not mean that there should be 15 days up until the final date for the submission of tenders but, rather, that the entity should ensure that there is at least 15 days provided for suppliers to submit applications for qualification and have the applications for qualification processed. *[US]*
- If, for example, a notice requesting submission of tenders states that there will be 90 days between the date of issue of the notice and the final date for the submission of tenders, the entity must provide at least 15 days for the submission of applications for qualification. The remaining 75 days after the submission of the applications for qualification should be left open for the submission and processing of tenders. The initial period could be longer. However, the US proposal suggests that that period should be a minimum of 15 days. *[US]*
- In the case of construction works contracts, open tendering procedures may be used in conjunction with a pre-qualification procedure, including demonstration of relevant technical skills and experience. In light of this, with respect to the reference to the completion of a 15-day period in paragraph 1 of the US proposal, to which period does this refer? Does this refer to the last day of the tender period or the first day on which suppliers can apply for qualification or neither of these? The GPA should provide a sufficiently long period between the day when the supplier knows whether or not it is qualified and the day by which tenders must be received. In the case of contracts for construction works, suppliers want to commence detailed cost estimation after they have been informed that they have qualified for a particular tender. The current GPA provides that similar considerations apply in relation to selective tendering. However, the US proposal does not include such considerations. *[Japan]*
- The US proposal seeks to create a provision (paragraph 1) that would apply to situations in which there is one notice of intended procurement which includes qualification requirements that must be satisfied. In that case, the qualification period would exist within the same time-frame as the tendering period. It is also intended to cover the situation in which there may be two different notices, the first of which invites interested suppliers to apply for qualification and the subsequent notice relates to the invitation to tender. In the latter case where there are two separate notices, the time-period envisaged could be fulfilled before the tendering process begins. In other words, if 15 days were the appropriate time-period (as compared to 25 days in Article VIII(b) of the current text), that could apply to the qualification period and upon expiration, a notice inviting tenders could be issued. The proposal attempts to encompass both situations in order to make the provisions flexible enough to cover the full range of possibilities. *[US]*
- In relation to construction works, qualification requirements relating to experience of similar construction works and availability of necessary qualified engineers for each individual construction work is widely used. How would Article VIII:1 and 2 of the US proposal deal with this type of qualification. *[Japan]*
- In the case of construction works involving this type of qualification, all suppliers who wish to participate in tendering procedures shall be subject to the qualification procedures. In the case of construction works involving qualification where suppliers are registered in the list of qualified suppliers, qualification procedures are necessary only for suppliers who have not been registered in the list. Therefore, suppliers (i.e. construction companies) would begin cost estimates for the calculation of bid price only after they have been informed of the result of qualification. In other words, suppliers need a period long enough for cost estimation after they have received notices of the qualification result. The current GPA takes this point into consideration for selective tendering (cf. Article XI:2(b)). *[Japan]*

- As for construction work projects in Japan, the qualification of a supplier occurs on the basis of their experience gained from similar construction works, and on the ability to secure necessary qualified engineers for each individual construction work, as well as on whether the supplier is registered in the permanent list. We understand that the first set of criteria (experience and availability of qualified engineers) is also widely used for construction works in many other countries. If a construction work project requires this kind of qualification, Japan notes that all suppliers (i.e. construction companies) would only be willing to engage in estimating the bidding price after having been informed of the result of the qualification, given that this involves substantial costs. Therefore, suppliers need a period that is long enough to prepare the cost estimation after having received notice of the qualification result. The "15 days" rule in Article VIII:1 and 2 of the U.S. proposal might have an effect of reducing flexibility, in that the period might not be long enough to prepare the cost estimation after receiving notice of the qualification result. [*Japan; Job No. 8474*]

## Article VIII

## Qualification of Suppliers

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and 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 suppliers of other Parties than to domestic suppliers and shall not discriminate among suppliers of other Parties.</p> <p>The financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier's global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations;</p>	<p><b>2. Procuring entities shall evaluate the financial, commercial and technical capacity of a supplier on the basis of that supplier's global business activities, and shall not impose the condition that, in order for a supplier to participate in a procurement process, the supplier has previously been awarded one or more contracts by an entity of a given Party or that the supplier has prior work experience in the territory of a given Party</b> [EC – Job No. 876].</p> <p><b>Entities shall:</b></p> <p>(a) <b>limit any registration or qualification requirements, or other conditions for participation in a procurement, to those requirements or conditions that are essential to ensure that a potential supplier has the legal, technical and financial abilities to fulfill the requirements and technical specifications of the procurement;</b></p> <p>(b) <b>evaluate the financial, commercial and technical abilities of a supplier on the basis of that supplier's global business activities, including both its activity in the territory of the Party of the supplier, and its activity, if any, in the territory of the Party of the entity.</b> [US – Job No. 1051]</p>

## Comment

- Many multinational enterprises, large or small, have slightly different company names in different regions or economies. Some are wholly owned subsidiaries, others are joint venture or other kinds of commercial arrangement. Unless the supplier uses exactly the same name in pursuing its global business, it is difficult to access or prove the supplier's global business and legal relationship between the companies in different territories. [Hong Kong, China]

## Article VIII

## Qualification of Suppliers

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(c) the process of, and the time required for, qualifying suppliers shall not be used in order to keep suppliers of other Parties off a suppliers' list or from being considered for a particular intended procurement.	<b>8. When a procuring entity in Annex 3 uses the notice regarding the permanent list of qualified suppliers as a notice of intended procurement, as provided in Article IX, paragraph 3, suppliers requesting to participate who are not on the permanent list of qualified suppliers shall also be considered for the procurement provided there is sufficient time to complete the qualification procedure; in this event the procuring entity shall promptly start procedures for qualification and the process of, and the time required for, qualifying suppliers shall not be used in order to keep suppliers of other Parties off the suppliers' list. [EC – Job No. 876]</b>

## Comments

- Paragraph 8 of the EC proposal seems to be overly narrow in that it only seems to apply when a particular type of notice is used. At the very least, this provision should probably apply even when an entity publishes a notice regarding a permanent list and further, notices concerning specific procurements. *[US]*
- The flexibility provided for in paragraph 8 in the EC proposal is important in that it allows for suppliers to be subsequently qualified provided that sufficient time exists. However, the paragraph should be amended so as to ensure that it is not more binding and strict for an entity as compared to paragraph 4 of the EC proposal. *[Switzerland]*
- Paragraphs 4 and 8 are not incompatible and should possibly be combined. Paragraph 4 entails a situation where an additional selection is made after a first decision on qualification is made at which point the qualified suppliers are ranked. This additional selection is made on the basis of criteria that have been published. *[EC]*
- The current drafting of paragraphs 4 and 8 suggests that paragraph 8 would only apply to the use of permanent lists by Annex 3 entities. A question arises as to whether a similar requirement to that contained in paragraph 8 should also apply to a selection process involving, for example, the evaluation of qualification requirements in a ranking of suppliers. *[US]*

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AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>4.(c) base their decisions on applications for registration, qualification or any other conditions for participation solely on the information they have specified in advance in notices or tender documentation; [US Job No. 1051]</b>

**Comment**

- Regarding "the information" referred to in this provision, procuring entities should be able to use, not only information from each participant concerning the tender, but also information from other persons or organizations. [*Japan; Job No. 5474*]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p>(d) recognize the registration, qualification or satisfaction of any other conditions of participation of any supplier that satisfies the relevant requirements or conditions; and</p> <p>(e) allow any supplier that they have recognized as registered, qualified or as having satisfied any other conditions for participation to participate in the relevant procurement. [U.S. – Job. No. 1051]</p>
<p>Entities shall recognize as qualified suppliers such domestic suppliers or suppliers of other Parties who meet the conditions for participation in a particular intended procurement.</p> <p>Suppliers requesting to participate in a particular intended procurement who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure;</p>	<p><b>4. Procuring entities shall recognize as qualified suppliers all domestic suppliers and suppliers of other Parties who meet the conditions for participation in a particular intended procurement. Entities shall base their qualification decisions solely on the conditions for participation that have been specified in advance in notices or tender documentation.</b> [EC – Job No. 876]</p>
	<p>Procuring entities may limit the number of qualified suppliers they will invite to tender, provided that they select the maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement process, and make the selection in a fair and non-discriminatory manner and on the basis of the criteria indicated in the notice of intended procurement or in tender documents. [EC – Job No. 876]</p>
	<p>The process of, and the time required for, qualifying suppliers to permanent lists maintained by the entity shall not be used in order to keep suppliers of other Parties off a suppliers' list or from being considered for a particular intended procurement. Entities shall recognize as qualified suppliers such domestic suppliers or suppliers of other Parties who meet the conditions for participation in a particular intended procurement. [Suppliers requesting to participate in a particular intended procurement who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure.] [Singapore – Job No. 3772]</p>



**Comments**

- Who is expected to take the initiative to respond to a tender? Is the tender an open invitation and interested suppliers take the initiative as to whether or not to respond to a tender? Alternatively, does the procuring entity make the decision to invite particular suppliers and not others? *[Singapore]*
- The selective tendering method covers two types of procedures. One type is for a specific procurement such as construction of highways for which interested suppliers submit qualification documents within the time-limit set out in the qualification documents. If the qualification documents cannot be submitted within the time-limit or the document submitted is not in conformity with the tender documentation, the qualification application would be rejected. The other type is the establishment of permanent lists of qualified suppliers, which allows suppliers to apply for qualification at any time. Any modification to Article VIII should take into account the difference between these two types of methods of selective tendering. *[Chinese Taipei]*
- It is preferable to separate the rules regarding permanent lists of qualified suppliers and those regarding qualification for an individual procurement. This approach is reflected in paragraphs 1 to 3 of the Singaporean proposal. *[Hong Kong, China]*
- With respect to the second part of the paragraph 4 of the EC proposal, procuring entities should have more discretion to set the maximum number of suppliers allowed to submit a bid consistent with the efficient operation of the procurement process as well as the non-discrimination principle of the GPA and on the basis of the criteria set out in the notice of intended procurement. This is a more realistic way of balancing efficiency with the interests of open competition than the current Article X:1. *[Hong Kong, China]*

## Article VIII

## Qualification of Suppliers

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>3. Where a notice inviting applications for inclusion in a registry, qualification, or recognition of satisfaction of any other conditions for participation in a procurement process is issued separately from the notice of intended procurement required under Article V of this Agreement, such notice shall be published in the same manner as the notice of intended procurement and shall contain at least the following information:</b>
	<b>(a) a description of the intended procurement;</b> [US – Job no. 1051; EC – Job No. 876]
	<b>(b) the registration or qualification requirements and any other conditions for participation</b> [US – Job No. 1051];
	<b>(c) The name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the procurement;</b> [US – Job No. 1051; EC – Job No. 876]
	<b>(d) The time limits, if any, for the submission of applications; and</b> [US – Job. No. 1051; EC – Job No. 876]
	<b>(e) an indication that the procurement is covered by this Agreement.</b> [US – Job No. 1051; EC – Job No. 876]

## Comments

- Do the words "separately from the notice of intended procurement" mean that the US no longer recognises the qualification notice as a notice of intended procurement? Under the current GPA, an Annex 3 entity is able to issue a notice of qualification which may also function as a notice of intended procurement. [Switzerland]
- The proposal does not deal with the separate question of whether Annex 3 entities should have flexibility with respect to the publication of notices. The aim of this proposal is to recognise various options. The first is the option is to publish a single notice in which both the qualification requirements and the tendering requirements are made available through the notice. The second option is to have two separate notices for instance with respect to qualification for a permanent list and subsequent notices relating to specific procurements conducted among the supplies included in the list. This is the case with which the proposal deals. [US]

## Article VIII

## Qualification of Suppliers

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p>(a) any supplier may apply for qualification at any time; and all qualified suppliers so requesting are included in the lists within a reasonably short time; [Singapore – Job No. 3772]</p>
	<p>Permanent list of qualified suppliers</p> <p>5. Procuring entities maintaining permanent lists of qualified suppliers shall ensure that suppliers may apply for qualification at any time; and that all suppliers that so request and that meet the qualification requirements are included in the lists within a reasonably short time. [EC – Job. No. 876]</p>
<p>(d) entities maintaining permanent lists of qualified suppliers shall ensure that suppliers may apply for qualification at any time; and that all qualified suppliers so requesting are included in the lists within a reasonably short time;</p>	<p>(d) each Party shall ensure that:</p> <p>(i) each entity and its constituent parts follow a single qualification procedure, except in cases of duly substantiated need for a different procedure, and</p> <p>(ii) efforts be made to minimize differences in qualification procedures between entities; [Singapore – Job No. 3772]</p>

## Comment

- It would be difficult to comply with subparagraph (d)(ii) of the Singapore proposal given the differences in scope and nature of procurement undertaken by different entities. [Hong Kong, China]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>(e) if, after publication of the notice under paragraph 1 of Article IX, a supplier not yet qualified requests to participate in an intended procurement, the entity shall promptly start procedures for qualification;</p>	<p>(b) if registration as a permanent qualified supplier is a pre-requisite for participation in an intended procurement, and a supplier not yet qualified requests to participate in the intended procurement, the [entity shall promptly start procedures for qualification] [supplier shall not be denied the opportunity to participate simply on the basis that the supplier is not on the entity's permanent list of qualified suppliers]; [Singapore – Job No. 3772]</p>
	<p>(c) any supplier having requested to become a qualified supplier shall be advised by the entities concerned of the decision in this regard. 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; [Singapore – Job No. 3772]</p>

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(f) any supplier having requested to become a qualified supplier shall be advised by the entities concerned of the decision in this regard.	<p><b>Information on Qualification Decisions</b></p> <p><b>5. Entities shall not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by an entity of that Party or that the supplier has prior work experience in the territory of that Party.</b> [US – Job No. 1051]</p> <p><b>6. A procuring entity shall promptly advise any supplier that requests qualification of its decision as to whether that supplier is qualified.</b> [EC – Job No. 876]</p>
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;	<p><b>Information on Entities' Decisions</b></p> <p><b>7. Where a supplier applies for inclusion in a registry, qualification, or recognition that it has satisfied the conditions for participation in a procurement, the entity shall promptly advise such supplier of its decision with respect to the application.</b> [US – Job No. 1051]</p> <p><b>8. Where an entity rejects supplier's application to qualify, or ceases to recognize a supplier as registered, qualified or as having satisfied the conditions for participation, the entity shall inform the supplier and, on request of the supplier, promptly provide the supplier with a written explanation of the reasons for its decision.</b> [US – Job No. 1051; EC – Job No 876]</p>

### Comments

In relation to the EC proposal:

- Paragraphs 5 – 8 of the EC proposal only apply to the use of permanent lists. However, some of these provisions should have more general application to all procurement covered by the GPA. This is particularly clear with respect to paragraph 6 of the EC proposal which addresses some basic transparency issues. [US]

In relation to the US proposal:

- With respect to paragraph 5 of the US proposal, the question arises as to whether the details in that proposed paragraph are necessary since there are many conditions that could be added which the entity should not be able to impose upon a supplier in order for that supplier to participate in a procurement such as prior work experience in the territory. [Switzerland]
- This proposal can be a useful in ensuring that the objectives of the GPA are achieved whereas a requirement that an entity might require any supplier that wishes to participate in a procurement to have had previous experience in the territory of that Party could constitute a serious barrier to new entrants and an obstacle to achieving the objectives of the Agreement.

The phrase "shall not impose the condition that a supplier has been previously awarded one or more contracts" does not necessarily exclude the possibility that experience should be taken into account but that that should not result in automatic exclusion. *[US]*

## Article VIII

## Qualification of Suppliers

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(g) each Party shall ensure that:	
(i) each entity and its constituent parts follow a single qualification procedure, except in cases of duly substantiated need for a different procedure; and	
(ii) efforts be made to minimize differences in qualification procedures between entities.	
(h) nothing in subparagraphs (a) through (g) 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.	<b>3. Nothing in this Article shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations or conviction for serious criminal organizations.</b> <b>[EC – Job No. 876]</b>
	<b>6. Nothing in this Article shall preclude the exclusion of a supplier on grounds such as bankruptcy or false declarations.</b> <b>[US – Job No. 1051]</b>
	<b>(e) nothing in subparagraphs (a) through (d) 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.</b> <b>[Singapore – Job No. 3772]</b>

## Comment

- The US proposal appears to omit the existing subparagraph (g), which deals with single qualification procedures. Clarification is sought as to why this change has been made. [Korea]

## Article VIII

## Qualification of Suppliers

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>3. Entities wishing to pre-qualify suppliers for participation in an individual intended procurement shall in addition to the other provisions in this Agreement, ensure that their procedures are consistent with the following:</b></p>
	<p>(a) the invitation to be considered for pre-qualification shall be published in adequate time to enable interested suppliers to submit proper documentation;</p>
	<p>(b) [any conditions] [the criteria] for pre-qualification shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and 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 suppliers of other Parties than to domestic suppliers and shall not discriminate among [against] suppliers of other Parties. The financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier's global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the [supply organizations] [business units of the supplier in different territories].</p> <p>[Singapore – Job No. 3772]</p>

## Comments on the proposal by Singapore

- The reference to "other provisions in this Agreement" in subparagraph 3 of the Singaporean proposal should be made more specific or it should be deleted as it appears to be unnecessary. [Hong Kong, China]
- The existing wording of Article VIII(a) is preferred to the proposed wording in subparagraph 3(a). [Hong Kong, China]



- Subparagraph 3(b) of the proposal is, in principle, desirable, particularly in relation to SMEs, since it purports to reduce administrative burdens on suppliers. However, more details of the proposal are required. [*Hong Kong, China*]
- The last sentence of paragraph 3(b) of the Singaporean proposal should be deleted given that it is difficult to assess a suppliers' global business and legal relationship between business units that are located in different territories. [*Hong Kong, China*]

**ARTICLE IX: INVITATION TO PARTICIPATE REGARDING INTENDED PROCUREMENT***Article IX**Invitation to Participate Regarding Intended Procurement*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>Article V - Publication of Notice of Intended Procurement</b></p> <p><b>1. For each contract covered by this Agreement, except as provided for in Article [IX of this Agreement] procuring entities shall publish a notice inviting interested suppliers to submit tenders for that contract. The notice shall be published in the appropriate publication listed in Appendix II. Such publications shall be in electronic or paper media which are widely disseminated and readily accessible to the general public.</b></p> <p><b>[US – Job No. 2867]</b></p>

**Comments**

- A question by Hong Kong, China (No. 21) regarding the term "widely disseminated" and the response by the United States are contained in Job. No. 5595.
- There is a tension between the aim of simplifying the Agreement and maintaining useful aspects of the Agreement. Perhaps a number of items that have been eliminated in the US proposal should be retained. *[EC]*
- The supplier should be able to make a decision as to whether they are interested in the procurement and, therefore, whether to make a request for tender documents. In addition, it should be possible to rely upon the principle of non-discrimination to ensure that information provided to one supplier is provided in a non-discriminatory way to all interested suppliers. It is not necessary to list everything of potential interest in a notice provided that suppliers who are interested in participating in a tender procedure receive all the information that is necessary to submit a tender and they receive that information in a non-discriminatory way. *[US]*
- It is important to have agreement on a predictable set of core requirements that is no more than necessary for suppliers to make a decision as to whether or not to submit a tender in a given case. *[Canada]*
- The information required in the US proposal is considered to be the core necessary for notices because it is considered sufficient for a supplier to make a decision as to whether they are interested in the procurement and, therefore, whether to make a request for tender documents. In addition, it should be possible to rely upon the principle of non-discrimination requirement to ensure that information provided to one supplier is provided in a non-discriminatory way to all interested suppliers. It is not necessary to list everything of potential interest in a notice provided that suppliers who are interested in participating in a tender procedure receive all the information that is necessary to submit a tender and they receive that information in a non-discriminatory way. *[US]*
- Publication in electronic media is transitory by nature. An important element of transparency is the ability to obtain information for the relevant period of time – that is, the entire period for which a tender is open and not merely the day that the tender notice is issued. How can it be ensured that that occurs if electronic media are used? *[Canada]*

- The existing Article IX identifies a number of different type of notices, leaving it unclear which notices should be used by particular entities. Is it necessary to list in the Agreement every type of notice that might be used or is it preferable to refer to a certain basic set of commitments that will apply to the various types of notices that might be used to ensure an adequate level of transparency? *[US]*

*Article IX:1**Invitation to Participate Regarding Intended Procurement*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>1. In accordance with paragraphs 2 and 3, entities shall publish an invitation to participate for all cases of intended procurement, except as otherwise provided for in Article XV (limited tendering). The notice shall be published in the appropriate publication listed in Appendix II.</p>	<p><b>1. In accordance with paragraphs 2 and 3, entities shall publish an invitation to participate for all cases of intended procurement, except as otherwise provided for in Article XV (limited tendering). The notice shall be published through means which offer the widest possible and non-discriminatory access to interested suppliers and service providers from all Parties to this Agreement; these means shall be accessible through a single point of access. Each Party shall notify to the other Parties this single point of access. Entities shall not charge for access to invitations to participate</b> [Singapore – Job No. 5271]</p>
	<p><b>1. In accordance with paragraphs 2 and 3, entities shall publish an invitation to participate for all cases of intended procurement, except as otherwise provided for in Article XV (limited tendering). The notice shall be published in the appropriate publication listed in Appendix II. Such appropriate publication may be electronic or paper.</b> [Canada – Job No. 3483]</p>
	<p><b>1. In accordance with paragraphs 2 and 3, entities shall publish an invitation to participate for all cases of intended procurement, except as otherwise provided for in Article XV. The notice shall be published in the appropriate publication or website listed in Appendix II.</b> [Chinese Taipei – Job No. 3193]</p>

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>Article IX – Notice of intended procurement</b></p> <p><b>1. For each intended procurement covered by this Agreement, except as provided for in paragraph 4, procuring entities shall publish a notice inviting interested suppliers to submit tenders or, where appropriate, requests for participation.</b>  <b>[EC – Job No. 876]</b></p> <p><b>The notice shall be published in the appropriate publication listed in Appendix III. Such publications shall be in electronic or paper media which offer the widest possible and non-discriminatory access to interested suppliers from all Parties of this Agreement and shall be accessible free of charge through a single point of access.</b>  <b>[EC – Job No. 876]</b></p>

### Comments

General comments in relation to the EC Proposal (Job No. 876):

- The proposal attempts to restructure and reorganise the provisions on publication requirements with a view to simplifying the Agreement. The proposal includes a general, universal obligation to publish a notice of intended procurement which applies to each entity that intends to award a contract. The proposal then lists the mandatory content of such a notice. The proposal foresees the possibility of having a separate notice for the invitation of applications for qualification. Further, the proposal lists circumstances that allow the entity not to publish the notice of intended procurement. The obligation to publish a summary notice has been retained since it is considered to be important in the interests of transparency and access to information. Further, the proposal regroups the provisions concerning notices for permanent lists of qualified suppliers, which should only be published by entities who maintain those kinds of lists. An additional article has been proposed regarding notices of planned procurement. The possibility has been maintained in that Article to use the notice of planned procurement to reduce the general time limits that would ordinarily apply. Annex 3 entities may still use notices of permanent lists and of planned procurement as an equivalent for a notice of intended procurement. The peculiarities of these Annex 3 entities justify additional flexibility. *[EC]*
- The proposed approach may be confusing for suppliers. Further, it is not really clear that it is necessary to specify a list of different notices with different labels or names. Further simplification could be achieved by focusing on the acts that require notification and the appropriate timing for such notification. *[Canada]*

### Comments in relation to the proposed requirement that procurement notices should be provided "free of charge"

- This proposal raises concerns. *[Hong Kong, China]* Would there be a benefit by shifting the costs of publication from suppliers to taxpayers? *[Canada]*

- The intent of the additional wording by Singapore is to explicitly state what is provided free of charge, as opposed to a blanket free of charge formulation. The telephone line, the computer, the Internet Service Provider fees are not free of charge. The current subparagraph 6(g) of Article IX also refers to "the amount and terms of payment of any sum payable for the tender documentation". Hence, it would be better to explicitly state what is provided free of charge. *[Singapore – Job No. 5271]*
- The principle of "reasonableness" might be relevant in this respect to ensure that barriers are not created through the imposition of excessive costs. Any charge that is imposed should be non-discriminatory and closely linked to the actual cost of providing the information. Fees charged for access to information should not be regarded as a source of revenue. *[EC; US]*
- The proposal to make the notice of intended procurement accessible at no cost through a single point of access is theoretically ideal for the convenience of local and foreign suppliers. However, in many countries, subscription fees are charged for the National Gazette. Although it has become common for procuring entities to publish their notices via the Internet, it does seem that only a limited number of Parties have ensured that notices made by all procuring entities are available through a single point of access. It will thus take some a considerable period of time before all Parties are ready to implement such a system. Therefore, a progressive approach, for example a system including appropriate transitional periods, might be necessary. *[Japan; Job No. 5474]*

#### **Comments in relation to single point of access**

- The establishment of "a single point of access" for electronic publications of tender notices under the GPA, as suggested by Korea, is technically feasible. However, it is questionable whether the benefits would be worth the significant cost and undue burden associated with introducing this system for Parties with decentralized systems and for developing countries. *[US]*
- Korea has a central procurement system from which all relevant information on government procurement can be obtained. A single contact point does not mean that masses of information need to be accumulated. Rather, that point would merely connect interested Parties to the right point. *[Korea]*
- Information should be as easily accessible as possible provided that providing such access does not impose unnecessary burdens on Parties. Having all the information available at a single point of access may not be practically possible and could defeat the aim of transparency since it could be very difficult to filter through all the information provided at the point. *[US]*
- It would be ideal to have a single Internet address where all relevant information could be obtained. However, this could be difficult to arrange in cases where procurement systems are highly decentralized. *[EC]*
- A single point of entry may not be workable or necessary. It may be easier to have information at a single point of entry on how to access information throughout a given system. However, it may not be practical to have too much detailed information at the single point of entry. The difficulties may be particularly pronounced in the case of Members with decentralized procurement systems. *[US]*

#### **Comments in relation to what is meant by "widest possible access"**

- The term "widest possible access" has been used to avoid referring to the Internet in recognition of the fact that other technological advances may emerge which also promote transparency. *[EC]*
- The reference to the term "widest possible access" suggests that the publication of procurement notices must be published through the use of information technology. The use of information technology should be optional. *[Japan; Korea]*

- The intention underlying the proposed text is not to make the use of information technology mandatory. Traditional means of publication can also be used provided that they are easily accessible. The EC proposal is intended to encourage the use of information technology as far as is possible and to facilitate its use. *[EC]*
- The reference to "widest possible access" may be too strong. This would mean that any notice that did not give the widest possible access would be contrary to this requirement and a potential source of dispute. "Widest possible" implies that there is only one choice, namely that a Party must, for example, publish on the Internet since any other option would not be as wide. *[US]*
- Given the aim to streamline the Agreement and encouraging broader participation, the proposed provision on the use of the Internet may not be appropriate. *[US]*
- A further question is whether technical specifications remain unchanged from procurement to procurement. There may be a risk that, in effect, a separate library is created that might duplicate what is already in the bid documents. *[Canada]*
- Technology offers possibilities that are not always fully exploited. There could be Internet pages with links. A stronger commitment is required to use the various possibilities of electronic procurement to allow businesses to easily access at least information as to where further information can be obtained. *[EC]*

## Article IX:2, 3

## Invitation to Participate Regarding Intended Procurement

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
2. The invitation to participate may take the form of a notice of proposed procurement, as provided for in paragraph 6.	<b>2. The invitation to participate may take the form of a notice of intended procurement, as provided for in paragraph 6. [Chinese Taipei – Job No. 3193]</b>

## Comment

- This paragraph should specify clearly that Annex 1 entities had an obligation to publish a notice containing the types of information as provided for in paragraph 6. The present use of the word "may" might be interpreted to suggest otherwise. [Job No. 5074]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
3. Entities in Annexes 2 and 3 may use a notice of planned procurement, as provided for in paragraph 7, or a notice regarding a qualification system, as provided for in paragraph 9, as an invitation to participate.	<b>3. Procuring entities in Annex 3 may use a notice of planned procurement, as provided for in paragraph 2, as a notice of intended procurement provided that it contains in addition the statement that interested suppliers should express their interest in the procurement to the procuring entity. [EC – Job No. 876]</b>  <b>3. Entities may use a notice of intended procurement, as provided for in paragraph 7, or a notice regarding a qualification system, as provided for in paragraph 9 as an invitation to participate. [Chinese Taipei – Job No. 3193]</b>

## Comments

- Entities at all levels of government should be able to use all methods of invitation to tender. [Job No. 5074]
- While the EU proposal indicates that each party shall encourage its procuring entities to publish procurement plans, considering the burden to procuring entities, it would be desirable to consider an amendment, providing, for example that only procurements above a certain value are encouraged for publication. [Japan; Job No. 5474]



AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>3. Procuring entities in Annex 3 may use a notice, regarding permanent lists of qualified suppliers, as provided for in paragraph 1, as a notice of intended procurement.</b></p> <p><b>When such a notice is used as a notice of intended procurement it shall, in addition to what is provided for in paragraph 1, include the following information:</b></p>
	<p><b>(d) the nature of the products or services concerned;</b></p>
	<p><b>(e) a statement that the notice constitutes a notice of intended procurement and that no further notices will be published.</b></p> <p><b>[EC – Job No. 876]</b></p>

- While the US agrees with the substance of paragraph 3 of the EC proposal, the question arises as to whether it is better placed in the general provision on notices or in an article on conditions for participation. *[US]*

## Article IX:4, 5

*Invitation to Participate Regarding Intended Procurement*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>4. Entities which use a notice of planned procurement as an invitation to participate shall subsequently invite all suppliers who have expressed an interest to confirm their interest on the basis of information which shall include at least the information referred to in paragraph 6.</p>	<p><b>3. Each Party shall encourage its procuring entities to publish as early as possible in each fiscal year information regarding entities' future procurement plans. Such information should include the subject matter of the procurement and the planned date of the publication of the notice of intended procurement. When the published information is in accordance with Article VI:2(a) of this Agreement, entities may apply Article VI:2 for the purpose of establishing more flexible time periods for tendering of procurements covered by this Agreement.</b> [US – Job No. 2867]</p>
<p>5. Entities which use a notice regarding a qualification system as an invitation to participate shall provide, subject to the considerations referred to in paragraph 4 of Article XVIII and in a timely manner, information which allows all those who have expressed an interest to have a meaningful opportunity to assess their interest in participating in the procurement. This information shall include the information contained in the notices referred to in paragraphs 6 and 8, to the extent such information is available. Information provided to one interested supplier shall be provided in a non-discriminatory manner to the other interested suppliers.</p>	<p><b>4. Procuring entities in Annex 3 that use a notice regarding permanent lists of qualified suppliers as a notice of intended procurement shall provide, in a timely manner, information which allows all those who have expressed an interest to have a meaningful opportunity to assess their interest in participating in procurement. This information shall include the information contained in the notice of intended procurement referred to in Article IX paragraph 2, to the extent such information is available. Information provided to one interested supplier shall be provided in a non-discriminatory manner to the other interested suppliers.</b> [EC – Job. No. 876]</p>

**Comments**

- While Parties should encourage their procuring entities to publish their future procurement plans, it is unclear whether procuring entities are ready to do so as entities may not want to commit themselves with their procurement plans or give false expectations to suppliers. With the deletion of Article IX:3 of the GPA, entities under different Annexes are subject to the same procedures in making known their notice of intended procurement. [Hong Kong, China]

## Article IX:6

*Invitation to Participate Regarding Intended Procurement*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
6. Each notice of proposed procurement, referred to in paragraph 2, shall contain the following information:	<b>2. Entities shall include the following information in each notice of intended procurement: [US Job No. 1051; EC Job. No. 876]</b>
(a) the nature and quantity, including any options for further procurement and, if possible, an estimate of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent tender notices for the products or services to be procured;	<b>(a) A description of the intended procurement, including the nature of the goods or services to be procured and, where applicable, the quantity of goods or services to be procured and any registration or qualification requirements or other conditions for participation in tendering for the procurement; [US Job No. 1051]</b>
(b) whether the procedure is open or selective or will involve negotiation;	<b>(e) whether the procurement method is open or selective and whether it will involve negotiation, and where, pursuant to Article XVI(4), an entity intends to limit the number of qualified suppliers invited to tender, the minimum and maximum number of suppliers that may be invited to tender and the criteria that will be used to select them; [EC Job No. 876]</b>
	<b>(b) the name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the procurement; [US Job No. 2867; EC Job No. 876]</b>
(c) any date for starting delivery or completion of delivery of goods or services;	<b>(c) The procurement method that will be used and whether it will involve negotiation; [US – Job No. 2867]</b>

**Comments**

- Article IX:6 should be modified to require procuring entities to include the means by which bids may be submitted/the means of communication to be used (e.g. mail, electronic means, telex, telegram or facsimile) in tender notices. *[Canada, Job No.3481]*

In relation to the US proposal:

- With regard to paragraph 2(a), the reference to the "quantity of goods and services to be procured" has been moved from the first to the second sub-clause of the sentence. This takes into account procurement modalities in which the duration of the contract and the quantity of the goods or services to be provided may not be known at the time of the procurement. *[US]*
- With regard to paragraph 2(c), clarification is sought on the meaning of "procurement method." *[Japan]*
- The term "procurement methods" is intentionally left undefined in the US proposal since, for example, selective tendering procedures may be regarded as something different in the US as compared to in Japan. Presumably, this would mean that each entity would identify in tender notices, the methods that apply to the relevant domestic context or system. The alternatives would be to either list every type of procurement method that any Party may use or to state that the information provided in the tender notice need not refer to the procurement method to be used. However, the latter may cause problems, for example, if a notice does not tell suppliers that pre-qualification is needed. *[US]*
- The words "where applicable" have been included in paragraph (a) of the US proposal given that the quantity to be procured may not always be known at the time the notice is issued, for example in cases involving indefinite quantity contracts or in cases involving a two-stage process. *[US]*

In relation to the EC proposal:

- With respect to sub-paragraph (e) of the EC proposal, the maximum number of suppliers is sometimes difficult to determine in cases where, for example, a points system is used and this results in a tie. It may be difficult choose between the tied suppliers in such cases. Modification may be necessary to take account of this situation. *[Japan]*
- Sub-paragraph (e) may be simplified by not suggesting that there are particular types of tendering procedures but rather focusing on the type of information that should be provided in notices. *[US]*
- The information referred to in sub-paragraph (e) should be included in the tender documentation. For example, the criteria used to select suppliers cannot be easily reduced to a few lines, which may be necessary given that the notices of intended procurement are usually quite short. *[Switzerland; Japan]*
- Any selection or elimination of suppliers must be based on criteria that are very clear and provided in advance. It is preferred that such information be included in the notices although it is acknowledged that this might not be feasible in all circumstances. *[US]*
- Regarding selective procurement in the EU proposal IX:2(e), procuring entities shall decide the minimum and maximum numbers of suppliers that may be invited to tender. However if, for example, an entity uses the point system for qualification, there may arise cases where two or more participants have the same number of points and, as a result, more suppliers than intended are selected. Therefore, the phrase in the EU proposal should take into consideration such cases (for example, indicating a target with a permissive range may be appropriate). *[Japan; Job No. 5474]*

## Article IX

*Invitation to Participate Regarding Intended Procurement*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(d) the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted;	<b>(d) The time limits set for the submission of tenders and, when appropriate, any time limits for the submission of applications to qualify for participation in the intended procurement and the dates for starting or completing delivery of goods and services; and</b> <b>[US – Job No. 1051]</b>
(e) the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents;	<b>(f) the address and the time-limits set for submission of an application to be invited to tender or for qualifying for the suppliers' lists, or for submission of tenders, as well as the language or languages in which they must be submitted.</b> <b>[EC – Job No. 876]</b>
(f) any economic and technical requirements, financial guarantees and information required from suppliers;	
(g) the amount and terms of payment of any sum payable for the tender documentation; and	<b>(g) the amount and terms of payment of any sum payable for the tender documentation; and</b> <b>[EC – Job No. 876]</b>
(h) whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.	<b>(e) An indication that the procurement is covered by this Agreement.</b> <b>[US – Job No. 2867]</b>

**Comments**

- Article IX:6(f) of the current GPA is useful, particularly in the case of procurement of construction services, not only for suppliers to obtain essential and helpful information to avoid unnecessary preparation, but also to enable procuring entities to execute procurement procedures in an efficient manner. The US proposal should include a similar provisions to Article IX:6(f) of the current GPA. *[Japan]*
- The information contained in Article IX:6(g) of the current GPA should be published as a part of the administrative services sector. For example, in the case of the procurement of construction services in Japan, suppliers cannot usually disregard the price for the tender documentation, since this price is often set high enough to cover the actual expenses. These expenses mainly consist of the cost incurred by the procuring entity in relation to the preparation of a large volume of documents. *[Japan; Job No. 5474]*
- The US proposal should not eliminate Article IX:6(g) of the current Agreement since the information provided under that provision is provided as part of normal administrative services. *[Japan]*

- With respect to the comments made in relation to Article IX:6(f) and (g), it may not be necessary to include such information in notices notifying the original tender opportunity, although that information may need to be provided to suppliers who request tender documents. The essential question is: what information is necessary in a notice in order for a supplier to evaluate whether they have an interest in the procurement and whether they want to request tender documents? It is considered that with respect to (f), it is not necessary for a supplier to have that information to determine whether it is interested. That information could be provided in tender documents. With respect to (g), any supplier that requests tender documents would be told what the cost of the tender documents would be. *[US]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p>(b) a description of the intended procurement including [EC – Job No. 876]</p> <ul style="list-style-type: none"> <li>- the nature of and quantity of the goods or services to be procured and, [EC – Job No. 876]</li> <li>- whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods and, [EC – Job No. 876]</li> <li>- where applicable, any options for further procurement and the related estimated timing when such options can be exercised as well as, [EC – Job No. 876]</li> <li>- for recurring contracts, the nature and quantity of the goods or services and, if possible, an estimate of the timing of subsequent notices of intended procurement; [EC – Job No. 876]</li> </ul>
	<ul style="list-style-type: none"> <li>- for framework agreements, the duration of the agreement, the estimated volume of purchases during the agreement and, if available, the volume and the expected frequency of the purchases; [EC – Job No. 876]</li> </ul>
	<p>(c) duration of the contract and/or any date for starting or completing delivery of goods or services; [EC – Job No. 876]</p>
	<p>(d) any qualification requirements and other conditions for participation of suppliers, and any documents and information required from suppliers. [EC – Job No. 876]</p>

**Comment**

- With respect to "framework agreements" reference is made to the work of the Committee on this subject and to the non-paper of the EC of 9 March 2000 (Job No. 1469) [EC]

- There may be possibilities to simplify some of the specific information requirements that are suggested in the EC proposal, particularly, in paragraph in 2 (b). *[US]*
- The term "framework agreements" would have to be defined in the Agreement because, for example, that term is not used in the US system. *[US]*



## Article IX:7, 8

*Invitation to Participate Regarding Intended Procurement*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
7. Each notice of planned procurement referred to in paragraph 3 shall contain as much of the information referred to in paragraph 6 as is available. It shall in any case include the information referred to in paragraph 8 and:	<b>1. Each Party shall encourage its procuring entities to publish as early as possible in each fiscal year information regarding entities' future procurement plans. Such information should include the subject-matter of the procurement and the planned date of the publication of the notice of intended procurement.</b> [EC – Job No. 876]
(a) a statement that interested suppliers should express their interest in the procurement to the entity;	<b>2. Procuring entities may apply Article XIV, paragraph 4, for the purpose of establishing shorter time-periods for procurements covered by this Agreement, when the notice of planned procurement contains as much of the information referred to in paragraph 2 of Article IX as is available and the address from which documents relating to the procurement may be obtained.</b> [EC – Job No. 876]
(b) a contact point with the entity from which further information may be obtained.	
8. For each case of intended procurement, the entity shall publish a summary notice in one of the official languages of the WTO. The notice shall contain at least the following information:	<b>8. For each case of intended procurement, procuring entities shall publish a summary notice in one of the official languages of the WTO. The notice shall contain at least the following information:</b>
(a) the subject matter of the contract;	<b>(a) the subject-matter of the procurement;</b>
(b) the time-limits set for the submission of tenders or an application to be invited to tender; and	<b>(b) the time-limits set for the submission of tenders or, where applicable, of applications to be invited to tender or for qualifying for the supplies lists; and</b>
(c) the addresses from which documents relating to the contracts may be requested.	<b>(c) the addresses from which documents relating to the procurement may be requested.</b> [EC – Job No. 876]

**Comments**

- The provisions of Article IX:8 should follow the provisions of Article XI:1 on publication of an invitation to participate. [Job No.5074]
- Clarification is sought as to why the US proposal excludes the requirement that is currently contained in Article IX:8 for a summary notice in a WTO language. [Korea]

- That requirement could be a significant obstacle, particularly for many non-Parties. Further, as a general matter, it does not seem necessary to achieve the objectives of the Agreement. *[US]*
- Paragraph 8 of the EC proposal could constitute a significant obstacle for countries that do not have one of the WTO languages as its national language. Problems that arise include undue resource burdens to undertake the translation of documents and incorrect translation of documentation. Such countries should be allowed to operate their procurement procedures in their own national language. *[Chinese Taipei]*
- Japan's experience is that Article VIII does not constitute a significant obstacle and that inaccurate translation is not a real problem. *[Japan]*
- The US proposal does not include a requirement to publish the summary notice in one of the WTO languages. This decision was made after taking into consideration, on the one hand, that if foreign suppliers are going to work in a foreign market, they need to be able to understand the local language and, on the other hand, that foreign suppliers may have to rely upon local representatives for information on local procurement opportunities. *[US]*
- Experience suggests that many foreign suppliers obtain information regarding procurement opportunities from local agents rather than, for example, referring to the summary notices on the relevant website. *[Chinese Taipei]*
- The EC publishes summary notices in 11 languages. It has been found that this does enhance transparency. The EC has taken initiatives to make it easier for companies to rely less on local agents and to increasingly conduct research themselves in relation to procurement opportunities. *[EC]*
- Perhaps acceding countries should be allowed to phase-in the obligation to publish the summary notice in a WTO language given that it might be difficult for acceding countries to comply with this obligation initially. *[US]*

## Article IX:9

*Invitation to Participate Regarding Intended Procurement*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
9. In the case of selective tendering procedures, entities maintaining permanent lists of qualified suppliers shall publish annually in one of the publications listed in Appendix III a notice of the following:	<b>Article XI – Notice regarding permanent lists of qualified suppliers</b>  <b>1. Procuring entities maintaining permanent lists of qualified suppliers shall publish annually in one of the publications listed in Appendix III a notice of the following:</b>
(a) the enumeration of the lists maintained, including their headings, in relation to the products or services or categories of products or services to be procured through the lists;	<b>(a) the enumeration of the lists maintained, including their headings, in relation to the products or services or categories of products or services to be procured through the lists;</b>
(b) the conditions to be fulfilled by suppliers with a view to their inscription on those lists and the methods according to which each of those conditions will be verified by the entity concerned; and	<b>(b) the conditions to be fulfilled by suppliers with a view to their inscription on those lists and the methods according to which each of those conditions will be verified by the entity concerned; and</b>
(c) the period of validity of the lists, and the formalities for their renewal.	<b>(c) the period of validity of the lists, and the formalities for their renewal.</b> <b>[EC – Job No. 876]</b>
	<b>2. However, when the duration of the list is three years or less, and if the duration of the list is made clear in the notice and it is also made clear that further notices will not be published, it shall be sufficient to publish the notice once only, at the beginning of the validity of the list. Such a system shall not be used in a manner which circumvents the provisions of this Agreement.</b>

In relation to the EC proposal (Job No. 876):

- It is unclear whether it is necessary to have a separate notice requirement for permanent lists. [US]
- The EC's proposed articles on notices of permanent lists and notices of planned procurement provide particular flexibility for Annex 3 entities. It is unclear whether that type of flexibility is necessary. [US]

*Article IX:10, 11**Invitation to Participate Regarding Intended Procurement*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
When such a notice is used as an invitation to participate in accordance with paragraph 3, the notice shall, in addition, include the following information:	
(d) the nature of the products or services concerned;	
(e) a statement that the notice constitutes an invitation to participate.	
However, when the duration of the qualification system is three years or less, and if the duration of the system is made clear in the notice and it is also made clear that further notices will not be published, it shall be sufficient to publish the notice once only, at the beginning of the system. Such a system shall not be used in a manner which circumvents the provisions of this Agreement.	
10. If, after publication of an invitation to participate in any case of intended procurement, but before the time set for opening or receipt of tenders as specified in the notices or the tender documentation, it becomes necessary to amend or re-issue the notice, the amendment or the re-issued notice shall be given the same circulation as the original documents upon which the amendment is based. Any significant information given to one supplier with respect to a particular intended procurement shall be given simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.	<b>5. If, after publication of a notice of intended procurement, but before the time set for opening or receipt of tenders as specified in the notices or the tender documentation, it becomes necessary to amend or re-issue the notice, the amendment or the re-issued notice shall be given the same circulation as the original documents upon which the amendment or re-issued notice is based. Any significant information given to one supplier with respect to a particular intended procurement shall be given simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.</b> [EC – Job No. 876]

**Comments**

In relation to the EC Proposal (Job No. 876):

- The EC paragraph 5 is probably better placed before the proposed paragraph 4. [US]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>Modifications</b></p> <p><b>7. If, during the course of a procurement process, an entity modifies the criteria or technical requirements set out in previous notices and information provided to participating suppliers, it shall transmit all such modifications in writing:</b></p> <p style="padding-left: 40px;"><b>(a) to all the suppliers that are participating at the time the information is amended, if known, and in all other cases, in the same manner as the original information; and</b></p> <p style="padding-left: 40px;"><b>(b) in adequate time to allow such suppliers to modify and re-submit their initial tenders, as appropriate.</b></p> <p><b>[US – Job No. 2867]</b></p>
<p>11. Entities shall make clear, in the notices referred to in this Article or in the publication in which the notices appear, that the procurement is covered by the Agreement.</p>	<p style="padding-left: 40px;"><b>(h) an indication that the procurement is covered by the Agreement.</b></p> <p><b>[EC – Job No. 876]</b></p>

### Comments

- The US proposal suggests that procuring entities need to provide amended information to all participating suppliers. In cases of procurement conducted over the Internet, the procuring entity will not know which suppliers have downloaded or viewed the tender documentation and, in many instances, procuring entities will publish the amendment in the same medium. The onus should be on the supplier to look at amended information in such cases. Perhaps the proposal should be amended to state that it is sufficient to make the amended information publicly available. *[Singapore]*
- What would be the position under the US proposal when, at some point in the process when only a few potential suppliers remain, there is a change in the published conditions, some of which could be substantial and could affect those suppliers that have already been disqualified? *[EC]*
- It is important to consider what the situation would be if there is a two-stage competition and a change in information occurs that affects the criteria on which the initial competition was based. In cases where information is changed during the second stage of the process, perhaps it would not be reasonable or necessary to share it or disseminate it to all the suppliers that initially expressed an interest in the procurement. *[US]*
- This paragraph provides that if an entity modifies the criteria or technical requirements, such modifications shall be transmitted to all suppliers. Are the two categories, namely, "criteria" and "technical requirements" comprehensive enough? The usage of the term "significant information" in Article IX:9 of the GPA is preferred. *[Hong Kong, China]*

**ARTICLE X: SELECTION PROCEDURES***Article X:1, 2, 3**Selection Procedures*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
1. To ensure optimum effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement system. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.	
2. Entities maintaining permanent lists of qualified suppliers may select suppliers to be invited to tender from among those listed. Any selection shall allow for equitable opportunities for suppliers on the lists.	
3. Suppliers requesting to participate in a particular intended procurement shall be permitted to submit a tender and be considered, provided, in the case of those not yet qualified, there is sufficient time to complete the qualification procedure under Articles VIII and IX. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system.	

**Comments relating to the absence of selective tendering procedures in the US proposal**

- The fact that the US proposal does not include a specific reference to selection procedures does not mean that such procedures cannot be used and are not appropriate. Pursuant to paragraph 1 of the existing Article X, entities must decide whether the maximum level of competition has been ensured. However, it is questionable whether such a provision requiring entities to decide this is necessary. *[US]*
- There may be some variety among countries in relation to the way in which the tendering procedures referred to in the Agreement are applied. One of the ways the Agreement can be made more accessible to new Parties and to reflect some of the different ways in which the current Parties may interpret the Agreement is to define the fundamental concepts and framework that all Parties can work within that still meet the objective of providing predictable and stable market access for both domestic and foreign suppliers. It is not considered necessary to have the same level of precision as to when qualification procedures take place in a given procurement as the current Agreement provides. The current provisions are overly complex. The US proposal moves in the right direction in that it establishes the necessary framework. *[Canada]*
- A distinction should be drawn between the use of particular procedures and the disciplines contained in the Agreement as they apply to specific procedures. The GPA does not dictate that a government should use a particular procedural process for procurement. It merely sets out the requirements that apply to whatever procedure a government chooses to use. Therefore, it is preferable to eliminate the distinction between open and selective tendering since many governments have the erroneous perception that the GPA dictates how governments can operate including what type of qualification should be used, when it can be

used, when selection occurs etc. This may be an obstacle to Parties' collective efforts to expand participation in the Agreement. Accordingly, the US proposal suggests elimination of the reference to the various types of procedures. Providing that a certain procedure is allowed to the extent that it is explicitly permitted under the GPA could lead to the establishment of a much longer Agreement since different Parties use different procedures in different situations. Removal of the reference to selective tendering does not mean that the use of selective tendering is inappropriate in certain circumstances. *[US]*

- The provisions dealing with tendering procedures are at the heart of the Agreement. Further, the Agreement will form the basis for acceding countries that do not yet have legislation on government procurement. It may be necessary to make obvious the possibility to use various tendering procedures, including selective procedures, without going into too much detail or mandating the use of particular procedures in a given set of circumstances. The GPA should contain a requirement that the various tendering procedures must comply with certain requirements. *[Switzerland]*
- The US proposal maintains the existing content of the GPA with respect to tendering procedures. However, the US proposal does not attempt to apply that content to specific processes. In particular, the GPA contains rules in relation to transparency, publication and content of notices and technical specifications etc. Those rules apply equally to any type of tendering procedure that is used. There are many ways in which procurement may be conducted. Some of the various procedures may be inconsistent with the requirements of the GPA. It is not considered efficient or desirable to recognise the various procedures that countries may use in undertaking government procurement. Further, the GPA should not be converted into a model law. That could prove to be more of an obstacle than a benefit from the perspective of new countries wishing to accede. It may be useful to more explicitly produce an explanation regarding how the various disciplines contained in the Agreement would relate to the various types of procedures. Such an explanatory document may be useful to existing Parties as well as other Members that are considering acceding to the GPA. The GPA would become too cumbersome if that was done in the Agreement itself. *[US]*

#### **Comments relating to the clarification of the existing Article X**

- With respect to Article X:1 of the current Agreement, reference is made to selection of "suppliers to participate in the procedure in a fair and non-discriminatory manner". It is understood that there is no need to publicise beforehand under this Article. Therefore, this selection rule is different from pre-qualification. Further clarification is sought in relation to the difference between the selective tendering rules and the rules relating to pre-qualification. *[Japan]*
- Paragraph 2 of the existing Article X states that permanent lists may be used, which is not particularly useful. In addition, the paragraph refers to "equitable opportunities", the meaning of which is unclear. If it means non-discriminatory, a non-discrimination obligation already exists in the Agreement. Therefore, the question arises as to whether paragraph 2 is necessary. *[US]*
- In relation to paragraph 3 of Article X, the US proposal contains an equivalent provision in its proposed Article VIII:2. The idea is that if there is a pre-qualification process using a permanent list or some other method, even if independent of the tendering process, there may be a need to provide the opportunity for new suppliers to participate, if there is time to complete the qualification procedure. *[US]*

See also the Explanatory Notes by the US in Job No. 6772, page 4.

*Article X:4**Selection Procedures*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
4. Requests to participate in selective tendering procedures may be submitted by telex, telegram or facsimile.	<b>4. Requests to participate in selective tendering procedures may be submitted by telex, telegram or facsimile, electronic means, including email. [Canada – Job No. 3481; 1998 Proposal]</b>

**Comments**

- Should the above definition of the term "writing" apply across-the-board in the Agreement or only to the provisions on selective tendering? *[US]*
- The US proposal does not contain an equivalent for paragraph 4 of the existing text hence it is unclear whether it is necessary to specify how documents may be submitted. *[EC]*



**ARTICLE XI: TIME-LIMITS FOR TENDERING AND DELIVERY***Article XI:1**Time-limits for Tendering and Delivery*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
<i>General</i>	<i>General</i>
<p>1.(a) Any prescribed time-limit shall be adequate to allow suppliers of other Parties 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 intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders by mail from foreign as well as domestic points.</p>	<p><b>1.(a) Any prescribed time-limit shall be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders, and where appropriate, applications to be invited to tender or applications for qualifying. In determining any such time-limit, procuring entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders from foreign as well as domestic points.</b></p> <p><b>[EC – Job 876; Singapore Job No. 3772]</b></p>

**Comments**

General comments in relation to the EC Proposal (Job No. 876):

- The suggestion for modification of this Article is based mainly on the need to simplify and avoid going into many details with different deadlines for different events and situations. With respect to the main deadlines, an attempt has been made to consolidate them. With respect to the circumstances that allow entities to reduce the normal time periods, the EC has taken an approach stating that time periods could be reduced and to fix just the minimum number of days, being 10 calendar days, and to list all the circumstances allowing this reduction without fixing different deadlines for each one of them. At the end of the proposal, a suggestion has been made for the reduction of time-limits because of the use of electronic means. The reduction for the use of electronic means in the EU proposal applies not only when the notice is published using electronic media but also when the complete tender documentation is made available electronically. It is considered that only if these two circumstances prevail, there is a real advantage in terms of time for potential bidders. [EC].

*Article XI**Time-limits for Tendering and Delivery*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(b) Each Party shall ensure that its entities shall take due account of publication delays when setting the final date for receipt of tenders or of applications to be invited to tender.	(b) <b>Each Party shall ensure that its entities shall take due account of publication delays when setting the final date for receipt of tenders or of applications to be invited to tender or for qualifying for the supplier's list.</b> [EC – Job No. 876; Singapore Job No. 3772]
	(c) <b>Where, as a result of a need to amend information provided to suppliers during the procurement process, a procuring entity must extend the time-period for qualification or tendering, such entity shall permit all participating suppliers to submit final tenders in accordance with a common deadline.</b> [EC – Job No. 876]
	<b>2. Under the following circumstances, entities may establish a time-period for tendering that is shorter than 40 days, provided that such time-period is sufficiently long to enable suppliers to prepare and submit responsive tenders and is in no case less than 10 calendar days prior to the final date for the submission of tenders;</b> [US – Job No. 2867]

## Article XI:2

## Time-limits for Tendering and Delivery

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<i>Deadlines</i>	<b><i>Deadlines</i></b>
2. Except in so far as provided in paragraph 3:	<b>2. Except insofar as provided in paragraph 3,</b>
(a) in open procedures, the period for the receipt of tenders shall not be less than 40 days from the date of publication referred to in paragraph 1 of Article IX;	<b>(a) in open procedures, the period for the receipt of tenders shall not be less than 40 days from the date of publication referred to in paragraph 1 of Article IX; [Singapore – Job No. 3772]</b>
	<b>2. Except in so far as provided in paragraphs [4] and [5] procuring entities shall provide no less than 40 calendar days between the date on which the notice of intended procurement is published and the final date for the submission of tenders. [EC – Job No. 876]</b>
	<b>2.(a) in open procedures, the period for the receipt of tenders shall not be less than 28 days from the date of publication referred to in paragraph 1 of Article IX. [Chinese Taipei – Job No. 3193]</b>

**Comments**

- The suppliers of products, the prices of which are subject to frequent changes, question the rationale for the extended time-periods in the Agreement. *[Singapore]*
- Further discussion is required in relation the reduction of time-limits when electronic procurement methods are used. *[EC]*

## Article XI:2

*Time-limits for Tendering and Delivery*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b><i>Time Periods for Tendering</i></b></p> <p><b>1. Except as provided for in paragraphs 2 and 3 of this Article, procuring entities shall provide no less than 40 calendar days between the date on which the notice of intended procurement is published and the final date for the submission of tenders.</b>  <b>[US – Job No. 2867]</b></p>
<p>(b) in selective procedures not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender shall not be less than 25 days from the date of publication referred to in paragraph 1 of Article IX; the period for receipt of tenders shall in no case be less than 40 days from the date of issuance of the invitation to tender;</p>	<p><b>(b) in selective procedures not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender shall not be less than 25 days from the date of publication referred to in paragraph 1 of Article IX; the period for receipt of tenders shall in no case be less than 40 days from the date of issuance of the invitation to tender;</b>  <b>[Singapore – Job No. 3772]</b></p>

*Article XI:2**Time-limits for Tendering and Delivery*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p>(b) in selective procedures not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender shall not be less than 14 days from the date of publication referred to in paragraph 1 of Article IX; the period for receipt of tenders shall in no case be less than 28 days from the date of issuance of the invitation to tender;</p> <p>[Chinese Taipei – Job No. 3193]</p>

## Article XI:2

## Time-limits for Tendering and Delivery

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>3. Where a procuring entity requires suppliers to satisfy qualification requirements in order to participate in a procurement, the entity shall provide no less than 25 calendar days between the date on which the notice of intended procurement is published and the final day to submit their application to be invited to tender and no less than 40 calendar days between the day of issuance of the invitation to tender and the final date for submission of tenders.</b></p> <p><b>[EC – Job No. 876]</b></p>
<p>(c) in selective procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders shall not be less than 40 days from the date of the initial issuance of invitations to tender, whether or not the date of initial issuance of invitations to tender coincides with the date of the publication referred to in paragraph 1 of Article IX.</p>	<p><b>(c) in selective procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders shall not be less than 40 [30] days from the date of the initial issuance of invitations to tender, whether or not the date of initial issuance of invitations to tender coincides with the date of the publication [referred to in paragraph 1 of Article IX].</b></p> <p><b>[Singapore – Job No. 3772]</b></p>
	<p><b>(c) in selective procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders shall not be less than 28 days from the date of the initial issuance of invitations to tender, whether or not the date of initial issuance of invitations to tender coincides with the date of the publication referred to in paragraph 1 of Article IX.</b></p> <p><b>[Chinese Taipei – Job No. 3193]</b></p>

## Comments

- The proposal attempts to consolidate paragraphs (b) and (c) of the existing text. This is linked to the proposed modification to allow the use of permanent lists. It is considered that both time-limits are needed. The first – 25 days – relates to the qualification stage whereas the second, 40 days, relates to the submission and evaluation of bids. *[EC]*
- The reference to 25 calendar days which are required for qualification results in a long process because 40 days still remain for invitations to tender. Could the deadline of 25 days be reduced under certain circumstances. *[Switzerland]*

- In some circumstances, reduction of the 25 and 40 day time limits are allowed whereas in other cases, only the 40 day time-limit may be reduced. *[EC]*
- According to the EC proposal, the current provision of the current GPA which deals with cases where a procuring entity uses a permanent list (Article XI 2(c)), has been deleted. Under the EC proposal, entities now need to secure 25 days between the date on which the notice of intended procurement is published and the final date to submit the application for participation, even if the entity uses a permanent list. Thus, Japan believes it more appropriate to maintain the rule that currently exists in the GPA. Why is the EC in favor of applying the 65-day rule (25 days plus 40 days) to cases where a permanent list is used? *[Japan; Job No. 5474]*
- Sufficient time for completion of the qualification process should exist. Twenty-five days has been proposed because some qualification procedures may be lengthy; shortening this period may limit access to procurement opportunities, particularly for foreign suppliers in cases where translation of documents is necessary. *[EC]*
- A balance needs to be struck between the need to ensure that a sufficient period of time is available to qualify and the associated costs. It should also be borne in mind that many projects are middle-sized projects rather than large projects; a longer period would not seem necessary for such projects. *[Japan]*

*Article XI:3**Time-limits for Tendering and Delivery*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
3. The periods referred to in paragraph 2 may be reduced in the circumstances set out below:	<b>3. The periods referred to in paragraph 2 may be reduced in the circumstances set out below:</b>
(a) if a separate notice has been published 40 days and not more than 12 months in advance and the notice contains at least:	<b>(a) if a separate notice has been published 40 days and not more than 12 months in advance and the notice contains at least:</b>
(i) as much of the information referred to in paragraph 6 of Article IX as is available;	<b>(i) as much of the information referred to in paragraph 6 of Article IX as is available;</b>
(ii) the information referred to in paragraph 8 of Article IX;	<b>(ii) the information referred to in paragraph 8 of Article IX;</b>
(iii) a statement that interested suppliers should express their interest in the procurement to the entity; and	<b>(iii) a statement that interested suppliers should express their interest in the procurement to the entity; and</b>
(iv) a contact point with the entity from which further information may be obtained,  the 40-day limit for receipt of tenders may be replaced by a period sufficiently long to enable responsive tendering, which, as a general rule, shall not be less than 24 days, but in any case not less than 10 days;	<b>(iv) a contact point with the entity from which further information may be obtained, the 40-day limit for receipt of tenders may be replaced by a period sufficiently long to enable responsive tendering, which, as a general rule, shall not be less than 24 days, but in any case not less than 10 days;</b> <b>[Singapore – Job No. 3772]</b>

**Comment**



AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>4. Under the following circumstances, procuring entities may establish a time-period for tendering that is shorter than the periods referred to in paragraphs 2 and 3, provided that such time-period is sufficiently long to enable suppliers to prepare and submit responsive tenders and is in no case less than 10 calendar days prior to the final date for the submission of tenders:</b></p>
	<p><b>(a) where a notice of planned procurement under Article XII, paragraph 2 has been published 40 days and not more than 12 months in advance;</b></p>
	<p><b>(b) in the case of the second or subsequent publications dealing with contracts of a recurring nature;</b></p>
	<p><b>(d) where a state of urgency duly substantiated by the procuring entity renders impracticable the periods specified in paragraphs 2 and 3.</b></p>
	<p><b>(e) when the period for the submission of tenders referred to in paragraph 3, for procurements by procuring entities in Annex 3, be fixed by mutual agreement between the entity and the selected suppliers. In the absence of agreement, the entity may fix periods which shall be sufficiently long to enable responsive tendering.</b></p> <p><b>[EC – Job No. 876]</b></p>

#### Comments

- The need for sub-paragraph (e) of the EC proposal is questioned. *[US]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>5. When a procuring entity publishes a notice of intended procurement in accordance with Article IX of this Agreement in an electronic media listed in Appendix III, and the complete tender documentation is made available electronically since the beginning of the publication of the notice, such entity may reduce the time-periods for tendering by up to 12 calendar days. The use of this provision, however, shall in no case result in the reduction of those time periods to less than 10 calendar days from the date on which the notice of intended procurement is published.</b></p> <p><b>[EC – Job No. 876]</b></p>

### Comments

- The reduction of time when electronic means are used applies not only when the notice is published in electronic media but also when the complete tender documentation is made available electronically. It is considered that only if these two circumstances prevail, there is a real advantage in terms of time for potential bidders. *[EC]*
- The EC proposal only concerns time reductions for notice publication using electronic means. For this reason, the EC is not proposing that time-limits should be reduced in the GPA context where only the notice is published using electronic means. *[EC]*
- The proposal regarding electronic tendering is a useful one and will facilitate the application of the Agreement. *[Switzerland]*
- It is interesting to note that the time-period may be reduced by up to 12 days if a procuring entity publishes a notice of intended procurement in an electronic medium and if the complete tender documentation is made available electronically. However, some Japanese suppliers are of the opinion that a 12-day reduction is excessive, even if the tender documentation is available electronically. Such reduction might be disproportionate from a supplier's point of view. What is the reason for allowing reduction by up to 12 days? What is the relationship between this new 12-day reduction provision and Article XIV:4 of the EU proposal, which enables a general reduction of the time-period. For example, what if both provisions are applied at the same time? *[Japan; Job No. 5474]*

## Article XI

## Time-limits for Tendering and Delivery

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p>(a) where a separate notice, including a notice under [Article V:3] of this Agreement, has been published at least 40 calendar days and not more than 12 months in advance, and such notice contains: a description of the intended procurement; the time limits for the submission of tenders or, when appropriate, applications for qualification; and the address from which documents relating to the procurement may be obtained;</p> <p>[US – Job No. 2867]</p>

## Comments

- Elements required under the proposed paragraph (a) of the US proposal relating to prior notice are not as comprehensive as those contained in Article XI:3 of the GPA. The US proposal only prescribes elements which are contained in Article XI:3(a) (ii) of the GPA. Information such as economic or technical requirements or completion date is not prescribed. However, such information is essential to enable a supplier to determine whether he or she should bid for that tender. *[Hong Kong, China]*
- The Agreement currently recognises the possibility that there may be two public notices relating to a single tendering procedure. There may be an advance notice which contains a certain minimum amount of information followed by a subsequent notice which would still be required to have all the information that is required for a notice for an intended procurement. The existence of a prior notice that contains a certain amount of information may be a reason to reduce the time-period to less than 40 days because some information is already available to suppliers. When the second notice is issued, the tendering procedure can, perhaps, proceed more quickly. *[US]*

## Article XI

## Time-limits for Tendering and Delivery

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>3. The periods referred to in paragraph 2 may be reduced in the circumstances set out below:</b>
	(a) if a separate notice has been published 28 days and not more than 12 months in advance and the notice contains at least:
	(i) as much of the information referred to in paragraph 6 of Article IX as is available;
	(ii) the information referred to in paragraph 8 of Article IX;
	(iv) a contact point with the entity from which further information may be obtained;
	the 28-day limit for receipt of tenders may be replaced by a period sufficiently long to enable responsive tendering, which as a general rule, shall not be less than 14 days, but in any case not less than 10 days; [Chinese Taipei – Job No. 3193]

## Comment

- The proposal to specify a minimum bid period for certain kinds of procurement may go against the aim of simplifying and improving the Agreement. *[Hong Kong, China]*

## Article XI

*Time-limits for Tendering and Delivery*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(b) in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 6 of Article IX, the 40-day limit for receipt of tenders may be reduced to not less than 24 days;	<b>(b) in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 6 of Article IX, the 40-day [30-day [EC]] limit for receipt of tenders may be reduced to [not less than 24 days][24 days [EC]];</b> [Singapore – Job No. 3772; EC – <a href="#">GPA/W/87</a> ]
	<b>(b) in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 6(a) of Article IX, the 28-day limit for receipt of tenders may be reduced to not less than 14 days;</b> [Chinese Taipei – Job No. 3193]
	<b>(b) in the case of the second or subsequent publication of notices dealing with contracts of a recurring nature;</b> [US – Job No. 2867]

**Comment**

- The meaning of "contracts of a recurring nature" is not clear. Clarification is sought as to whether this reference includes contracts which are recurrently required. For example, there may be an annual contract or contract for longer periods, say three years, and renewal is necessary before expiration. *[Hong Kong, China]*

## Article XI

## Time-limits for Tendering and Delivery

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>Under the following circumstances, entities may establish a time-period for tendering that is shorter than 40 days.</b></p> <p>(c) in the case of procurement of commercially available off-the-shelf goods and services, except that a procuring entity shall not reduce time periods for this reason if the entity requires that potential suppliers be qualified for participation in the procurement before submitting tenders, in accordance with Article [IX] of this Agreement; and [US – Job No. 1051]</p>
	<p>(e) where the subject-matter of a procurement is an off-the-shelf product or service, or agricultural or mineral product, the period shall not be less than 10 days; [Chinese Taipei – Job No. 3193]</p>
	<p>(c) in the case where the procuring entity procures off-the-shelf goods (goods with the same technical specifications as those of goods that are sold or offered for sale to, and customarily purchased by non-governmental buyers for non-governmental purposes); the procuring entity shall not reduce time periods for this reason if the entity requires that potential suppliers be qualified for participation in the procurement before submitting tenders; [EC– Job No. 876]</p>

## Comments

In relation to the US proposal:

- It is an open question whether it would be useful to define "commercially available off the shelf" goods and services (a lengthy definition is incorporated in the US Federal Acquisition Regulation). It is appropriate to allow for shorter time-periods where entities procure goods and services that are normally bought and sold outside the public sector and where entities do not establish government-unique specifications for such goods and services. [US]
- Clarification is sought as to the aim, purpose of and necessity for Article VI:2(c) of the US proposal. It appears that this Article governs the procurement of commercially available goods and services that are commonly procured by non-governmental buyers, such as pens and pencils. Under Article XV:1(h) of the existing GPA and Article IX:3(e) of the US proposal, procurement of products purchased on a commodity market may involve limited tendering procedures. [Hong Kong, China]

- Article XV:1(h) dealing with commodity markets relates to bulk commodities like wheat and grains and would not necessarily have application to as broad a range of goods as "commercial off-the-shelf" goods. The latter term does not necessarily relate to a particular product category but rather indicates whether a particular product that the government buys is essentially the same as the product that is being sold in the general market. *[US]*
- The US proposal provides for greater flexibility in reducing time periods below the standard 40-day time-period in cases including those concerning procurement of commercial goods and services, referred to in Article VI:2(c) of the US proposal. In some cases, governments purchase "off-the-shelf" products or commercial products, which are products that are not distinguishable from products that are purchased by non-governmental users. Such products can be purchased from anywhere and the government does not have any specific technical specifications for such products. Therefore, the procurement can be undertaken in an open and competitive way, more quickly than, for example, a major public construction project. *[US]*
- The idea of "off-the-shelf services" does not sound appealing but will be considered. *[EC]*

In relation to the EC proposal:

- With respect to sub-paragraph (c) of the EC proposal, the question arises as to whether the Parties would have a common understanding of the meaning of "commercially available off-the-shelf goods" or whether it is necessary for the text to provide further detail as to what that means. *[US]*
- The definition of that expression is in brackets in the EC proposal because the EC is considering whether this term should be defined in a separate place or in the same provision. *[EC]*
- The EC and equivalent US proposal regarding off-the-self goods are welcome. One of the concerns regarding the implementation of the existing GPA is that the existing time-limits may not be realistic, especially when they are applied to simple and very straightforward procurements such as for paper and stationery when they exceed the GPA thresholds. *[Singapore]*
- It would also be useful to insert some standard services into this paragraph, such as the cleaning of buildings or the provision of security for buildings, since these could also be treated in the same way as off-the-shelf goods to make the Agreement more attractive to non-Parties. *[Switzerland]*

## Article XI

*Time-limits for Tendering and Delivery*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(c) where a state of urgency duly substantiated by the entity renders impracticable the periods in question, the periods specified in paragraph 2 may be reduced but shall in no case be less than 10 days from the date of the publication referred to in paragraph 1 of Article IX; or	<b>(c) where a state of urgency duly substantiated by the entity renders impracticable the periods in question, the periods specified in paragraph 2 may be reduced but shall in no case be less than 10 days from the date of the publication referred to in paragraph 1 of Article IX; or</b> <b>[Singapore – Job No. 3772]</b>
	<b>(d) when, for duly substantiated reasons of extreme urgency brought about by events unforeseeable by the entity, the use of a 40-day time period would result in serious injury to the entity or the relevant Party; however, concerns relating to the amount of funds available to an entity within a particular period of time shall not be considered to be a reason of extreme urgency for these purposes.</b> <b>[US – Job No. 2867]</b>



## Article XI

*Time-limits for Tendering and Delivery*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(d) the period referred to in paragraph 2(c) may, for procurements by entities listed in Annexes 2 and 3, be fixed by mutual agreement between the entity and the selected suppliers. In the absence of agreement, the entity may fix periods which shall be sufficiently long to enable responsive tendering and shall in any case not be less than 10 days.	<b>(d) the period referred to in paragraph 2(c) may, for procurements by entities listed in Annexes 2 and 3, be fixed by mutual agreement between the entity and the selected suppliers. In the absence of agreement, the entity may fix periods which shall be sufficiently long to enable responsive tendering and shall in any case not be less than 10 days.</b> <b>[Singapore – Job No. 3772]</b>
	<b>(d) the period referred to in paragraph 2(c) may be fixed by mutual agreement between the entity and the selected suppliers. In the absence of agreement, the entity may fix periods which shall be sufficiently long to enable responsive tendering and shall in any case not be less than 10 days;</b> <b>[Chinese Taipei – Job No. 3193]</b>
	<b>(f) where an electronic tender documentation is available from a website indicated in the notice of paragraph 6 of Article IX, the period may be further reduced by 5 days.</b> <b>[Chinese Taipei – Job No. 3193]</b>

## Article XI

## Time-limits for Tendering and Delivery

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>3. When a procuring entity publishes a notice of intended procurement in accordance with Article V of this Agreement in an electronic media listed in Appendix III, the entity may reduce the time periods provided for in this Agreement by up to 10 calendar days. The use of this provision, however, shall in no case result in the reduction of those time periods to less than 10 calendar days from the date on which the notice of intended procurement is published.</b>  <b>[US – Job No. 2867]</b></p>
	<p><b>4. Where, as a result of a need to amend information provided to suppliers during the procurement process, a procuring entity must extend the time period for qualification or tendering procedures, such entity shall permit all participating suppliers to submit final tenders in accordance with a common deadline.</b>  <b>[US – Job No. 2867]</b></p>

## Comments

- It is not clear how this section is proposed to apply to a case where the intended procurement is published in both paper and electronic media. The following two cases need to be considered and properly addressed:
- If a procuring entity publishes a notice of intended procurement in an electronic medium, the entity is entitled to shorten the time for submission of tenders. However, if a procuring entity chooses to publish a notice in both paper and electronic media, those suppliers who can only access the paper version will suffer a reduced period for submission of tenders.
- The publication of a notice of intended procurement in an electronic medium does not necessarily mean that such procuring entity will accept the submission of tenders via electronic transmission. As such, a period of 10 calendar days may seem too short for a foreign supplier who still needs to submit his tender by post or by courier. *[Hong Kong, China]*
- When procurement notices are published electronically rather than through traditional paper means, the efficiency that results may allow for a reduction in the time-period of 10 days, 10 days representing the potential gain in efficiency by using electronic means. Depending upon the circumstances, time-periods could be reduced to a minimum of 10 days. *[US]*
- It is interesting to note that the time-period may be reduced by up to 10 days when a procuring entity publishes a notice of intended procurement in an electronic medium. However, some Japanese suppliers are of the opinion that a 10-day reduction is excessive, even if the tender documentation is available electronically. Such reduction might be disproportionate from a supplier's standpoint. At the same time, Japan would like to know the reason for allowing a reduction by up to 10 days. The US proposal only requires, as a condition for a reduction of the time-period, a notice of intended procurement to be made available via electronic media, while a similar provision of the EU proposal requires that the complete tender documentation be available through electronic media. What is the relationship between this 10-day reduction provision and Article VI:2 of the U.S. proposal, which enables a general reduction of the

time-period. For example, what if both provisions are applied at the same time? [*Japan; Job No. 5474*]

- Ten days is the minimum period to which the time-limits could be reduced. [*US*]
- Article VI(3) of the US proposal states that the reduction of time-limits by 10 days can only be based on the publication of a notice of intended procurement whereas Article XIV:5 of the EC proposal states that the documentation must be provided electronically. Different reduction of time limits should be available for all tender documentation, rather than in relation to tender notices only. If a procurement entity publishes a tender notice electronically, can such circumstances warrant a reduction of time limits for tendering? If this is the case, it is proposed that the time limits should be reduced to 5 days instead of 7 days. In the case where all the tender documentation is made available electronically, it is considered that 10 days is acceptable. [*Chinese Taipei*]

**Drafting suggestion**

- Adding a phrase "irrespective of whether such notice is also published in paper media" after Appendix III in the first sentence. [*Hong Kong, China*]

## Article XI:4

## Time-limits for Tendering and Delivery

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
4. Consistent with the entity's own reasonable needs, any delivery date shall take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the points of supply or for supply of services.	<b>(d) Consistent with the procuring entity's own reasonable needs, any delivery date shall take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the points of supply or for supply of services.</b> [EC – Job No. 876]
	<b><u>Possible replacement paragraphs (can have more than one option):</u></b>  <b>Clause (a)</b>  Each Party shall make known in a medium which is [in the public domain] [readily available to both local and foreign suppliers] its overall policy on the time-limits for intended procurement to be followed by its entities.
	<b>Clause (b)</b>  Consistent with the provisions in Article XX, entities shall provide for rapid and immediate measures to address challenges by suppliers on the inadequacy of time-limits given for intended procurement. [Singapore – Job No. 3772]

## Comments

- With respect to sub-paragraph (d) of the EC proposal and the reference to delivery dates, it might be more appropriate for that provision to be included in an article on technical specifications. The delivery date is seen as one of the specifications or requirements for evaluation of offers. [US]
- While Article XI is perhaps not the most appropriate place to discuss delivery dates, it is unclear whether the proposed provision should be moved into the section on technical specifications. [EC]

**ARTICLE XII: TENDER DOCUMENTATION***Article XII:1, 2**Tender Documentation*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
1. 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 WTO.	<b>4. If a procuring entity allows tenders to be submitted in more than one language, one of those languages shall be one of the official languages of the WTO.</b> <b>[EC – Job. No. 876]</b>

**Comments**

General Comments in relation to the EC Proposal:

- The EC proposal attempts to simplify and streamline the Article. Some of the current requirements for inclusions in the tender documentation are not necessary either because they are more appropriately included in the notice of intended procurement or because it is considered that they involve information that is not needed at the tendering stage. *[EC]*

Other:

- Why has the requirement regarding the use of a WTO language been omitted from the US proposal? *[Japan]*
- The US considers that it is not necessary to deal with that issue in the Agreement. *[US]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
2. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including information required to be published in the notice of intended procurement, except for paragraph 6(g) of Article IX, and the following:	<b>1. Procuring entities shall provide to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive bids. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of: [US – Job No. 2867, EC – Job No. 876]]</b>
(a) the address of the entity to which tenders should be sent;	
(b) the address where requests for supplementary information should be sent;	
(c) the language or languages in which tenders and tendering documents must be submitted;	
(d) the closing date and time for receipt of tenders and the length of time during which any tender should be open for acceptance;	
(e) the persons authorized to be present at the opening of tenders and the date, time and place of this opening;	<b>(d) the date, time and place for the opening of tenders; [US – Job No. 2867]</b>
	<b>(d) the date, time and place for the opening of tenders; and persons authorized to be present; and [EC – Job No. 876]</b>

**Drafting suggestion**

- Suggest replacing the word "opening" by "lodging" in the US' proposal. *[Hong Kong, China]*

## Article XII

## Tender Documentation

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(f) any economic and technical requirement, financial guarantees and information or documents required from suppliers;	<b>(b) any conditions for participation in the procurement, including any financial guarantees, information and documents that suppliers are required to submit;</b> [US – Job No. 2867, EC – Job No. 876]
(g) a complete description of the products or services required or of any requirements including technical specifications, conformity certification to be fulfilled, necessary plans, drawings and instructional materials;	<b>(a) the intended procurement, including the nature and quantity of the goods or services to be procured and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings or instructional materials;</b> [US – Job No. 2867, EC – Job No. 876]
(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of products or services of other Parties, customs duties and other import charges, taxes and currency of payment;	<b>(c) all criteria, including all cost factors, to be considered in the awarding of the contract, and the weights that will be assigned to such criteria in evaluating tenders;</b> [US – Job No. 2867, EC – Job No. 876]
(i) the terms of payment;	<b>(e) any other terms or conditions, including terms of payment.</b> [EC – Job No. 876]
(j) any other terms or conditions;	
(k) in accordance with Article XVII the terms and conditions, if any, under which tenders from countries not Parties to this Agreement, but which apply the procedures of that Article, will be entertained.	

## Comments

- With respect to sub-paragraph (c) of the EC and US proposals, it is a good idea for relative weightings to be published in advance. However, there is a probability that the relative weighting may not be confirmed in advance or may have not yet been decided, for example, in complicated cases such as procurement for BOT or concession contracts. Further, the US proposal regarding limited tendering deletes the reference to design contests which means that normal procurement procedures should apply to design contests. The relative weighting for design contests at the notice stage would be difficult to anticipate since these are normally determined by a jury of specialists after receiving the proposals. There may be a need for an exceptional clause to deal with these situations. [Japan; Switzerland] It may be also be possible to list criteria in order of importance. [Switzerland]

- It is important to include the relative weighting of evaluation criteria in the tender notices or the documentation to ensure transparency of the process and to ensure that suppliers and others can understand the bases for decisions that are made in the procurement process. *[US]*
- Deliberation is necessary as to whether it is practical to include in the tender documentation for all procurements the relative weightings assigned to criteria for the awarding of the contract in addition to the criteria themselves. It is important to analyze some concrete examples of the use of relative weightings which satisfy this provision, for instance, procurements of design and consulting services relating to construction. *[Japan; Job No. 5474]*



## Article XII:3

## Tender Documentation

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<i>Forwarding of Tender Documentation by the Entities</i>	
3.(a) In open procedures, entities shall forward the tender documentation at the request of any supplier participating in the procedure, and shall reply promptly to any reasonable request for explanations relating thereto.	<b>2. Procuring entities shall forward the tender documentation at the requests of any suppliers participating in the procurement.</b> <b>[EC Job No. 876]</b>
(b) In selective procedures, entities shall forward the tender documentation at the request of any supplier requesting to participate, and shall reply promptly to any reasonable request for explanations relating thereto.	
(c) Entities shall reply promptly to any reasonable request for relevant information submitted by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract.	<b>3. Procuring entities shall reply promptly to any reasonable request for relevant information submitted by a supplier participating in the procurement, on condition that such information does not give that supplier an advantage over its competitors in the procurement process.</b> <b>[EC – Job No. 876]</b>
	<b>Third Countries</b>  <b>Each Party shall encourage its entities to make tender documentation available on the internet at the time of publication of the notice of intended procurement or as soon as possible thereafter, with access thereto being either free of charge or at a reasonable cost, having regard to the actual cost to the entity of making such information available in this way. [EC; Job No. 4312]</b>

## Comments

- This proposal appears to negate the current paragraph 6(g) of Article IX which refers to "the amount and terms of payment of any sum payable for the tender documentation". Parties should be given the flexibility to impose a reasonable charge, even for technical specifications and tender documents which are downloaded from the Internet. **[Country? Job No. 5074]**
- Some form of charges may be necessary to ensure that documents are not downloaded indiscriminately. Taxpayers should not have to subsidise access for the benefit of suppliers. **[Singapore; Canada]**
- The costs associated with providing documents and technical specifications via the Internet might be far less than the costs associated with providing the documents by mail. Providing

documents free of charge will increase transparency and, in particular, will benefit small and medium enterprises seeking opportunities in procurement markets. *[EC]*

- The fee charged should be strictly linked to actual cost incurred in the provision of information. *[EC]*

**ARTICLE XIII: SUBMISSION, RECEIPT AND OPENING OF TENDERS  
AND AWARDING OF CONTRACTS**

*Article XIII:1*

*Submission, Receipt and Opening of Tenders and Awarding of Contracts*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>1. The submission, receipt and opening of tenders and awarding of contracts shall be consistent with the following:</p> <p>(a) tenders shall normally be submitted in writing directly or by mail. If tenders by telex, telegram or facsimile 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. The tender must be confirmed promptly by letter or by the despatch of a signed copy of the telex, telegram or facsimile. Tenders presented by telephone shall not be permitted. The content of the telex, telegram or facsimile shall prevail where there is a difference or conflict between that content and any documentation received after the time-limit; and</p>	<p>(a) tenders shall normally be submitted in writing. If tenders by telex, telegram or facsimile or electronic means 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. Tenders presented by telephone shall not be permitted. The content of the telex, telegram or facsimile shall prevail where there is a difference or conflict between that content and any documentation received after the time-limit; and</p> <p>[Canada- Job No. 3481 – Alternative 1]</p>
	<p>(a) tenders shall normally be submitted in writing, directly or by mail. Tenders must include all the information necessary for the evaluation of the tender, however submitted. A procuring entity may require that the tender be confirmed promptly by letter or by the despatch of a signed copy of the telex, telegram or facsimile or electronic document.</p> <p>[Canada- Job No. 3481 – Alternative 2]</p>

## Article XIII

## Submission, Receipt and Opening of Tenders and Awarding of Contracts

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p>(a) tenders shall normally be submitted in writing directly or by mail. If tenders by telex, telegram, facsimile or electronic transmission are permitted, the tender made thereby must include all the information necessary for the evaluation of the tender. The tender must be confirmed promptly by letter or by the despatch of a signed copy of the telex, telegram, facsimile or electronic transmission, if required. Tenders presented by telephone shall not be permitted. Unless otherwise specified in the tender documentation, the content of the telex, telegram, facsimile or electronic transmission shall prevail where there is a difference or conflict between that content and any documentation received after the time-limit; and</p> <p>[Chinese Taipei – Job No. 3193]</p>

## Comments

- Parties need to agree whether electronic communications can be considered to be "in writing"? [Japan]
- The expression "in writing" could include the use of electronic means to the extent that the rest of the rules of the Agreement are respected. Paper bids should be kept as a warranty of transparency and equal treatment. [EC]
- There are two aspects to the phrase "in writing". One is the physical aspect. The meaning of "in writing" has changed over time. Now that an electronic medium has been invented, the reference to "writing" could mean electronic writing. The other aspect is the legal aspect. In most cases, tenders are firm undertakings to carry out a contract. For the purposes of the GPA, the more important aspect is the second aspect. [Singapore]
- A provision should be added to indicate that the means for submitting tenders may be specified by the procuring entity, provided the requirement to use such means does not reduce access by foreign and domestic suppliers. [Canada – Job No. 3481]
- The proposals do not make it clear who is responsible and to what extent, for the accuracy of data in tender documents and ensuring the protection of confidentiality of tender information. There should be limits on the burden imposed upon procuring entities as regards the protection of the confidentiality of data transmitted electronically. [Japan]
- What is the rationale for the elimination of the phrase "in particular the definitive price...invitation to tender" in the second sentence of the proposal for Article XVIII:1(a) by Chinese Taipei? [Korea]

- Since some Parties are already using electronic procurement, a consensus is needed to the effect that electronic procurement procedures are not inconsistent with the basic objective of the GPA, that is, non-discrimination and transparency of procurement. *[Japan]*
- Even though the EC has put forward proposals favouring the submission of bids by electronic means, this does not mean that the current wording does not allow for the use of such means. *[EC]*

*Article XIII**Submission, Receipt and Opening of Tenders and Awarding of Contracts*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	(b) integrity of data and confidentiality of tenders must be preserved. Tenders shall not be opened until after the deadline set by the contracting entity for receipt of tenders;
	(c) whatever means of communication or exchange of information chosen they shall not cause a discrimination and be consistent with the principles laid down in Article 3 hereof; and
(b) the opportunities that may be given to tenderers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice.	(d) the opportunities that may be given to tenderers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice. [EC – <a href="#">GPA/W/87</a> ]
	4. When procuring entities provide suppliers with opportunities to correct unintentional errors of form between the opening of tenders and the awarding of the contract, they shall provide the same opportunities to all participating suppliers. [US – Job No. 2867; EC – Job No. 876]

**Drafting comment**

- Would like to seek clarification on the meaning of "unintentional errors of form" as it has significant implications for the implementation of the Agreement. [**Country?**]

## Article XIII:2, 3

*Submission, Receipt and Opening of Tenders and Awarding of Contracts*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<i>Receipt of Tenders</i>	
2. A supplier shall not be penalized if a tender is received in the office designated in the tender documentation after the time specified because of delay due solely to mishandling on the part of the entity. Tenders may also be considered in other exceptional circumstances if the procedures of the entity concerned so provide.	<b>2. Procuring entities shall not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the entity.</b> <b>[US – Job No. 2867; EC – Job No. 876]</b>
<i>Opening of Tenders</i>	
3. All tenders solicited under open or selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings. The receipt and opening of tenders shall also be consistent with the national treatment and non-discrimination provisions of this Agreement. Information on the opening of tenders shall remain with the entity concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles XVIII, XIX, XX and XXII.	<b>1. Procuring entities shall receive and open all tenders under procedures that guarantee the fairness and impartiality of the procurement process.</b> <b>[US – Job No. 2867]</b>
	<b>1. Procuring entities shall receive and open all tenders under procedures that guarantee the fairness and impartiality of the procurement process. In particular, integrity of data must be preserved. Tenders shall not be opened until after the deadline set by the procuring entity for receipt of tenders.</b> <b>[EC – Job No. 876]</b>
	<b>5. Where an entity requires suppliers to satisfy registration or qualification requirements or any other conditions for participation in a procurement, it may, subject to the other provisions of this Agreement, limit the receipt of tenders to those suppliers that satisfy such requirements and conditions.</b> <b>[US – Job No. 1051]</b>

**Comments**

- The US proposal responds to informal consultations in the GPA Committee regarding the implications of the initial US proposal for "selective tendering" procedures. The new paragraph, which is permissive rather than prescriptive, would confirm that tendering may be limited to suppliers that meet any conditions for participation. At the same time, it would clarify that the use of "selective tendering" must be understood in the context of the GPA's other requirements, including those regarding registration, qualification and other conditions of participation, and that the use of selective tendering procedure does not permit departure from those requirements. [US]

## Article XIII:4

*Submission, Receipt and Opening of Tenders and Awarding of Contracts*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<i>Award of Contracts</i>	<i>Awarding of Contracts</i>
<p>4.(a) To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. If an entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract.</p>	<p><b>5. To be considered for award, a tender must be in writing and must, at the time of opening, conform to the essential requirements of the notices and tender documentation that have been provided in advance to all participating suppliers, and be from a supplier that satisfies any registration or qualification requirements or any other conditions for participation.</b> [US – Job No. 1051]</p>
	<p><b>5. To be considered for award, a tender must be in writing and must, at the time of opening, conform to the essential requirements of the notices and tender documentation and be from a supplier which complies with the conditions for participation, including any specified time periods. Procuring entities shall base contract award decisions solely on the requirements and evaluation criteria that have been specified in the notices and tender documentation provided in advance to all participating suppliers. If a procuring entity receives a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract.</b> [EC – Job No. 876]</p>
<p>(b) Unless in the public interest an entity decides not to issue the contract, the entity 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 products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.</p>	<p><b>6. Entities shall award the contract to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender is determined to be the most advantageous on the basis of the requirements and evaluation criteria set forth in the notices or tender documentation.</b> [US – Job No. 1051]</p>



AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>6. Unless a procuring entity determines that it is not in the public interest to award a contract, procuring entities shall award the contract to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender is either the lowest tender or the tender which is determined to be the most advantageous in terms of the requirements and evaluation criteria set forth in the notices or tender documentation.</b>  <b>[EC – Job No. 876]</b></p>
	<p><b>7. A procuring entity may determine that it is not in the public interest to award a contract.</b>  <b>[US Job No. 1051]</b></p>

#### Comments relating to the existing paragraph (a)

- For the purpose of simplifying the Agreement, the following test should apply in connection with the elimination of the last sentence of Article XIII:4(a). If there is anything in the Agreement that calls into question the right of the entity to enquire abnormally low tenders, it may be necessary to state such a right. Otherwise, the sentence should be eliminated. *[US]*
- The US proposal does not contain a reference to "abnormally low bids". The examination of how abnormal the lowest bid may be can be an important part of the award process, particularly if there is a high level of competition in the relevant market. *[Japan]*
- Regarding the proposed deletion of the current provision on abnormally low offers, would it still be possible for the contracting entity to make the necessary checks and investigations? It would be preferable to have an explicit provision unless that provision has been abused. However, there is no evidence that that has been the case. *[EC]*
- There is nothing to prevent entities from examining abnormally low bids at any time the entity considers it to be appropriate, provided that such an examination is conducted in a non-discriminatory fashion. *[US]*
- The provision for "enquiry into abnormally lower tenders" in the second sentence of Article XIII:4(a) of the current GPA is not included in the U.S. proposal. However, the number of abnormally lower tenders has recently been on the increase in the procurement of services, such as computer system design, in Japan, and procuring entities have been making such enquiries more and more frequently. Regarding construction work projects, this enquiry is most important in order to exclude an improper execution of the works and to secure public interest. *[Japan; Job No. 5474]*

#### Comments relating to the existing paragraph (b)

- The wording "a procuring entity determines that it is not in the public interest ..." in paragraph 6 of the EC proposal involves a subjective assessment by the procuring entity. How does paragraph 7 interplay with paragraph 6? If a procuring entity determines that a procurement exercise should be cancelled in the light of public interest, how is paragraph 7 invoked to allege that the procurement process is cancelled in a manner that circumvents the obligations of the Agreement? *[Hong Kong, China]*
- If contract award information is available electronically, it should be made available for a certain period of time so that suppliers are not required to regularly check the electronic site where that information is located. *[Canada]*

- Even though procuring entities can determine that it is not in the interest of the public to award a contract to a certain bidder based on Article X:6 of the US proposal, the right of enquiry should be provided, specifically in the Agreement, in a case where a supplier rejects such enquiry or does not cooperate. Moreover, an explicit provision for such an enquiry is an important basis for a supplier to enable the latter to request the relevant procuring entity to conduct such enquiry when confronted with abnormally lower tenders from competitors. Japanese suppliers have expressed their desire that this provision should continue to exist.  
*[Japan; Job No. 5474]*

*Article XIII**Submission, Receipt and Opening of Tenders and Awarding of Contracts*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>7. Entities shall not cancel a procurement, or terminate or modify awarded contracts in a manner that circumvents the obligations of this Agreement.</b> <b>[US – Job No. 1051]</b>

**Comments**

- Clarification is sought in relation to what is meant by "circumvention of the Agreement" in proposed paragraph 7 of the US proposal. The concept appears to be overly broad. *[Korea]*
- Is proposed paragraph 7 necessary since it seems to apply across the board to many provisions of the Agreement? *[Switzerland]*
- Proposed paragraph 7 responds to a concern that while tendering procedures may be fully compliant with the GPA, an unpopular award may be cancelled, the contract may not be awarded at all, or it may be awarded at some time in the future using a different procedure. The US proposal aims to avoid such circumvention of the Agreement. *[US]*
- In response to a question on the rationale for paragraph 7 *[Canada]*, in a number of major procurement situations, suppliers have encountered situations where entities have cancelled award procedures at the last moment. There can be an impression among the suppliers that the entities had taken their decision relating to the technical merits of the tenders and that the cancellation of the procedures close to the award decision was for some other reasons which might be contrary to the objectives of the Agreement. *[US]*
- With respect to the US proposal regarding circumvention of tendering procedures, it allows cancellation of an award after the contract has been granted but was not popular. However, if a tender had already been awarded, the procuring entity would be contractually bound to perform the contract. The supplier could have an action for breach of contract if the procuring entity had terminated the contract otherwise than in accordance with the terms of the contract. There may not be a need to insert this paragraph so as to complicate the matter. A more stringent condition is proposed by the US on the cancellation of a procurement process in Article X:7. Reservations exist about doing away with the escape clause on "public interest" as Parties may be left with little leeway in genuine cases. *[Hong Kong, China]*

*Article XIII:5**Submission, Receipt and Opening of Tenders and Awarding of Contracts*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(c) Awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.	
<i>Option Clauses</i>	
5. Option clauses shall not be used in a manner which circumvents the provisions of the Agreement.	<b>5. Procuring entities shall not use option clauses in a manner that circumvents the provisions of this Agreement [US Proposal – Job No. 2867]</b>
	<b><u>New Article:</u></b>  <b>Parties shall, within a period of (two) years, conduct a review of the Agreement in the light of developments in the use of electronic tendering with a view to developing criteria for discontinuation of paper-based tenders, such as the experience of the entity in conducting electronic tendering and the readiness of potential suppliers of a particular procurement to use electronic tendering, if appropriate. [Hong Kong, China – Job No. 3436]</b>

**ARTICLE XIV: NEGOTIATION***Article XIV:1, 2, 3, 4**Negotiation*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
1. A Party may provide for entities to conduct negotiations:	<b>1. A Party may provide for its procuring entities to conduct negotiations:</b>
(a) in the context of procurements in which they have indicated such intent, namely in the notice referred to in paragraph 2 of Article IX (the invitation to suppliers to participate in the procedure for the proposed procurement); or	<b>(a) in the context of procurements in which they have indicated such intent in the notice of intended procurement referred to in paragraph 2 of Article IX, [EC – Job No. 876]</b>
(b) when it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.	<b>(b) when it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation; or [EC – Job No. 876]</b>
	<b>(c) when, for a limited procurement a notice of intended procurement has not been published in accordance with Article IX, paragraph 4. [EC – Job No. 876]</b>
2. Negotiations shall primarily be used to identify the strengths and weaknesses in tenders.	<b>2. Procuring entities shall treat tenders in confidence. In particular, they shall not provide information to particular suppliers that might prejudice fair competition between suppliers. [US – Job No. 2867]</b>
3. Entities shall treat tenders in confidence. In particular, they shall not provide information intended to assist particular participants to bring their tenders up to the level of other participants.	<b>2. Negotiations shall primarily be used to identify the strengths and weaknesses in tenders. [EC – Job No. 876]</b>
	<b>2. Procuring entities shall treat tenders in confidence. In particular, they shall not provide information to particular suppliers that might prejudice application of the principles of transparency and non-discrimination between suppliers. [EC – Job No. 876]</b>
4. Entities shall not, in the course of negotiations, discriminate between different suppliers. In particular, they shall ensure that:	<b>3. Procuring entities shall not, in the course of negotiations, discriminate between different suppliers. In particular, they shall ensure that:</b>

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(a) any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation;	<b>(a) any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation;</b>
(b) all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations;	<b>(b) all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations;</b>
	<b>(c) on the basis of the revised requirements and or when negotiations are concluded, all remaining participants are afforded an opportunity to submit new or amended tenders in accordance with a common deadline.</b> <b>[EC – Job No. 876]</b>

### Comments

In relation to the EC Proposal (Job No. 876):

- The EC proposal adds sub-paragraph (c) to the list of circumstances that may lead to negotiations to clarify that this circumstance is implicit in the GPA but, perhaps, better dealt with in a stand-alone provision. *[EC]*
- The US proposal does not include a specific Article on negotiations. Rather the US proposal takes certain provisions out of the existing Article on negotiations and incorporates them into other elements of the proposal. *[US]*
- There is a question as to whether it is necessary or appropriate to have a separate Article specifically related to negotiations. The EC and US proposals and the GPA all say that any Party can use negotiations whenever they state in their notice of intended procurement that they will do so. *[US]*
- Paragraph 2 contains a general statement about the objective of negotiation but it is unclear whether that statement has much effect operationally. Paragraph 3 of the EC proposal is merely an elucidation of specific measures or steps related to ensuring that there is non-discrimination. Sub-paragraph 3(a) is similar to a provision that has been included in the US and EC proposals on qualifications or conditions for participation. Further, sub-paragraphs (b) and (c) appear to be potentially applicable to a broader range of procurement than just negotiated procurements. *[US]*
- A provision on negotiation is seen to be exceptional. Negotiations usually take place in an unstructured environment. It is strongly believed that a provision explaining what is possible and what is not possible in relation to negotiations is important and necessary. *[EC]*

*Article XIV**Negotiation*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(c) all remaining participants are afforded an opportunity to submit new or amended submissions on the basis of the revised requirements; and	
(d) when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline.	

**Comments**

- It may not be necessary to identify a separate framework given that negotiations can be a part of other procurement procedures. It would be sufficient to apply the basic principles in the Agreement to negotiations. This Article should be removed from the Agreement. *[US]*
- There should be certain parameters in this respect, given the role that negotiations often play in the tendering process. *[EC]*
- While the US proposal allows for negotiation if that has been indicated in the tender documentation or when it appears that there is not necessarily a single most advantageous tender, it does not contain a requirement that the tender notice should indicate that negotiations will occur. Why has this requirement been omitted from the US proposal? *[EC]*
- The possibility for an entity to use negotiations should not be limited. Nevertheless, there is a need to have some basic rules in order to provide a framework and guidelines that should be followed when negotiations are being conducted. *[EC]*
- Article XIV of the GPA is deleted without replacement. It seems that negotiations are allowed under the present draft as Article V:2(c) of the United States' proposal provides that each notice of intended procurement should disclose whether the procurement will involve negotiations. Does it mean that under the draft agreement, procuring entities are entitled to conduct whatever types of negotiations they wish? On the other hand, the last sentence of Article X:5 of the US proposal provides that procuring entities shall base contract award decisions solely on the requirements and evaluation criteria that have been specified in the notices and tender documentation provided in advance to all participating suppliers. Does this mean that procuring entities are not allowed to conduct negotiations and to let remaining participating suppliers submit final tenders on the basis of the revised requirements (see Article XIV:4 of the GPA)? *[Hong Kong, China]*
- Article XIV:1 states that negotiations are allowed when a Party has indicated in its notice that it will provide for negotiations. Article V:2(c) of the US proposal states that if negotiations are to be used, that information must be provided in the notice. If an entity holds negotiations but that has not been referred to in the notice, Article V of the US proposal will not have been complied with. Similarly, Article XIV:4(c) of the existing Agreement provides that when requirements for a project have been revised, all remaining participants in a tendering process should have an opportunity to submit amended submissions on the basis of the revisions. Article VII:7 of the US proposal requires that if there are changes in the requirements during the process, that information must be provided to all suppliers that are participating. *[US]*
- It is important that the Agreement appropriately addresses the issue of negotiations. However, given that the use of negotiations needs to be appropriately disciplined, the question is

whether the general commitments and obligations contained in the Agreement adequately address that need or whether there is a need for additional commitments that specifically relate to the use of negotiations. There are many provisions contained in the GPA apart from Article XIV that are relevant to the use of negotiations and discipline such use in some way.  
[US]

- See also the Explanatory Note by the US in Job No. 6772, pages 3 and 4.



**ARTICLE XV: LIMITED TENDERING***Article XV:1**Limited Tendering*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
<p>1. The provisions of Articles VII through XIV governing open and selective tendering procedures need not apply in the following conditions, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers:</p>	<p><b>4. Provided that it does not use this possibility for the purposes of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Parties, or that protects domestic suppliers, a procuring entity may choose not to publish a notice of intended procurement in the following circumstances and, subject to the following conditions, where applicable.</b>  <b>[EC – Job No. 876]</b></p> <p><b>1. An entity may choose not to publish a notice of intended procurement prior to the award of a contract in the following circumstances and subject to the following conditions, where applicable:</b>  <b>[US – Job No. 1051]</b></p>

**Comments**

General comments in relation to the US Proposal (Job No. 1051):

- The US proposal clarifies that the exception to normal GPA rules allowed by this Article is limited to the publication of advance notices. In the US view, the elimination of the term "limited tendering" from the text would not detract from the clarity of the rules. Rather, it would further contribute to the objective of streamlining the GPA text and emphasizing that the GPA provides a framework of disciplines without unnecessarily imposing detailed procedural requirements on current and future Parties. [US]
- The US proposal seeks to avoid reference to particular types of tendering procedures, including limited tendering. The proposal begins by clarifying that limited tendering constitutes an exception to the obligation to publish a notice in advance of an intended procurement. This approach is similar to what has been proposed by the EC. [US]

General comments in relation to the EC Proposal (Job No. 876):

- The EC proposal introduces the list of circumstances where the use of limited tendering is permitted under the Article concerning notices of intended procurement. For the sake of coherence and clarity, the provision allowing entities not to publish a notice might be better placed close to where the obligation to publish a notice of intended procurement is contained. The substance of the list of circumstances allowing deviation from the obligation to publish has not been modified since it is believed that the current circumstances are still needed. However, the proposal attempts to make it easier to understand those circumstances. It is difficult to strike the right balance between detail which allows for more security and greater guarantees and the necessity to render this provision less cumbersome and less difficult to understand. [EC]
- It is a good idea to include the provisions on limited tendering as an exception to the provisions on publication. [Switzerland]

- The chapeau of paragraph 4 of the EC proposal is well-drafted, effectively incorporates the substance of Article XV and, in some respects, is similar to the US proposal with respect to limited tendering. *[US]*
- It might be useful to introduce a reference to "limited tendering" in the chapeau. *[Switzerland]*
- Is the intention of the EC and US proposals that procuring entities be required to issue tender documentation and to follow all other procedures that were formerly provided for in Article VII-XVII in urgent situations? *[Canada]*
- When a limited procedure is used and a contract is awarded to one supplier, it would still be useful to state that Articles VII – XIV do not apply in order, for example, to avoid some other disgruntled firms going to court in search of remedies. *[Switzerland]*

**Comments relating to the existing subparagraph (a)**

- Regarding the proposed deletion of the exception in relation to collusive tendering, there may be cases of collusive tendering in particular markets and, therefore, procuring entities should have instruments to react in those situations. *[EC]*
- Normally, the absence of competition in cases of collusive tendering should not necessarily lead to the restriction of competition by the entity. If collusive tendering occurs, suppliers should be excluded. Further consideration of tendering procedures is needed in markets where it is difficult to introduce or maintain competition. *[US]*

## Article XV

*Limited Tendering*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(a) in the absence of tenders in response to an open or selective tender, or when the tenders submitted have been collusive, or not in conformity with 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 as awarded;	(a) <b>when no tender or request to participate or no suitable tenders or requests to participate have been submitted in response to a prior procurement, on condition that the requirements of the initial procurement are not substantially modified;</b> [EC – Job No. 876]
	(a) <b>in the absence of tenders that conform to the essential requirements in the tender documentation provided in a prior tendering procedure, on condition that the requirements of the initial procurement are not substantially modified in the contract as awarded;</b> [US – Job No. 1051]
	(b) <b>in the absence of tenders from suppliers which satisfy the registration, qualification or other conditions for participation established for a prior tendering procedure;</b> [US – Job No. 1051]
	(b) <b>when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;</b> [EC – Job No. 876]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;	(c) <b>where, for works of art, or for reasons connected with the protection of exclusive rights, such as patents, copyrights or proprietary information or where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;</b> [US – Job No. 1051]
	(b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products or services can be supplied only by a particular supplier or group of suppliers and no reasonable alternative or substitute exists; [Hong Kong, China – Job No. 1333]

## Article XV

## Limited Tendering

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products or services could not be obtained in time by means of open or selective tendering procedures;	(f) <b>in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the entity, the goods or services could not be obtained in time under tendering procedures consistent with Articles [V] and [VI] of this Agreement, and the use of such procedures would result in serious injury to the entity, the entity's programme responsibilities, or the responsible Party;</b> [US – Job No. 1051]
	(d) <b>for additional deliveries by the original supplier that are intended either as replacement parts, extensions, or continuing services for existing equipment, software, services or installations, where a change of supplier would compel the entity to procure goods or services not meeting requirements of interchangeability with existing equipment, software, services, or installations;</b> [EC – Job No. 876]
(d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies, or installations, or as the extension of existing supplies, services, or installations where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services <sup>5</sup> ;	(d) <b>for additional deliveries by the original supplier that are intended either as replacement parts, extensions, or continuing services for existing equipment, software, services or installations, where a change of supplier would compel the entity to procure goods or services not meeting requirements of interchangeability with existing equipment, software, services, or installations;</b> [US – Job No. 1051]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>(e) when an entity procures prototypes or a first product or service which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent procurements of products or services shall be subject to Articles VII through XIV<sup>6</sup>;</p> <p><sup>5</sup> It is the understanding that "existing equipment" includes software to the extent that the initial procurement of the software was covered by the Agreement.</p> <p><sup>6</sup> Original development of a first product or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards. It does not extend to quantity production or supply to establish commercial viability or to recover research and development costs.</p>	<p>(e) <b>when an entity procures prototypes or a first product or service which are developed at its request in the course of, and for, a particular contract for research experiment, study or original development;</b></p> <p><b>[EC – Job No. 876]</b></p>

**Comments relating to the existing subparagraph (c)**

- While paragraph 3(f) of Article IX of the US proposal provides that extreme urgency is a condition under which limited tendering can be used, paragraph 2 states that a procuring entity cannot use limited tendering because of a lack of advance planning. If a procuring entity needs to purchase vaccines as a result of a sudden outbreak of epidemic, can a procuring entity make use of limited tendering under Article IX:3(f) or will the procuring entity be accused of a "lack of advance planning"? On many occasions it is difficult to say whether an extreme urgency is due to an unforeseen emergency or due to a lack of advance planning. How advanced should planning be? *[Hong Kong, China]*
- There have been a number of situations where trading partners have used limited tendering procedures merely because money that had been allocated for a fiscal year had to be used quickly and there had not been enough time to use an open tendering procedure. That situation cannot necessarily be categorized as an emergency situation, allowing an exception to be made to the general transparency and competitive requirements of the Agreement. *[US]*
- The US Explanatory Note (Job No. 6772) indicates that the US was concerned about some Parties' use of the exception for extreme urgency on the ground that these Parties only had a few days before the close of fiscal year for the tendering although they had a long time for planning. Clarification is sought as to whether the US' concern are met by arguing that these Parties' claim does not fall within Article XVI:1(c) of the existing GPA since such situations are not an extreme urgency because they are not brought about by "events unforeseeable by the entity". Such Parties could have definitely foreseen when the close of fiscal year would take place. *[Hong Kong, China]*

**Comments relating to the existing subparagraph (d)**

- Subparagraph (d) which relates to additional deliveries is used to a reasonable extent. If anything, this subparagraph should be strengthened rather than deleted since the circumstances referred to in subparagraph (d) could be used to circumvent competition. *[Switzerland]*

**Comments relating to the existing subparagraph (e)**

- Purchasing entities do use some of the provisions contained in Article XV, such as subparagraph (e). In relation to the circumstances referred to in subparagraph (e), it would be difficult to conduct an open competition since the relevant entity will develop the prototype with the selected supplier over time. *[Switzerland]*
- The issue of prototypes is connected with designs. The prototype may be needed to validate the design. Continuity may be needed in relation to the design and the subsequent development of a prototype. *[Canada]*
- Experience in the US suggests that when a contract is awarded for the development of a prototype, the compensation for that development is normally incorporated into the price of that contract and that there is no need for an additional incentive of a guaranteed follow-on contract for limited tendering in order to attract interest in the development of a prototype. *[US]*
- It is not clear why a fully open and competitive tendering process cannot be used in circumstances involving the use of prototypes or design contests or why a limited tendering process could not be used on the basis of another provision contained in Article XV, such as that relating to interchangeability. Clarification is sought as to whether Parties opposing the deletion of the paragraphs relating to prototypes and design contests are concerned that the contract for construction of the prototype itself should not be competitive or that in the case of both prototypes and design contests, the subsequent contract for the construction of the prototype or the design should not involve competition for some reason *[US]*
- In relation to design contests, once a design had been chosen pursuant to the contest, there could be a competition to build the relevant design. However, that would defeat the purpose

of the design contest. In practice, there would probably not be many applicants for the design contest since the contest is viewed by, at least some, a form of qualification. Further, the applicants would not be willing to invest in preparing a design for the design contest unless they are guaranteed the subsequent construction contract and would be reluctant to enter the contest if they are subsequently forced to give up rights to their designs. It is questionable whether limited tendering could be used on the basis of interchangeability in such circumstances. *[Canada]*

- Clarification is sought as to whether, in the United States, limited tendering is used in cases of, for example, design contests and prototypes. *[Canada]*
- It is doubted as to whether a design contest can be conducted in a way that would not involve limited tendering. *[Canada]*



## Article XV

## Limited Tendering

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>(f) when additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the construction services described therein, and the entity needs to award contracts for the additional construction services to the contractor carrying out the construction services concerned since the separation of the additional construction services from the initial contract would be difficult for technical or economic reasons and cause significant inconvenience to the entity. However, the total value of contracts awarded for the additional construction services may not exceed 50% of the amount of the main contract;</p>	<p><b>(f) when additional services which were not included in the initial procurement but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the services described therein, and the procuring entity needs to award contracts for the additional services to the contractor carrying out the services concerned since the separation of the additional services from the initial procurement would be difficult for technical or economic reasons and cause significant inconvenience to the procuring entity. However, the total value of contracts awarded for the additional services may not exceed 50% of the amount of the main procurement;</b>  <b>[EC – Job No. 876]</b></p>
<p>(g) for new construction services consisting of the repetition of similar construction services which conform to a basic project for which an initial contract was awarded in accordance with Articles VII through XIV and for which the entity has indicated in the notice of intended procurement concerning the initial construction service, that limited tendering procedures might be used in awarding contracts for such new construction services;</p>	<p><b>(g) for new services consisting of the repetition of similar services which conform to a basic project for which an initial contract was awarded following an open or selective procurement method and for which the procuring entity has indicated in the notice of intended procurement concerning the initial service, that a limited procurement method might be used in awarded contracts for such new services;</b>  <b>[EC – Job No. 876]</b></p>

## Comments relating to the existing subparagraph (f)

- Subparagraph (f) of the existing provision may be necessary, although there may be opportunities for simplifying and clarifying that provision. *[US]*
- With respect to the EC proposal regarding modification of construction services, such a modification may entail a change in the existing contract but not a new or different contract. Therefore, there will be no need for a notice in respect of such a change. *[Japan]*

**Comments relating to the existing subparagraph (g)**

- Regarding the proposed deletion by the US of the exception relating to additional construction services, clarification is necessary as to whether such cases are covered by other exceptions such as the additional delivery of goods or services. *[EC]*

## Article XV

## Limited Tendering

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>(h) for products purchased on a commodity market;</p> <p>(i) for purchases made under exceptionally advantageous conditions which only arise in the very short term. This provision is intended to cover unusual disposals by firms which are not normally suppliers, or disposal of assets of businesses in liquidation or receivership. It is not intended to cover routine purchases from regular suppliers;</p>	<p><b>(h) for goods purchased on a commodity market and for purchases of goods made under exceptionally advantageous conditions which only arise in the very short term in the case of unusual disposals and note for routine purchases from regular suppliers;</b> [EC – Job No. 876]</p> <p><b>(e) for goods purchased on a commodity market;</b> [US – Job No. 1051]</p> <p><b>(i) in the case of contracts award to the winner of a design contest provided that the contest has been organized in a manner which is consistent with the principles of this Agreement, notably as regards the publication of a notice of intended procurement, and provided that the participants shall be judged by an independent jury with a view to design contracts being awarded to the winners.</b> [EC – Job No. 876]</p>

## Comments relating to the existing subparagraphs (h) and (i)

- The Agreement's coverage of procurements through commercially run websites should be examined in the light of the provisions of subparagraphs (h) and (i).

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>(j) in the case of contracts awarded to the winner of a design contest provided that the contest has been organized in a manner which is consistent with the principles of this Agreement, notably as regards the publication, in the sense of Article IX, of an invitation to suitably qualified suppliers, to participate in such a contest which shall be judged by an independent jury with a view to design contracts being awarded to the winners.</p>	

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**Comments relating to the deletion of certain subparagraphs from the existing Article XV**

- Caution should be exercised in dropping conditions for limited tendering contained in the current Article XV. *[Japan; Canada; Korea; Hong Kong, China; EC]*
- Clarification is sought as to why the US proposal omits subparagraphs (e), (f), (g), (i), (j) from the existing text of the Agreement. *[Japan; Canada; Korea]*
- Certain subparagraphs – namely, (e), (f), (g), (j) – that are to be deleted under the US proposal should be maintained. Subparagraphs (f) and (j) should be maintained since they are often used in relation to construction works. Further, Japan's GPA statistics for the period 1997 – 1999 indicate that subparagraph (e) has been constantly used. On the basis of advice from construction experts but depending upon confirmation from other agencies and local governments, subparagraph (g) may not be necessary. *[Japan]*
- It is necessary to determine on a substantive basis whether the particular circumstances contained in the Agreement warrant the use of limited tendering whereas it is not relevant to consider whether the various provisions are currently made use of. Parties should proffer specific reasons why they believe limited tendering is necessary in particular circumstances. *[US]*
- Some of the existing provisions in Article XV seem to be similar but have been expanded upon at great length and, perhaps, in unnecessary detail. For example, subparagraphs (f) and (g) relate to similar construction services. The relevant issues are compatibility or interchangeability and the need to maintain consistency. It is unclear whether it is necessary to have three or four separate subparagraphs that address those overall, broad issues. The US proposal seeks to condense subparagraphs (d), (f) and (g) of the existing text into one subparagraph. In addition, at least on the basis of the US system, a number of subparagraphs in the existing text are not considered necessary. *[US]*
- Statistical reports regarding limited tendering indicate that the paragraphs that have been deleted by the US have not been frequently used. Most cases involve follow-up purchases. *[Switzerland]*
- The wording contained in some parts of the US proposal differs from the wording contained in the existing text. What will be the impact of the proposed wording changes and how will the proposed new wording accommodate situations that are proposed to be deleted? *[Canada]*
- Subparagraphs (f) and (j) are very often used in cases of procurement of construction and related services. They should therefore be included in the GPA. In addition, with regard to subparagraph (f), some experts have indicated that, in a considerable number of cases, procuring entities choose to amend the original contract, rather than to enter into a new one. Japan would like to ask each Party to look into its own existing situation.

Note: With regard to additional construction works, there are a number of cases where it is unreasonable for such additional work to be conducted separately from the initial work, or where it is necessary for such additional work to be conducted by the same contractor as for the initial work. The reasons for the above are as follows: In order to secure a better quality of civil engineering and building work, it is desirable that the initial contractor, who has become familiar with the specific conditions of the construction site (including geological, climatic and environmental conditions). If a different contractor were to conduct any additional work, such contractor would be required to prepare new temporary equipment (such as scaffolding, concrete forms and machinery), which would be unreasonably costly and time-consuming.

Typical examples of the above are tunnel works. As the work proceeds, contractors encounter different geological conditions, the emergence of obstacles, such as rocks and spring water, and so forth.

Regarding subparagraph (e), 2% to 3% of the total number of limited tendering contracts are categorized under this paragraph, according to Japan's government procurement statistics (1997-1999). Therefore it should also be included in the GPA. There have been a few cases where

subparagraph (g) has been used in Japan and only a limited number of cases where subparagraph (i) has been used. Japan cannot, however, deny the possibility that it may be used in the future. [*Japan; Job No. 5475*]

## Article XV

## Limited Tendering

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><u>new paragraph (k)</u></p> <p><b>(k) for additional purchases of human life-preserving or life-saving products that require extensive user training or experience or trial for safety reasons.</b></p> <p><b>[Hong Kong, China – Job No. 1333]</b></p>

**Comments relating to the proposed subparagraph (k)**

- The new proposed subparagraph (k) is aimed at fairly restricted circumstances. *[Hong Kong, China]*
- The issues that have been raised in this context as warranting an addition to Article XV relate primarily to issues of quality control and the technical appropriateness of products. It is unclear why it is considered necessary in these cases to use limited tendering as opposed to selective tendering which could involve qualification requirements including performance records and technical specifications establishing high quality standards and which would be much more transparent and competitive. *[US]*
- This proposal must be carefully considered since the use of limited tendering must be strictly limited. *[EC]*
- The proposed subparagraph (k) is quite similar to the existing Article XV:1(d) in that both provisions refer to "additional purchases". *[Singapore]* Article XV:1(d) could/might be modified to meet the concerns raised by Hong Kong, China. *[Switzerland; United States]*
- Singling out a particular sector or set of issues in the new subparagraph (k) would create a problem of interpretation of Article XV:1(d) regarding all other cases of additional deliveries. *[Switzerland]*
- The existing subparagraph 1(d) may not be wide enough to cover what is proposed to be covered by the proposed subparagraph (k). Also, in relation to the former subparagraph, it is unclear what is meant by "interchangeability" and "compulsion". *[Hong Kong, China]*
- The concerns of Hong Kong, China could be met by formulating appropriate conditions in tender documents. *[US]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>2. Entities shall not invoke paragraph 1 of this Article:</b></p> <p><b>(a) for the purpose of avoiding competition among suppliers; or</b></p> <p><b>(b) because of a lack of advance planning or concerns relating to the amount of funds available to an entity within a particular period of time.</b></p> <p><b>[US- Job No. 1051]</b></p>

## Article XV:2

## Limited Tendering

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>2. Entities shall prepare a report in writing on each contract awarded under the provisions of paragraph 1. Each report shall contain the name of the procuring entity, value and kind of goods or services procured, country of origin, and a statement of the conditions in this Article which prevailed. This report 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 under the procedures of Articles XVIII, XIX, XX and XXII.</p>	<p><b>4. Entities shall prepare a report in writing on each contract awarded under paragraph 1 of this Article. Each such report shall include the name of the procuring entity, the value and kind of goods or services procured, and a statement indicating the circumstances and conditions described in paragraph 1 of this Article that justified the use of such procedures. Entities shall retain each such report for a minimum of three years.</b>  <b>[US – Job No. 1051]</b></p>

## General comments

- The issue of limited tendering and how it should be addressed in the Agreement is very important since limited tendering, while necessary in some cases, has significant implications for market access and, therefore, has significant implications for achieving the objectives of the Agreement. While limited tendering is used in a limited way by most entities and in most countries, there are some cases and situations in which it is used 80-85% of the time. The Agreement should provide flexibility in cases where limited tendering is necessary while at the same time ensuring that that flexibility is not be abused. *[US]*
- See also the Explanatory Note by the US in Job No. 6772, pages 4 and 5.



**ARTICLE XVI: OFFSETS***Article XVI:1, 2**Offsets*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
<p>1. Entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets.<sup>7</sup></p> <p><sup>7</sup>Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.</p>	<p><b>4. Procuring entities shall not consider, seek or impose offsets in the qualification and selection of suppliers, goods or services, in the evaluation of tenders, or in the award of contracts.</b> [US – Job No. 2867]</p>
	<p><b>Parties shall not impose offsets in respect of public procurement contracts. Procuring entities shall not seek, take account of or impose offsets in the qualification and selection of suppliers, goods or services, in the evaluation of tenders or in the award of contracts.</b> [EC – Job No. 4312]</p>
<p>2. Nevertheless, having regard to general policy considerations, including those relating to development, a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the country's Appendix I and may include precise limitations on the imposition of offsets in any contract subject to this Agreement. The existence of such conditions shall be notified to the Committee and included in the notice of intended procurement and other documentation.</p>	<p><b><u>Definition:</u></b></p> <p><b>offsets means conditions imposed or considered by a procuring entity prior to, or in the course of, its procurement process that encourages local development or improves a Party's balance of payments accounts by means of requirements of local content, licensing of technology, investment, counter-trade or similar provisions;</b> [US – Job No. 2867]</p>
	<p><b>Offsets are conditions used to encourage local development or to improve balance-of-payments accounts that require use of local content, the licensing of technology, investment, counter-trade or similar actions.</b> [EC; Job No. 4312]</p>

**Comments**

- Offsets are one of the main benefits for developing countries and provision for them in the Agreement could encourage other developing countries to become a Party. Developing country companies are, generally speaking, small to medium-sized enterprises and it is difficult for them to compete in international markets. Offsets provides those companies with an opportunity to enter into joint-ventures with international companies and to establish business contacts that could lead to participation in future projects. [Israel]

- Given that the flexibility to use offsets is aimed at favouring developing countries, it might be more appropriate to address this issue in the context of an Article addressing developing countries' needs. Perhaps providing flexibility in the Agreement will suffice. *[Switzerland; US]*
- Offsets is not necessarily the best way in which to incorporate flexibility into the Agreement in favour of developing countries. *[EC]*
- With respect to the definition of "offsets" in the US proposal, several of the elements contained in the proposed definition do not correspond to the main principles of the Agreement. Switzerland is, therefore, not in favour of offsets. Further, offsets might not be useful for developing countries since they do not contribute to the long-term, sustainable success of a company that may have benefited from an offset in relation to a one-off contract. *[Switzerland]*
- Offsets are an important tool for developing countries because they may result in working partnerships between small local companies and larger companies that may enable the smaller companies to gain experience and develop a reputation in the marketplace. They may also facilitate technology transfer and capacity-building. *[Israel]*

**ARTICLE XVII: TRANSPARENCY***Article XVII:1**Transparency*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
1. Each Party shall encourage entities to indicate the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures, under which tenders will be entertained from suppliers situated in countries not Parties to this Agreement but which, with a view to creating transparency in their own contract awards, nevertheless:	<b>1. Each Party shall encourage entities to indicate the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures, under which tenders will be entertained from suppliers situated in countries not Parties to this Agreement but which, with a view to creating transparency in their own contract awards, nevertheless:</b>
(a) specify their contracts in accordance with Article VI (technical specifications);	<b>(a) specify their contracts in accordance with Article VI (technical specifications);</b>
(b) publish the procurement notices referred to in Article IX, including, in the version of the notice referred to in paragraph 8 of Article IX (summary of the notice of intended procurement) which is published in an official language of the WTO, an indication of the terms and conditions under which tenders shall be entertained from suppliers situated in countries Parties to this Agreement;	<b>(b) publish the procurement notices referred to in Article IX, including, in the version of the notice referred to in paragraph 8 of Article IX (summary of the notice of intended procurement) which is published in an official language of the WTO, an indication of the terms and conditions under which tenders shall be entertained from suppliers situated in countries Parties to this Agreement;</b>
(c) are willing to ensure that their procurement regulations shall not normally change during a procurement and, in the event that such change proves unavoidable, to ensure the availability of a satisfactory means of redress.	<b>(c) are willing to ensure that their procurement regulations shall not normally change during a procurement and, in the event that such change proves unavoidable, to ensure the availability of a satisfactory means of redress.</b>

*Article XVII:2**Transparency*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
2. Governments not Parties to the Agreement which comply with the conditions specified in paragraphs 1(a) through 1(c), shall be entitled if they so inform the Parties to participate in the Committee as observers.	

**ARTICLE XVIII: INFORMATION AND REVIEW AS REGARDS OBLIGATIONS OF ENTITIES***Article XVIII:1**Information and Review as Regards Obligations of Entities*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
1. Entities shall publish a notice in the appropriate publication listed in Appendix II not later than 72 days after the award of each contract under Articles XIII through XV. These notices shall contain:	<b>1. Entities shall publish a notice in the appropriate publication listed in Appendix II not later than 72 days after the award of each contract under Articles XIII through XV. These notices shall contain:</b> [EC – <a href="#">GPA/W/87</a> ]
	<b>2. Not later than 90 calendar days after the award of a contract covered by this Agreement, the procuring entity shall publish a notice in the appropriate publication designated in Appendix III of this Agreement that includes at least the following information about the contract:</b> [US – Job No. 2867]
	<b>1. Having awarded a contract, entities shall:</b>  <b>(a) Publish, for at least 120 days, information on contract awards, including:</b> [Canada – Job No. 3484]
(a) the nature and quantity of products or services in the contract award;	<b>(a) the nature and quantity of products or services in the contract award [by referring to the relevant CPV code, if applicable]</b> [Singapore – Job No. 5271]]; [EC – <a href="#">GPA/W/87</a> ]
	<b>(b) a description of the goods or services procured;</b> [US – Job No. 2867]
	<b>(iii) a description of the nature and quantity of the goods or services included in the contract;</b> [Canada – Job No. 3484]
(b) the name and address of the entity awarding the contract;	<b>(b) the name and address of the entity awarding the contract;</b> [EC – <a href="#">GPA/W/87</a> ]

**Comments**

- It is not clear why 90 calendar days is proposed as a substitute for 72 calendar days in the US' proposal. It appears that 72 calendar days are long enough. [Hong Kong, China]
- The period of 90 days for publication of contract award information might be too long for certain suppliers, for instance for bid challenge purposes. [Singapore]

- Publication of information on contract award for at least 120 days is intended to deal with the situation of electronic-based publishing, for instance on an Internet site. It would be useful to have parameters with respect to the minimum time the information should be made accessible to suppliers through electronic media. The wording could be changed so as not to give the impression that the information should be published each day for 120 days. *[Canada]*
- Further clarification of Canada's rationale for its proposal is sought. *[US]*
- The underlying intention is to ensure that information remains available to suppliers for a reasonable and sufficient period of time. In the case of electronic publication, information may be published for a single day and then may disappear. *[Canada]*
- There is a link between the United States' proposal and the proposal of the European Community for using publication of contract award information as an alternative to statistical reporting. If the proposal by the European Community were to be pursued, the time-periods for publication of notices would need to be longer. *[Canada]*

*Article XVIII.1**Information and Review as Regards Obligations of Entities*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	(a) the name of the procuring entity; [US – Job No. 2867]
	(iv) the name and contact location of the procuring entity; [Canada – Job No. 3484]
(c) the date of award;	(c) the date of award; [EC – <a href="#">GPA/W/87</a> ]
(d) the name and address of winning tenderer;	(d) the name and address of winning tenderer; [EC – <a href="#">GPA/W/87</a> ]
	(c) the name of the winning tenderer; [US – Job No. 2867]
	(i) the name and address of the winning supplier; [Canada – Job No. 3484]

## Article XVIII.1

## Information and Review as Regards Obligations of Entities

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(e) the value of the winning award or the highest and lowest offer taken into account in the award of the contract;	<b>(e) the value of the winning award or the highest and lowest offer taken into account in the award of the contract;</b> [EC – <a href="#">GPA/W/87</a> ]
	<b>(d) the value of the winning award or the highest and lowest offer taken into account in the award of the contract; and</b> [US – Job No. 2867]
	<b>(ii) the value and date of the contract;</b> [Canada – Job No. 3484]

## Comments

- A question by the European Community (No. 13) regarding the limitation of the publication of information to the value of the winning award only in the United States' proposal and the response by the United States are contained in Job No. 5595.
- There is currently a choice given to the procuring entity to publish either the value of the winning award or the highest and the lowest offers made. The US proposal 2(d) to eliminate that choice and make compulsory the publication of the value of the winning award would mean that no information may be provided when entities consider the precise value of the contract to be commercially sensitive information. Would this change not lead to a reduction in the level of transparency achieved? [EC]
- For the purposes of transparency, the value of all tenders received should be published. There are some rare instances, such as defence contracts, that are excluded from the GPA, that do contain sensitive information. If open tendering procedures are used, transparency should apply throughout the process, until the tender award. If, for whatever reason, open tendering procedures are not used, the bid value might be commercially sensitive and should not be published - for example, in cases involving confidential information, R&D, or prototypes. [Singapore]
- Article XVIII is applicable to all procedures and not only to open tendering procedures. The release of the value of the winning bid may not be problematic in cases of open tendering procedures. However, that may not be the case where selective and limited tendering procedures are used. [EC]
- The two options currently allowed for have their advantages and disadvantages. If an option is to be removed, it is necessary to justify why one option is better than the other. [Switzerland]
- In cases where there are oligopolistic market structures, would it be risky to have an absolute transparency rule regarding publication of award values? [EC]
- From the procuring entity's point of view, there is no reason why the award value should not be disclosed, especially since taxpayers' money is being used. The issue is only relevant to suppliers. However, suppliers' concerns are already accommodated in paragraph 4, which states that publication can be withheld upon request where legitimate commercial interests could be prejudiced. [Singapore]



- Why would some entities consider the total value of a contract to be commercially sensitive information? *[US]*

## Article XVIII.1

## Information and Review as Regards Obligations of Entities

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(f) where appropriate, means of identifying the notice issued under paragraph 1 of Article IX or justification according to Article XV for the use of such procedure; and	<b>(f) where appropriate, means of identifying the notice issued under paragraph 1 of Article IX or justification according to Article XV for the use of such procedure; and</b> [EC – <a href="#">GPA/W/87</a> ]
	<b>(v) and, where appropriate, the justification according to Article XV.</b> [Canada – Job No. 3484]
(g) the type of procedure used.	<b>(g) the type of procedure used.</b> [EC – <a href="#">GPA/W/87</a> ]
	<b>(e) the type of procurement method used, and in cases where limited tendering procedures are used, a description of the circumstances justifying the use of such procedures.</b> [US – Job No. 2867]
	<b>(b) Publish such information in officially designated media which are readily accessible to suppliers and other Parties within 72 days of contract award. Officially designated media, listed in Appendix II, may be electronic or paper.</b> [Canada – Job No. 3484]

## Comment

- With regard to paragraph (e) of the US proposal, reference is made to "procurement method" which is not defined in the article containing definitions. Clarification is sought in relation to the meaning of "procurement method". [Japan]

*Article XVIII:2, 3**Information and Review as Regards Obligations of Entities*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
2. Each entity shall, on request from a supplier of a Party, promptly provide:	<b><i>Announcement of Post Award Information</i></b>  <b>1. Procuring entities shall promptly inform suppliers that have submitted tenders of the contract award decisions subject to Article [XII] of this Agreement, procuring entities shall, upon request, provide losing bidders with an explanation of the reasons for not being selected and the relative advantages of the successful supplier.</b> <b>[US – Job No. 2867]</b>
(a) an explanation of its procurement practices and procedures;	
(b) pertinent information concerning the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end and why it was not selected; and	
(c) to an unsuccessful tenderer, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer.	<b>(c) Provide bidders, upon request, with information regarding the reasons that they were not successful.</b> <b>[Canada – Job No. 3484]</b>
3. Entities shall promptly inform participating suppliers of decisions on contract awards and, upon request, in writing.	

## Article XVIII:4

## Information and Review as Regards Obligations of Entities

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>4. However, entities may decide that certain information on the contract award, contained in paragraphs 1 and 2(c), be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers.</p>	<p><b><i>Non-Disclosure of Information</i></b></p> <p><b>1. Nothing in this Agreement shall prevent Parties or their procuring entities from withholding the release of information under this Agreement where release might (a) impede law enforcement; (b) prejudice fair competition between suppliers; (c) prejudice the legitimate commercial interests of particular suppliers or procuring entities, including the protection of intellectual property; or (d) otherwise be contrary to the public interest. [US – Job No. 2867]</b></p>
	<p><b>3. Nothing in this Article shall be construed as requiring any Party and its procuring entities to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers, without formal authorization from the [party] [Party or supplier] providing the information. [Canada – Job No. 3484]</b></p>

## Drafting suggestion

- In order to emphasize the obligation not to disclose other Parties' confidential information, suggest adding the following wording at the end of the paragraph in the US' proposal: ", in particular such information which is obtained from or supplied by other Parties or their procuring entities." *[Hong Kong, China]*

## Comments

- It seems that clarification is required on whether by "confidential" information, the information is confidential to any one of the bidders or the procuring entity. *[Hong Kong, China]*
- The basic concepts in Articles VII:2, XIV:3, XVIII:4, XIX:2 and XIX:4 are the same and do not differ in their application to procuring entities or Parties. This appears to provide scope for consolidation and simplification, perhaps by stating the concept once in the text and incorporating it by reference elsewhere. *[US; Canada]*
- Article XII:2 of the US proposal refers to the ability to withhold the release of information. Subparagraph (c) refers to that right in cases where it would prejudice legitimate commercial interests. *[US]*

**ARTICLE XIX: INFORMATION AND REVIEW AS REGARDS OBLIGATIONS OF PARTIES***Article XIX:1**Information and Review as Regards Obligations of Parties*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
<p>1. Each Party shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement covered by this Agreement, in the appropriate publications listed in Appendix IV and in such a manner as to enable other Parties and suppliers to become acquainted with them. Each Party shall be prepared, upon request, to explain to any other Party its government procurement procedures.</p>	<p style="text-align: center;"><b>Article IV</b> <b>Publication of Procurement Measures</b></p> <p><b>Each Party shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, and procedure regarding procurement covered by this Agreement in officially designated electronic or paper media which are widely disseminated and readily accessible to the public. Each Party shall promptly publish in the same media all additions and changes to such measures. [US – Job No. 2867]</b></p>

**Comments**

- Is further clarification of the phrase "of general application" in paragraph 1 necessary? [US; EC]
- Rules of general application are rules that are not specific to a particular procurement but perhaps apply to only some sectors. [EC]
- The term "general application" is contained in a number of WTO agreements in the context of provisions that relate to notification, for example in GATT Article X and Article 63 of the TRIPS Agreement. [Secretariat]
- In response to a clarification sought as to why the US proposal omits any reference to Appendix IV [Japan; Korea], Appendix IV may not be necessary, provided that laws, regulations etc. are published in an appropriate way. [US]
- For the benefit of foreign suppliers, it might be better to publicize the name of officially designated media in Appendix IV. [Japan]
- The US proposal does not contain a reference to Appendix IV for several reasons. Consideration of the administrative burden is necessary. Suppliers interested in competing in a market are able to locate the necessary information given that the relevant publications are open and publicly available. Therefore, it may not be crucial from the suppliers' point of view to have a list of publications in the Agreement. Further, there may be some Parties that have a large number of publications listed in Appendix IV, to which frequent changes may need to be made. If there are frequent changes that are not notified in a timely manner, lists in Appendix IV may ultimately be less transparent than not having the lists at all. It is necessary to consider whether it would be efficient in the long-run to adopt this approach. [US]
- A provision should be added requiring procuring entities to meet the same requirements for retention of electronic documents as their national legislation, regulations and policies require for paper documents, with the proviso that electronic documents may be printed and the paper copies only retained. [Canada – Job No. 3481]
- This change may not be necessary. Further, the clause does not specify the form by which entities are required to produce and record information. [Hong Kong, China]

- Parties should consider setting up a single "information centre" given that some Parties have decentralised procurement systems. Accordingly, it is important to establish an information system that provides suppliers with a single point of access. [*Korea; EC*]

## Article XIX:2, 3

## Information and Review as Regards Obligations of Parties

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>2. The government of an unsuccessful tenderer which is a Party to this Agreement may seek, without prejudice to the provisions under Article XXII, such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the government of the unsuccessful tenderer provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer.</p>	<p><b>3. Upon the request of any other Party, a Party shall provide such detailed information on the award of a contract as may be necessary to determine whether the procurement was conducted fairly, impartially and in accordance with the provisions of this Agreement. Such information shall include information on the characteristics and relative advantages of the winning tender and on the contract price.</b>  <b>[US – Job No. 2867]</b></p> <p><b>2. A Party may seek additional information on the award of a contract as may be necessary to determine whether the procurement was made fairly and impartially. To this end, the Party of the procuring entity shall provide information on the characteristics and relative advantages of the winning tender and the contract price.</b>  <b>[Canada – Job No. 3484]</b></p>
<p>3. Available information concerning procurement by covered entities and their individual contract awards shall be provided, upon request, to any other Party.</p>	

## Comments

- Comments and questions by Hong Kong, China (No. 8) regarding the above proposal by the United States and the responses by the United States are contained in Job No. 5595.
- A question by Korea (No. 9) regarding the distinction between GPA Article XIX:2 and paragraph 2 of the United States' proposal and the replies of the United States are contained in Job No. 5595.
- In relation to the reference in the Canadian proposal to the requirement that procuring entities provide information on the contract price, while this could be an option, it should not be a rule. *[Switzerland; EC]*
- The contract price is useful information that should be readily available to the public. The mere fact that entities did not always want to release that information should not prevent its release. *[Canada]*
- The Canadian proposal relates to the provision of information from one party to another party, which is not necessarily the same as the public release of that information. Such information is intended to provide an opportunity for Parties to exchange information in order to verify the appropriate implementation of the Agreement. *[US]*
- In those cases where the Party providing the information considers it to be confidential, Article XIX:4 would apply. *[US]*

- In some business areas, the entity but also the winner of the contract may not want the contract price to be disclosed. *[Switzerland]*

In relation to the US proposal:

- With respect to proposed paragraph 3, the option not to disclose the contract price has been removed, provided the release of information would prejudice competition. In contrast, the existing GPA allows flexibility in this respect. It should be considered whether this flexibility should be retained. *[Switzerland]*
- The words "detailed information" in paragraph 1 above should be replaced by "available information". *[Japan – No. 13, Job No. 5595]*



*Article XIX:4**Information and Review as Regards Obligations of Parties*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
4. Confidential information provided to any Party which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers shall not be revealed without formal authorization from the party providing the information.	<b>Non-Disclosure of Information</b>  <b>1. The Parties and their procuring entities shall not disclose confidential or proprietary information.</b> <b>[US – Job No. 2867]</b>

**Comments**

- The US proposal attempts to consolidate a number of similar provisions that currently exist in the GPA that relate to non-disclosure. [US]
- See also the Explanatory Note by the US in Job No. 6772, page 6.

## Article XIX:5

*Information and Review as Regards Obligations of Parties*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
5. Each Party shall collect and provide to the Committee on an annual basis statistics on its procurements covered by this Agreement. Such reports shall contain the following information with respect to contracts awarded by all procurement entities covered under this Agreement:	<b>Collection and Report of Statistics</b>  <b>5. Each Party shall collect and report to the Committee statistics on contracts awarded by entities covered under Appendix 1 of this Agreement. Each report shall be submitted within two years of the end of the reporting period, and shall contain:</b>
(a) for entities in Annex 1, statistics on the estimated value of contracts awarded, both above and below the threshold value, on a global basis and broken down by entities; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value on a global basis and broken down by categories of entities;	(a) <b>For Annex 1 entities, statistics on the:</b>  (i) <b>aggregate number and value, for all such entities collectively, of contracts covered by this Agreement;</b> (ii) <b>number and total value of all contracts covered by this Agreement awarded by such entities, broken down by categories of goods and services according to a uniform classification system; and</b> (iii) <b>number and total value of contracts covered by this Agreement awarded by each such entity under limited tendering procedures.</b>  <b>[US – Job No. 2867]</b>

**Comments**

- In developing the US proposal, an effort was made to determine precisely what statistical information available under the GPA is used for, how useful that information is and the appropriate amount of information that should be provided. [US]
- The EC agrees with the idea that some useful statistics are needed under the GPA and that the level of complexity associated with the current requirements needs to be reduced. [EC]

*Article XIX**Information and Review as Regards Obligations of Parties*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>(b) for entities in Annex 1, statistics on the number and total value of contracts awarded above the threshold value, broken down by entities and categories of products and services according to uniform classification systems; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value broken down by categories of entities and categories of products and services;</p>	<p><b>(b) For Annex 2 and 3 entities, separately, statistics on the:</b></p> <p><b>(i) aggregate number and value of contracts covered by this Agreement awarded by such entities;</b></p> <p><b>(ii) estimated total value of contracts covered by this Agreement awarded by such entities, broken down by categories of entities; and</b></p> <p><b>(iii) estimated value of contracts covered by this Agreement awarded by such entities under limited tendering procedures, broken down by categories of entities.</b></p> <p><b>[US – Job No. 2867]</b></p>
<p>(c) for entities in Annex 1, statistics, broken down by entity and by categories of products and services, on the number and total value of contracts awarded under each of the cases of Article XV; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded above the threshold value under each of the cases of Article XV; and</p>	

## Article XIX

## Information and Review as Regards Obligations of Parties

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(d) for entities in Annex 1, statistics, broken down by entities, on the number and total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes.	
To the extent that such information is available, each Party shall provide statistics on the country of origin of products and services purchased by its entities. With a view to ensuring that such statistics are comparable, the Committee shall provide guidance on methods to be used. With a view to ensuring effective monitoring of procurement covered by this Agreement, the Committee may decide unanimously to modify the requirements of subparagraphs (a) through (d) as regards the nature and the extent of statistical information to be provided and the breakdowns and classifications to be used.	

## Comments

- Comments made by delegations in 1999 and 2000 and the latest revision of a note by the Chair presenting a draft revision of the text of Article XIX:5 were circulated in Job No. 5674 in 1999. Moreover, a note by the Secretariat reflecting the divergences of views among Parties in respect of the main elements of the Chairman's draft text has been circulated in January 2001 (Job No. 244). Comments of a more general nature are set out below.
- The basic question in relation to statistical reporting requirements is the overall balance in terms of the benefits and costs of providing those statistics. *[US; EC]* Even if not perfect, statistics should be collected in order to enable an assessment of the volume of public procurement. Statistical reports allow implementation of the Agreement to be monitored and to confirm that certain expectations are being met. *[US; Switzerland]* The statistics may also be useful for future negotiations. *[US]* Significant costs are involved both for the system and the entities. It is difficult to generate some of the information required and there is a trade-off between the quality of the statistical information to be provided and the possibility of achieving it in a reasonable period of time. To what extent is it realistic and useful to ask for detailed information in view of the cost and complications involved? *[EC]*
- In the OECD context, efforts have been made to collect statistics on total procurement by OECD Members and non-Members based on national account statistics. *[EC; US]*
- In considering the addition of new elements or statistical reporting obligations, it is necessary to bear in mind that a number of Member countries failed to comply with their statistical reporting requirements. *[Japan]*
- The use to be made of statistics should guide decisions regarding the extent of details that statistical reporting requirements should contain. For example, the statistics in relation to limited tendering has been useful in showing the number of procurement contracts that have been awarded to one company without open tendering. *[Switzerland]*

- It is necessary to consider what statistics are currently available and whether those numbers could influence policy-making in ensuring that behaviour becomes more competitive. *[Switzerland]*
- Once the entities put IT systems in place, annual statistics could be provided in a more timely manner. *[Switzerland]*
- In future, statistics could be provided on a real-time basis by all Parties, which would make them more useful. *[US]*

**ARTICLE XX: CHALLENGE PROCEDURES***Article XX:1**Challenge Procedures*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
<i>Consultations</i>	<b><i>Consultations</i></b>
1. In the event of a complaint by a supplier that there has been a breach of this Agreement in the context of a procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.	<b>1. In the event of a complaint by a supplier that there has been a breach of this Agreement, each Party shall encourage its relevant procuring entity and such supplier to seek resolution of the complaint through consultations. Procuring entities shall accord impartial and timely consideration to any such complaint in a manner that is not prejudicial to suppliers' participation in ongoing or future procurement activities or to suppliers' rights to seek corrective measures under the challenge system. [US – Job No. 2867]</b>
	<b>1. In the event of a complaint by a supplier that there has been a breach of this Agreement in the context of a procurement, each Party shall encourage the supplier to seek solution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system. Such encouragement may take place in particular through the designation of one or more bodies which can offer their good advice in trying to solve the situation. [EC – <a href="#">GPA/W/87</a>]</b>

**Comments**

With respect to the US proposal:

- With respect to paragraph 1, is the reference to prejudicial behaviour appropriate given the sensitivity of this issue? *[Switzerland]*

**Drafting suggestion**

- Suggest amending the first sentence of the US proposal as follows: "In the event of a complaint by a supplier who has an interest in a procurement that there has been a breach of this Agreement, arising in the context of a procurement in which the supplier has, or has had, an interest, each Party shall encourage ... ." *[Hong Kong, China]*

With respect to the EC proposal:

- The last sentence in this paragraph should be clarified. The division of labour between the new challenge bodies created under paragraphs 1 and 2 of the EC's proposed amendment and the challenge bodies referred to in paragraph 6 of the existing agreement should be clarified. *[Japan; Hong Kong, China]*
- It is not intended that the proposed amendment would have the result of imposing a new authority on procuring entities. Rather, the intent was to have a central point to address any problems in an unbureaucratic fashion, informally and rapidly. It would be left to Parties to decide how to organize these bodies. *[EC]*
- The need for such prescriptive provisions is doubtful. *[Hong Kong, China]*
- Rather than create a completely new body, the relevant aspects of the approach proposed by the EC could be incorporated into the existing procedures. *[Singapore]*
- The proposal is not intended to make it compulsory for Members to create new bodies. Rather, the intention is to designate bodies that may already be in place. This proposal was made in recognition of the fact that resort to a court is not an ideal solution for government procurement disputes. *[EC]* Settling of government procurement disputes outside legal judicial systems will afford increased flexibility in dispute settlement procedures.
- With respect to the concept that access to consultations should not be prejudicial to rights under the bid challenge system, it is unclear whether it is necessary to establish another consultative procedure akin to mediation if the bid challenge system worked the way it should. *[US]*
- It is unclear whether there is a need for an independent body as provided for in the EC proposal. Parties should have flexibility to establish the most appropriate review bodies for their particular procurement system as is currently the case under the GPA. *[Canada]*

## Article XX:2

## Challenge Procedures

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p><i>Challenge</i></p> <p>2. Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.</p>	<p><b><i>Challenge</i></b></p> <p><b>3. Each Party shall provide timely, effective, transparent, predictable and non-discriminatory means for suppliers to challenge alleged breaches of this Agreement, without a prejudice to suppliers' participation in ongoing or future procurement activities. All challenge procedures shall be in writing and made generally available.</b>  <b>[US – Job No. 2867]</b></p>

**Comment**

- Article XX:2 of the GPA provides that a challenge procedure should be made available to suppliers to challenge alleged breaches of the GPA arising in the context of procurements in which they have or have had an interest. One main difference between the US text and the GPA is that any supplier, instead of a supplier having an interest in a procurement, can bring a case to bid challenge. It is suggested that "breaches of this Agreement" should be inserted in this proposal. Similar wording should be inserted in draft Article XIII:1: "arising in the context of procurements in which the suppliers have, or have had, an interest." *[Hong Kong, China]*
- With respect to paragraph 3 of the US proposal, what is the meaning, rationale and intent of the word "predictable" Does it refer to the outcome or process? *[Canada; Switzerland]*
- The word "predictable" refers to procedures and not results. The word is chosen to address situations where there are bid challenge procedures that may be considered to be transparent, timely and effective, but may not be implemented in a predictable way because of changes in certain elements. Parties should be able to anticipate how to proceed. *[US]*



*Article XX:3, 4, 5**Challenge Procedures*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
3. Each Party shall provide its challenge procedures in writing and make them generally available.	
4. Each Party shall ensure that documentation relating to all aspects of the process concerning procurements covered by this Agreement shall be retained for three years.	
	<p><b>2. Parties shall ensure that their procuring entities maintain records of tendering procedures relating to contract awards covered by this Agreement. Procuring entities shall maintain such records for a period of at least three years. [US – Job No. 2867]</b></p>
<p>5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.</p>	<p><b>6. (a) suppliers shall be allowed a sufficient period of time to prepare and submit challenges, which in no case shall be less than 10 days from the time when the basis of the complaint became known or reasonably should have become known to the supplier; [US – Job No. 2867]</b></p>

## Article XX:6

## Challenge Procedures

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>6.</b></p> <p><b>(b) the proceedings shall be conducted in a transparent manner, consistent with predictable, written procedures that are readily available to all participants in advance;</b></p> <p><b>[US – Job No. 2867]</b></p>

## Comment

- Paragraph 6(b) does not prescribe how the bid challenge should proceed if the review body is not a court subject to judicial review. For example, some important elements such as open hearing and legal representation are not prescribed. The original GPA text is preferred. *[Hong Kong, China]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b><i>Independent Review Authorities</i></b></p> <p><b>2. Each Party shall establish or designate at least one impartial authority, which is independent from its procuring entities, to receive and review supplier challenges relating to the provisions of this Agreement and make appropriate findings and recommendations. Such authorities shall be authorized, pending the resolution of a challenge, to take prompt interim measures to preserve the opportunity to correct potential breaches of this Agreement, including the suspension of the award of a contract or the performance of a contract already awarded.</b></p> <p><b>[US – Job No. 2867]</b></p>

## Drafting suggestion

- The word "authorized" in the last sentence seems to suggest that the "impartial authority" shall be given the power to order prompt rapid interim measure. It is suggested that the last sentence be amended as follows: "Such authorities shall recommend the procuring entity, pending the resolution of a challenge, to impose prompt interim measures to preserve the opportunity to correct potential breaches of this Agreement, including the suspension of the award of a contract or the performance of a contract already awarded. However, the authorities shall take into account the overriding adverse consequences for the interests concerned, including the public interest, in deciding whether such measures should be applied." Without prejudice to the above, in relation to the same sentence of the US draft text, it is better to use "impose prompt interim measures" than "take prompt interim measures". *[Hong Kong, China]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>6. Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that:</p>	<p><b>4. In the event that a challenge is initially reviewed by a body other than an authority established or designated under paragraph (2) of this Article, each Party shall ensure that suppliers may appeal the initial decision to an impartial administrative or judicial authority which is separate and independent from the procuring entity that is the subject of the challenge.</b>  <b>[US – Job No. 2867]</b></p>
(a) participants can be heard before an opinion is given or a decision is reached;	
(b) participants can be represented and accompanied;	
(c) participants shall have access to all proceedings;	

### Comments

In relation to paragraph 4 of the US proposal:

- Is the "impartial administrative or judicial authority" the same authority that is referred to in paragraph 2 of the US proposal? *[Japan]*
- Paragraph 4 of the US proposal refers to the possibility that a challenge may be initially reviewed by a "body". What kind of body is anticipated by this provision? The current text in Article XXVI refers to three different types of review bodies. *[Japan]*
- Paragraph 4 of the US proposal provides that a supplier may appeal the initial decision to an impartial administrative or judicial authority. Is it possible for a supplier to appeal the initial decision to the authority designated under Article XIII:2? *[Hong Kong, China]*
- The body referred to in paragraph 4 may be, for example, a body within the procuring entity to whom a complaint be made. That body may not necessarily constitute an impartial and independent review body. Paragraph 2 refers to "at least one" impartial authority, indicating that each government/Party must have at least one such body to whom suppliers will have access. *[US]*
- In the case of the impartial authority in paragraph 2, there is a provision for prompt interim measures. However, it appears that interim measures are not available for the other type of review mechanism provided for under paragraph 4. The existing GPA allows for interim measures for any kind of review mechanism. *[EC]*
- The ability to order prompt interim measures should be available for any review procedure that is relied upon. *[US]*
- In response to a question on the deletion of the second sentence of the existing paragraph 6, the existing paragraph 6 currently refers to authorities that are not judicial authorities. The US proposal lists procedures that would apply to any authority, administrative or judicial. *[US in response to Canada]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>6.</b></p> <p><b>(d) a supplier that initiates a complaint shall be provided an opportunity to respond to the procuring entities' report prior to a decision being taken on the complaint;</b></p> <p><b>[US – Job No. 2867]</b></p>
	<p><b>5. Each Party shall ensure that any confidential or proprietary information that is submitted in the course of a challenge proceeding is protected in accordance with paragraph 1 of Article XII of this Agreement.</b></p> <p><b>[US – Job No. 2867]</b></p>

**Comment**

- With respect to paragraph 6(d) of the US proposal, it may be appropriate to add "of the review body" after "decisions" in order to make the scope of the obligation clear. *[Canada]*

## Article XX

## Challenge Procedures

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>Review Procedures</b>
	<b>6. Each Party shall ensure that review procedures are conducted in accordance with the following:</b>
	<b>(c) procuring entities shall respond in writing to the complaint and disclose all relevant documents to the review body; [US – Job No. 2867]</b>

**Comments**

- What is the relationship between this subparagraph (c) and Article XII:2? Does the latter prevail so that a procuring entity is entitled to withhold the release of sensitive information to the review body in a bid challenge? *[Hong Kong, China]*
- In paragraph 6 of the US proposal, the existing provisions that apply only to non-judicial bodies have been simplified so that they can apply to all review bodies, both administrative and judicial. The US proposal provides additional flexibility to apply to all types of review procedures, eliminating the need for some of the distinctions that currently exist in Article XX. *[US]*

## Article XX:7

## Challenge Procedures

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(d) proceedings can take place in public;	
(e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;	
	<b>6.</b> <b>(e) decisions relating to supplier challenges shall be provided in a timely fashion, in writing, with an explanation of the basis for each decision;</b> <b>[US – Job No. 2867]</b>
(f) witnesses can be presented;	
(g) documents are disclosed to the review body.	
7. Challenge procedures shall provide for:	
(a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;	
(b) an assessment and a possibility for a decision on the justification of the challenge;	
(c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.	

**Comments**

- Paragraph 2 of the US proposal adopts the discipline contained in Article XX:7(a) and expands on it. It introduces a provision allowing for rapid or prompt interim measures to suspend a procurement process that is underway prior to the award of a contract but also to suspend work on a contract that has been awarded, which is an addition to the existing provision. The addition is necessary to take account of problems that come to light late in the procurement process so that a supplier may have the opportunity to raise or express a complaint to the procuring entity before the entity awards the contract. In such cases, there should be an opportunity for a review body to temporarily suspend work or further action under the contract until the case is heard. *[US]*
- Why has the clause on public interest in the existing Article XX:7(a) been deleted from the US proposal? There are circumstances where it would be important and in the public interest for the government to proceed with an acquisition. *[Canada]*
- Circumstances in which there may be overriding circumstances would be unusual and rare. The use of general exceptions under Article XXIII might be sufficient to protect the public interests in this respect. *[US]*

## Article XX:8

## Challenge Procedures

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
8. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.	
	<b>9. The Parties undertake to designate or establish an independent body with a view to solve informally problems encountered in gaining access to contracts.</b> <b>[EC - <a href="#">GPA/W/87</a>]</b>

**Comments**

- Clarification is required in relation to what is meant by the new paragraph 9. *[Japan; Hong Kong, China]*
- An illustrative example of an independent body dealing with complaints about government procurement is contained in a non-paper. *[EC – Job No. 1466]*



**ARTICLE XXI: INSTITUTIONS***Article XXI:1, 2**Institutions*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
<p>1. A Committee on Government Procurement composed of representatives from each of the Parties shall be established. This Committee shall elect its own Chairman and Vice-Chairman and shall meet as necessary but not less than once a year for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.</p>	<p><b><i>Committee on Government Procurement</i></b></p> <p><b>1. A Committee on Government Procurement composed of representatives from each of the Parties shall be established. This Committee shall elect its own Chairman and Vice-Chairman and shall meet as necessary, but not less than once a year, for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.</b></p>
<p>2. The Committee may establish working parties or other subsidiary bodies which shall carry out such functions as may be given to them by the Committee.</p>	<p><b>2. The Committee may establish working parties or other subsidiary bodies which shall carry out such functions as may be given to them by the Committee.</b></p>
	<p><b><i>Observers</i></b></p> <p><b>3. WTO Members and other governments who are not Parties to this Agreement shall be entitled to participate in the Committee as observers upon submitting a written notice to the Secretariat. [US – Job No. 2867]</b></p>

**Comment**

- Under the present system, does a government need the prior endorsement of the Committee before it can become an observer? Under the present draft, no prior approval is required and a written notice from a government will suffice. *[Hong Kong, China]*

**ARTICLE XXII: CONSULTATIONS AND DISPUTE SETTLEMENT***Article XXII:1, 2**Consultations and Dispute Settlement*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
1. The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement (hereinafter referred to as the "Dispute Settlement Understanding") shall be applicable except as otherwise specifically provided below.	<b>1. The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement (hereinafter referred to as the "Dispute Settlement Understanding") shall be applicable, except as otherwise provided below.</b>
2. If any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded as the result of the failure of another Party or Parties to carry out its obligations under this Agreement, or the application by another Party or Parties of any measure, whether or not it conflicts with the provisions of this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter, make written representations or proposals to the other Party or Parties which it considers to be concerned. Such action shall be promptly notified to the Dispute Settlement Body established under the Dispute Settlement Understanding (hereinafter referred to as "DSB"), as specified below. Any Party thus approached shall give sympathetic consideration to the representations or proposals made to it.	<b>2. Where any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded as the result of the failure of another Party or Parties to carry out its obligations under this Agreement, or the application by another Party or Parties of any measure, whether or not it conflicts with the provisions of this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter, make written representations or proposals to the other Party or Parties which it considers to be concerned. Such action shall be promptly notified to the Dispute Settlement Body established under the Dispute Settlement Understanding (hereinafter referred to as "DSB"), as specified below. Any Party thus approached shall give sympathetic consideration to the representations or proposals made to it. [US – Job No. 2867]</b>

## Article XXII:3, 4, 5

## Consultations and Dispute Settlement

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
3. The DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, make recommendations or give rulings on the matter, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under this Agreement or consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible, provided that only Members of the WTO Party to this Agreement shall participate in decisions or actions taken by the DSB with respect to disputes under this Agreement.	<b>3. Only Members of the WTO party to this Agreement shall participate in decisions or actions taken by the DSB with respect to disputes under this Agreement.</b>
4. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days of the establishment of the panel:	<b>4. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days of the establishment of the panel:</b>
"To examine, in the light of the relevant provisions of this Agreement and of (name of any other covered Agreement cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in this Agreement."	<b>"To examine, in the light of the relevant provisions of this Agreement and of (name of any other covered Agreement cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in this Agreement."</b>
In the case of a dispute in which provisions both of this Agreement and of one or more other Agreements listed in Appendix 1 of the Dispute Settlement Understanding are invoked by one of the parties to the dispute, paragraph 3 shall apply only to those parts of the panel report concerning the interpretation and application of this Agreement.	<b>In the case of a dispute in which provisions both of this Agreement and of one or more other Agreements listed in Appendix 1 of the Dispute Settlement Understanding are invoked by one of the parties to the dispute, paragraph 3 of this Article shall apply only to those parts of the panel report concerning the interpretation and application of this Agreement.</b>
5. Panels established by the DSB to examine disputes under this Agreement shall include persons qualified in the area of government procurement.	<b>5. Panels established by the DSB to examine disputes under this Agreement shall include persons qualified in the area of government procurement. [US – Job No. 2867]</b>

### Comments

- The phrase "consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible", which appears in Article XXII:3 of the GPA is not present in the DSU or the US draft text. This may possibly be an additional power given to the DSB. It is therefore worth reinstating this power in the US draft text. [*Hong Kong, China*]
- Clarification is sought as to why paragraph 3 of the US omits some of the wording contained in the equivalent paragraph of the existing text. [*EC*]
- The language that has been excluded is contained in the WTO Dispute Settlement Understanding. The relevant provisions of the DSU have already been incorporated by reference into the dispute settlement procedures for the GPA. Therefore, it is unnecessary to restate them in the GPA. [*US*]

## Article XXII:6, 7

## Consultations and Dispute Settlement

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>6. Every effort shall be made to accelerate the proceedings to the greatest extent possible. Notwithstanding the provisions of paragraphs 8 and 9 of Article 12 of the Dispute Settlement Understanding, the panel shall attempt to provide its final report to the parties to the dispute not later than four months, and in case of delay not later than seven months, after the date on which the composition and terms of reference of the panel are agreed. Consequently, every effort shall be made to reduce also the periods foreseen in paragraph 1 of Article 20 and paragraph 4 of Article 21 of the Dispute Settlement Understanding by two months. Moreover, notwithstanding the provisions of paragraph 5 of Article 21 of the Dispute Settlement Understanding, the panel shall attempt to issue its decision, in case of a disagreement as to the existence or consistency with a covered Agreement of measures taken to comply with the recommendations and rulings, within 60 days.</p> <p>7. Notwithstanding paragraph 2 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in the said Appendix 1.</p>	<p><b>6. Every effort shall be made to accelerate the proceedings to the greatest extent possible. Therefore, notwithstanding the provisions of paragraphs 8 and 9 of Article 12 of the Dispute Settlement Understanding, the panel shall attempt to provide its final report to the parties to the dispute not later than four months, and in case of delay not later than seven months, after the date on which the composition and terms of reference of the panel are agreed. Consequently, every effort shall be made to reduce also the periods foreseen in Article 20 and paragraph 4 of Article 21 of the Dispute Settlement Understanding by two months. Moreover, notwithstanding the provisions of paragraph 5 of Article 21 of the Dispute Settlement Understanding, the panel shall attempt to issue its decision, in case of a disagreement as to the existence or consistency with a covered Agreement of measures taken to comply with the recommendations and rulings, within 60 days.</b></p> <p><b>7. Notwithstanding paragraph 2 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in the said Appendix 1. [US – Job No. 2867]</b></p>

**ARTICLE XXIII: EXCEPTIONS TO THE AGREEMENT***Article XXIII:1, 2**Exceptions to the Agreement*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.	

**Comments**

- The US is reviewing its position on this Article. [US]

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.	

**ARTICLE XXIV: FINAL PROVISIONS***Article XXIV:1, 2**Final Provisions*

<b>AGREEMENT ON GOVERNMENT PROCUREMENT (1994)</b>	<b>PROPOSED MODIFICATIONS</b>
1. Acceptance and Entry into Force	<b>Entry into Force of Amended Agreement</b>
<p>This Agreement shall enter into force on 1 January 1996 for those governments<sup>8</sup> whose agreed coverage is contained in Annexes 1 through 5 of Appendix I of this Agreement and which have, by signature, accepted the Agreement on 15 April 1994 or have, by that date, signed the Agreement subject to ratification and subsequently ratified the Agreement before 1 January 1996.</p>	<p><b>1. This Agreement supersedes the Government Procurement Agreement, which entered into force on 1 January 1996, and enters into force on [date].</b></p>
<p><sup>8</sup> For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Communities.</p>	<p><b>(a). This Agreement shall enter force on [_____] for those states or customs territories possessing full autonomy in the matters provided for in this Agreement which have, by signature, accepted this Agreement on, [_____] or have, by or on that date, signed the Agreement subject to ratification and have subsequently ratified the Agreement before [_____].</b></p>
	<p><b>(b) This Agreement supersedes the Government Procurement Agreement dated 15 April 1994. [EC; Job No. 4312]</b></p>

**Comments**

- It is objectionable to simply provide that the present GPA is to be superseded by the new agreement. It is because according to GPA Article XXIV:9, amendments shall not enter into force for any Party until it has been accepted by such Party. Therefore, it is possible that amendments will be accepted by Party A but not by Party B. As such, if the original GPA is superseded by the new agreement in respect of Party A, there will not be a GPA to apply between Party A and Party B. What can be provided is that as between two Parties which are Parties to both the original GPA and the new GPA, either the new agreement will prevail or the old one will be superseded. *[Hong Kong, China]*
- It may be premature to consider this question. *[US]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>2. <i>Accession</i></p> <p>Any government which is a Member of the WTO, or prior to the date of entry into force of the WTO Agreement which is a contracting party to GATT 1947, and which is not a Party to this Agreement may accede to this Agreement on terms to be agreed between that government and the Parties. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession which states the terms so agreed. The Agreement shall enter into force for an acceding government on the 30<sup>th</sup> day following the date of its accession to the Agreement.</p>	<p><b><i>Accession</i></b></p> <p><b>2. Any government which is a Member of the WTO and which is not a Party to this Agreement may accede to this Agreement on terms to be agreed between that government and the Parties. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession which states the terms so agreed. The Agreement shall enter into force for an acceding government on the 30<sup>th</sup> day following the date of its accession to the Agreement.</b>  <b>[US – Job No. 2867]</b></p>



## Article XXIV:3

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
3. <i>Transitional Arrangements</i>	
<p>(a) Hong Kong and Korea may delay application of the provisions of this Agreement, except Articles XXI and XXII, to a date not later than 1 January 1997. The commencement date of their application of the provisions, if prior to 1 January 1997, shall be notified to the Director-General of the WTO 30 days in advance.</p>	
<p>(b) During the period between the date of entry into force of this Agreement and the date of its application by Hong Kong, the rights and obligations between Hong Kong and all other Parties to this Agreement which were on 15 April 1994 Parties to the Agreement on Government Procurement done at Geneva on 12 April 1979 as amended on 2 February 1987 (the "1988 Agreement") shall be governed by the substantive<sup>9</sup> provisions of the 1988 Agreement, including its Annexes as modified or rectified, which provisions are incorporated herein by reference for that purpose and shall remain in force until 31 December 1996.</p> <p><sup>9</sup> All provisions of the 1988 Agreement except the Preamble, Article VII and Article IX other than paragraphs 5(a) and (b) and paragraph 10.</p>	
<p>(c) Between Parties to this Agreement which are also Parties to the 1988 Agreement, the rights and obligations of this Agreement shall supersede those under the 1988 Agreement.</p>	

## Article XXIV:4, 5

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(d) Article XXII shall not enter into force until the date of entry into force of the WTO Agreement. Until such time, the provisions of Article VII of the 1988 Agreement shall apply to consultations and dispute settlement under this Agreement, which provisions are hereby incorporated in the Agreement by reference for that purpose. These provisions shall be applied under the auspices of the Committee under this Agreement.	
(e) Prior to the date of entry into force of the WTO Agreement, references to WTO bodies shall be construed as referring to the corresponding GATT body and references to the Director-General of the WTO and to the WTO Secretariat shall be construed as references to, respectively, the Director-General to the CONTRACTING PARTIES to GATT 1947 and to the GATT Secretariat.	
4. <i>Reservations</i>	<b>Reservations</b>
Reservations may not be entered in respect of any of the provisions of this Agreement.	<b>4. Parties may not take reservations in respect of any of the provisions of this Agreement.</b>
5. <i>National Legislation</i>	<b>National Legislation</b>
(a) Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities contained in its lists annexed hereto, with the provisions of this Agreement.	<b>5. Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities contained in its lists annexed hereto, with the provisions of this Agreement.</b> <b>[US – Job No. 2867]</b>

## Drafting suggestion

- Please consider using "make reservations" or "enter into reservations" instead of "take reservations". *[Hong Kong, China]*

## Article XXIV:6

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(b) Each Party shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.	<b>6. Each Party shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.</b> <b>[US – Job No. 2867]</b>
<b>6. Rectifications or Modifications</b>	<b>Rectifications or Modifications</b>
(a) Rectifications, transfers of an entity from one Annex to another or, in exceptional cases, other modifications relating to Appendices I through IV shall be notified to the Committee, along with information as to the likely consequences of the change for the mutually agreed coverage provided in this Agreement. If the rectifications, transfers or other modifications are of a purely formal or minor nature, they shall become effective provided there is no objection within 30 days. In other cases, the Chairman of the Committee shall promptly convene a meeting of the Committee. The Committee shall consider the proposal and any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement prior to such notification. In the event of agreement not being reached, the matter may be pursued in accordance with the provisions contained in Article XXII.	<b>7. Rectifications, transfers of an entity from one Annex to another or, in exceptional cases, other modifications relating to Appendices I through IV shall be notified to the Committee, along with information as to the likely consequences of the change for the mutually agreed coverage provided in this Agreement. If the rectifications, transfers or other modifications are of a purely formal or minor nature, they shall become effective provided there is no objection within 30 days. In other cases, the Chairman of the Committee shall promptly convene a meeting of the Committee. The Committee shall consider the proposal and any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement prior to such notification. In the event of agreement not being reached, the matter may be pursued in accordance with the provisions contained in Article XV of this Agreement.</b> <b>[US – Job No. 2867]</b>

## Article XXIV

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>(b) Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. Such modification shall become effective the day after the end of the following meeting of the Committee, provided that the meeting is no sooner than 30 days from the date of notification and no objection has been made. In the event of an objection, the matter may be pursued in accordance with the procedures on consultations and dispute settlement contained in Article XXII. In considering the proposed modification to Appendix I and any consequential compensatory adjustment, allowance shall be made for the market-opening effects of the removal of government control or influence.</p>	<p><b>Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. Such modification shall become effective the day after the end of the following meeting of the Committee, provided that the meeting is no sooner than 30 days from the date of notification and no objection has been made. In the event of an objection, the matter may be pursued in accordance with the procedures on consultations and dispute settlement contained in Article XXII.</b>  <b>[Japan – Job No. 860]</b></p>

## Comments

- In order to avoid any legal ambiguity regarding requests for compensation, subparagraph 6(b) would need to be modified. [*Japan*]
- The present provisions are a carefully balanced outcome of the negotiations between Parties and reflect the uncertainties in market access opportunities which might be associated with the withdrawal of an entity from Appendix I, notwithstanding a claimed removal of government control or influence. Its purpose is to ensure that any future changes to an agreed annex does not affect the negotiated balance. [*Job No. 5189*]

## Article XXIV

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>The transfer to the private sector of the actual control over the entity:</b>
	<ul style="list-style-type: none"> <li>- the government does not control a majority of the entity's capital nor the voting rights;</li> </ul>
	<ul style="list-style-type: none"> <li>- the government does not appoint more than half of the members of the entity's managing board who has the power to decide on its operations;</li> </ul>
	<ul style="list-style-type: none"> <li>- the operation of the entity is financed by its business revenue, not by government subsidies; and</li> </ul>
	<ul style="list-style-type: none"> <li>- the government does not have control or influence over the entity's procurement decisions.</li> </ul>
	<b>The fact that the entity is exclusively engaged in the provision of goods or services on markets that are subject to genuine competition:</b>
	<ul style="list-style-type: none"> <li>- the government does not provide the entity with any special and exclusive rights to operate;</li> </ul>
	<ul style="list-style-type: none"> <li>- there are more than one entity that engage in the provision of goods or services on the market;</li> </ul>
	<ul style="list-style-type: none"> <li>- in principle, downward price rigidity regarding goods or services on the market has not lasted for a long period of time after the new entry of suppliers; (Note 1) and</li> </ul>
	<ul style="list-style-type: none"> <li>- in principle, there does not exist in the market the situation where the market share of various suppliers have not changed for a long period of time after the entry of new suppliers. (Note 2)</li> </ul> <p>[Japan – Job No. 3289]</p>

## Article XXIV

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<b>(Note 1) - This condition should not apply to special cases where, for example, price increase on the market is to be attributed to changes in import prices and/or exchange rates, with which the state of competition in the market could not have linkage.</b>
	<b>(Note 2) – This condition should apply only if the existing suppliers were once monopoly or exclusive suppliers (cf. Articles 28(h) and 8.5 of the GATS). The condition could not apply to special cases where, for example, the new entry of suppliers to the market would not be expected for a long period of time, due to peculiarities of the market. [Japan – Job No. 3289]</b>

**General comments**

- There are advantages associated with both the Japanese and the US approaches. It might be useful to consider more generally what should be included in the Agreement and what should be developed in the form of a decision. However, it is first necessary to first have a common understanding of what is being discussed. [EC]
- From Japan's experience with the NTT notification, the questions posed to Japan revealed that privatization could be categorized into criteria or conditions, which should be taken into account when considering whether or not the proposed privatised entities deserve to be excluded from coverage under the Agreement. [Japan]

(Reference) Relevant Articles of the GATS:

- Article 28(h): "'monopoly supplier of service' means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service;"
- Article 8.5: "The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory." [Japan]

In relation to the proposal by Japan

- It is difficult to establish simple criteria or parameters to define government control or influence is or what constitutes effective elimination of government control or influence. The criteria that have been proposed are not sufficient to prove the elimination of government control or influence, especially for Parties whose entities may still have to closely follow the direction of the government. [EC]
- The proposal attempts to define the conditions under which Parties would relinquish their right to seek consultation with other Parties about a proposed modification for the removal of an entity from the Agreement's coverage. Parties should not be denied that right. [US]
- The application of the criteria listed in Japan's proposal would facilitate consultations between Parties. [Japan]
- There is a need to establish clear criteria for cases where privatization occurs and a Party wishes to withdraw the privatized entity from Appendix I. [Korea]
- The GPA does not prevent privatization and it is unclear whether there is a need for further clarification of the criteria. [Canada]
- Since some Parties consider that criteria contained in the GPA are not objective or clear enough, further clarification may be needed as to what the existing language means in specific circumstances. [US]
- Regarding the requirement in subparagraph (a) that the government not provide the entity with any special or exclusive rights, a wide variety of private companies are granted such rights by the government. For instance a corner store might be authorized to sell fishing licences or postage stamps. [Job No. 5189]
- It is unclear whether a company that is granted a special right to operate, for instance a bus company that is no more within the government sphere given a franchise to operate by the government on certain routes in competition with other forms of transport, would fall within the scope of proposed subparagraph (a). [Hong Kong, China]
- An effect of the proposed paragraph on appointment of a managing board would be that it would not allow consideration of compensatory adjustment if, for example, an entity that was unilaterally withdrawn from Appendix I still had 48% government membership on its board. What would be an appropriate percentage in this respect? [US]
- With regard to the criteria in the subparagraph on the financing of the operation of an entity, in some circumstances, government subsidies to privatized entities may still be necessary if the subsidies are linked to lowering the cost of provision of basic services and where the beneficiaries are the members of the general public. [Korea]
- The criterion in subparagraph on the financing of the operation of an entity might not be appropriate in all cases. For instance, a number of entities in both Annexes 1 and 3 of the United States, while operating on the basis of their own business revenues, continue to be considered as government agencies conducting government procurement. If the entity was mainly financed by its business revenue, some non-voting equity infusions by the government would not affect the degree of government control or influence. [Job No. 5189]
- The Japanese proposal establishes a hierarchy amongst the various criteria and suggests something more structured in terms of meeting criteria on a cumulative or on an alternative basis. [EC]
- The Japanese proposal contains two separate lists of criteria and states that "either of these sets of criteria would suffice to define effective elimination of government control or influence". However, it seems clear that fulfilment of one of set of criteria would not necessarily be sufficient. [US]

- The proposal proposes that regard should be had to the market structure in which a entity operates should not be incorporated since it implies that those entities operating in a competitive environment should be covered by the GPA. [*Hong Kong, China*]
- Given the different market and governmental structure among Parties, there is no one-size-fits set of criteria. Instead of developing generalised criteria, the approach in the existing Agreement is preferable since it allows for a flexible approach. [*Hong Kong, China*]

In relation to the US proposal in Job No. 3152:

- It is necessary to maintain a procedure that allows for consultations among the Parties relating to the withdrawal of entities from coverage. As is the case under the existing Agreement, the procedure should not allow for unilateral withdrawal of entities from coverage without consultation. Further, elimination of government control or influence should be "effective" and not merely a formal change in legal status. Since it is difficult to generalise what may constitute effective elimination of government control or influence in all circumstances, it might be useful to develop a Committee Decision that provides illustrative guidance but would not necessarily be binding. The US proposal includes an illustrative list of factors which might cast light on whether government control or influence has been eliminated. It is unclear whether the list is complete, whether all the listed factors will be relevant in all cases, and how they would be weighted in a particular case. [*US*]
- The illustrative list of criteria contained in the US proposal does not fit within the logic of the existing provision. [*EC*]
- Privatization efforts should not be delayed or obstructed since, in general, when an entity has been privatized and government control or influence has been effectively eliminated, there is greater market access than is possible under the GPA. Nevertheless, in cases where the level of government investment or interest in an entity is significant, it is not self-evident that government control or influence has been effectively eliminated simply because, for example, the government holding of shares is less than 50% or because the entity is selling a good or service to a non-governmental user. [*US*]



## Article XXIV

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>(b) Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. Such modification shall become effective the day after the end of the following meeting of the Committee, provided that the meeting is no sooner than 30 days from the date of notification and no objection has been made. [...] In the event of objection, the notifying Party may consult with the objecting Party for the 60 days following the end of the Committee Meeting where the notification was first discussed. If no agreement is reached from such consultation, the notified modification enters into effect on the 61<sup>st</sup> day, and the matter may be pursued in accordance with the procedures on consultations and dispute settlement contained in Article XXII of this Agreement.</b></p> <p><b>[Korea; Job No. ....]</b></p>

## Comments

- With respect to Korea's proposed amendment to Articles I and XXIV:6(b) of the GPA, Korea considers that applying the GPA to privatized entities is neither legally consistent nor practically desirable. Therefore, Korea's proposed amendment seeks to exclude privatized entities from the scope of the GPA. The proposal involves the insertion of a new note – Note 1 – to Article I in addition to an amendment of Article XXIV:6(b). [Korea]
- Does the proposal mean that the modification would come into effect, regardless of whether or not the other Parties agree to the proposed modification? [Canada]
- The modification process would proceed as follows. The proposed modification would first be notified. If there is an objection to the proposed modification, a GPA Committee meeting will be convened. If agreement is not reached at that Committee meeting, the notification will enter into effect 61 days following the date of that meeting. The dispute settlement mechanism could be replied upon subsequently if any Parties objected to the modification. [Korea]

## Article XXIV

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. The elimination of such control or influence may be indicated by the transfer to the private sector of the actual control over the entity or by the fact that the entity is exclusively engaged in the provision of goods or services on markets that are subject to genuine competition. Such modification shall become effective the day after the end of the following meeting of the Committee, provided that the meeting is no sooner than 30 days from the date of notification and no objection has been made. In the event of an objection, the matter may be pursued in accordance with the procedures on consultations and dispute settlement contained in article XXII. In considering the proposed modification to Appendix I and any consequential compensatory adjustment, allowance shall be made for the market-opening effects of the removal of government control or influence.</b></p> <p><b>[EC – Job No. 443]</b></p>

**Comments with respect to the EC proposal**

- There should be an opportunity for objective proceedings, during which Parties have an opportunity to request clarification and information regarding a privatisation. However, such a procedure should be based on objective criteria. A Party can always withdraw an entity from the GPA without giving any particular reason if the other Parties agree. Under the proposed Article, there is a right to withdraw entities but only when certain objective circumstances are met. If those circumstances are not met, a Party can offer compensation or negotiate for withdrawal. Some elements contained in the EC proposal are contained in the existing provision. However, experience illustrates that Parties do not necessarily have a clear understanding of what is intended by that provision. [EC]
- The existing provision provides the possibility of removing coverage without consensus. However, compensation must be paid in such circumstances. Perhaps it should be considered whether there are any circumstances where a consensus might not be necessary to withdraw coverage without compensation. [Canada; US]
- If there is a consensus among the Parties to agree with a change to the Agreement, a problem does not arise. However, clarification is needed in cases of conflict. [EC]
- A mechanism is needed to deal with cases where an entity is no longer controlled by the government and there is no longer public ownership or when there is a structural change in a market so that it becomes more competitive. It is necessary to have a common understanding of what Parties' rights and obligations are in those circumstances. [EC]

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- Although some Parties consider that it would be useful to have more precise criteria, there are limits to the extent to which a precise formula could be included. *[EC]*
  - It is important to stress that what is referred to in the EC proposal is effective elimination of influence or control, not just formal changes in the status of an entity. The question then becomes what constitutes "effective elimination of control or influence"? In answering that question, there is a relationship between that issue and the issue of the definition of government procurement in general. After all, if an entity is not conducting government procurement, Parties do not have an interest in subjecting it to the GPA. *[United States]*
  - The terms "genuine competition" and "actual transfer of control to the private sector" are not concrete, objective criteria in determining whether or not government control or influence of the entity has been effectively eliminated since uncertainty and the possibility of conflict among Parties still remains. *[Korea]*
  - Clarification is needed of the term "genuine competition"? *[US; Canada; Hong Kong, China]*
  - The concept of "genuine or effective competition" comes from competition law. *[EC]*
  - The key issue of who controls the company is who is deciding the policy of the company. *[EC]*
  - It is necessary to consider the economic aspects as well as the legal aspects of the situation. It is necessary to see whether the entity, apart from no longer having a legal monopoly, is indeed facing competition in the marketplace. *[EC]*
  - What is meant by, for example, "actual transfer of control to the private sector" or "effective genuine competition"? Factors relevant to privatization might be whether and how the government controls the decision-making of the entity concerned or whether the government subsidises entities. The judgement as to whether "genuine competition" exists or not would differ from country to country. Therefore, such elements (for example, price inflation or market share increases) that would be taken into account when the Committee considers a privatization case, would be quite useful. *[Japan]*
  - Market structure in which an entity operates should not be a factor for consideration in determining whether the GPA disciplines should apply. The first sentence of the proposal in relation to the "elimination or transfer of actual control to the private sector", is a bit too evident as justification for withdrawal of entities from coverage and, therefore, does not add any clarity to the Article as a whole. This Article is very important because it relates to the definition of government procurement and hence the coverage of the Agreement. *[Hong Kong, China]*
  - In one way or another, market structure is of relevance in this context since the last phrase of the current text refers to "market-opening effects". *[EC]*
  - The issue of whether there is "effective genuine competition" could be addressed by the competition authority responsible for assessing the extent to which, in various sectors of the economy, there is or is not competition or insufficient competition. Further discussion is needed as to how to assess "genuine competition". *[Switzerland]*
  - It is necessary to further consider whether it is possible for an entity to procure for governmental purposes even if it is selling in a competitive market. If so, it would be possible for there to still be government control or influence over entities, even if they are selling in a competitive market. *[US]*
  - It is necessary to find the right balance between using general concepts and being more precise. *[EC]*

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
	<p><b>8. Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. Such modification shall become effective the day after the end of the following meeting of the Committee, provided that the meeting is no sooner than 30 days from the date of notification and no objection has been made. In the event of an objection, the matter may be pursued in accordance with the procedures on consultations and dispute settlement contained in Article XV of this Agreement. In considering the proposed modification to Appendix I and any consequential compensatory adjustment, allowance shall be made for the market-opening effects of the removal of government control or influence.</b></p> <p><b>[US – Job No. 2867]</b></p>

## Article XXIV:7

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>7. Reviews, Negotiations and Future Work</p> <p>(a) The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the General Council of the WTO of developments during the periods covered by such reviews.</p> <p>(b) Not later than the end of the third year from the date of entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving this Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to developing countries.</p>	<p><b>Reports and Future Work</b></p> <p><b>9. The Committee shall annually inform the General Council of the WTO of developments relating to the implementation and operation of this Agreement.</b></p>

## Comments

- Does the deletion of Article XXIV:7(b) in the US proposal mean that the US considers that a further review is no longer necessary? *[EC]*
- The US did not intend to prejudge the possibility of further reviews. Its assumption is that the US proposal relates to the current review. If modifications to the current text are made during the current review process, it is necessary to determine whether, at the end of the current review process, there is a need for another review. It may be too early to know how the Parties feel about that at the present point in time. *[US]*
- Paragraph 7(b) of the existing text appears to be contained in paragraph 10 of the US proposal. However, unlike the existing text, the US proposal does appear to impose an obligation on Members to conduct negotiations to improve the Agreement and to extend its coverage. What is the rationale behind this omission? *[Hong Kong, China]*

## Article XXIV

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(c) Parties shall seek to avoid introducing or prolonging discriminatory measures and practices which distort open procurement and shall, in the context of negotiations under subparagraph (b), seek to eliminate those which remain on the date of entry into force of this Agreement.	<b>10. Parties shall seek to avoid introducing or continuing discriminatory measures and practices that distort open procurement and shall, in the context of negotiations, seek to eliminate those which remain on the date of entry into force of this Agreement. [US – Job No. 2867]</b>

**Comment**

- This paragraph builds upon Article XXIV:7(b) of the GPA which provides that Parties shall in the context of negotiations seek to eliminate those discriminatory measures and practices. However, unlike Article XXIV:7(c) of the GPA, the present draft does not impose an obligation on Parties to conduct negotiations to improve the Agreement and to extend its coverage. *[Hong Kong, China]*

## Article XXIV:8, 9, 10

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>8. <i>Information Technology</i></p> <p>With a view to ensuring that the Agreement does not constitute an unnecessary obstacle to technical progress, Parties shall consult regularly in the Committee regarding developments in the use of information technology in government procurement and shall, if necessary, negotiate modifications to the Agreement. These consultations shall in particular aim to ensure that the use of information technology promotes the aims of open, non-discriminatory and efficient government procurement through transparent procedures, that contracts covered under the Agreement are clearly identified and that all available information relating to a particular contract can be identified. When a Party intends to innovate, it shall endeavour to take into account the views expressed by other Parties regarding any potential problems.</p>	
<p>9. <i>Amendments</i></p> <p>Parties may amend this Agreement having regard, <i>inter alia</i>, to the experience gained in its implementation. Such an amendment, once the Parties have concurred in accordance with the procedures established by the Committee, shall not enter into force for any Party until it has been accepted by such Party.</p>	<p><b>Amendments</b></p> <p><b>11. Parties may amend this Agreement having regard, inter alia, to the experience gained in its implementation. Such an amendment, once the Parties have concurred in accordance with the procedures established by the Committee, shall not enter into force for any Party until it has been accepted by such Party.</b></p>
<p>10. <i>Withdrawal</i></p> <p>(a) Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date on which written notice of withdrawal is received by the Director-General of the WTO. Any Party may upon such notification request an immediate meeting of the Committee.</p>	<p><b>Withdrawal</b></p> <p><b>12. Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date on which written notice of withdrawal is received by the Director-General of the WTO. Any Party may upon such notification request an immediate meeting of the Committee. [US – Job No. 2867]</b></p>

## Comment

- Article XXIV:8 should be revised in the light of the ongoing work on possible modifications to the Agreement in relation to the use of information technology. [Job No. 5189]

## Article XXIV:11, 12, 13, 14

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
(b) If a Party to this Agreement does not become a Member of the WTO within one year of the date of entry into force of the WTO Agreement or ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect from the same date.	<b>13. If a Party to this Agreement ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect from the same date.</b>
11. Non-application of this Agreement between Particular Parties	<b>Non-application of this Agreement between Particular Parties</b>
This Agreement shall not apply as between any two Parties if either of the Parties, at the time either accepts or accedes to this Agreement, does not consent to such application.	<b>14. This Agreement shall not apply as between any two Parties if either of the Parties, at the time either accepts or accedes to this Agreement, does not consent to such application.</b>
12. Notes, Appendices and Annexes	<b>Notes, Appendices and Annexes</b>
The Notes, Appendices and Annexes to this Agreement constitute an integral part thereof.	<b>15. The Notes, Appendices and Annexes to this Agreement constitute an integral part thereof.</b>
13. Secretariat	<b>Secretariat</b>
This Agreement shall be serviced by the WTO Secretariat.	<b>16. This Agreement shall be serviced by the WTO Secretariat.</b>
14. Deposit	<b>Deposit</b>
This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party a certified true copy of this Agreement, of each rectification or modification thereto pursuant to paragraph 6 and of each amendment thereto pursuant to paragraph 9, and a notification of each acceptance thereof or accession thereto pursuant to paragraphs 1 and 2 and of each withdrawal therefrom pursuant to paragraph 10 of this Article.	<b>17. This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party a certified true copy of this Agreement, of each rectification or modification thereto pursuant to paragraphs 7 and 8 of this Article and of each amendment thereto pursuant to paragraph 11 of this Article, and a notification of each accession thereto pursuant to paragraph 2 of this Article and of each withdrawal therefrom pursuant to paragraph 12 and 13 of this Article.</b> <b>[US – Job No. 2867]</b>



## Article XXIV:15

## Final Provisions

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>15. Registration</p> <p>This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.</p> <p>Done at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four in a single copy, in the English, French and Spanish languages, each text being authentic, except as otherwise specified with respect to the Appendices hereto.</p>	<p><b>Registration</b></p> <p><b>18. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.</b>  <b>[US – Job No. 2867]</b></p>

## NOTES

AGREEMENT ON GOVERNMENT PROCUREMENT (1994)	PROPOSED MODIFICATIONS
<p>The terms "country" or "countries" as used in this Agreement, including the Appendices, are to be understood to include any separate customs territory Party to this Agreement.</p> <p>In the case of a separate customs territory Party to this Agreement, where an expression in this Agreement is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.</p> <p><i>Article 1, paragraph 1</i></p> <p>Having regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by Parties.</p>	<p>[cf. US proposals on definitions]</p>

## Comments

- Switzerland proposes to re-organize and streamline the content of Article V and add elements relevant to accession by developing and least-developed countries to the Agreement on Government Procurement. *[Switzerland – Job No. 1274]*
- In addition, Switzerland proposes to move these five new articles (presently Article V of the Agreement on Government Procurement) near the end of the Agreement as it is already the case in several other WTO Agreements for provisions referring to developing and least-developed countries. *[Switzerland – Job No. 1274]*

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**ATTACHMENT****ISSUES RAISED AND POINTS MADE IN INFORMAL CONSULTATIONS REGARDING THE SIMPLIFICATION AND IMPROVEMENT OF THE APPENDICES TO THE AGREEMENT**

A summary of the discussion relating to the simplification of Appendices at the informal consultations held in 1997 to 1999 is contained under Item A.1(i) of the Checklist of Issues Raised and Points Made, a note by the Secretariat, dated 7 September 1999 (Job No. 5189). Below is an update of that section of the Checklist in the light of further discussions held on the issue at the informal consultations of 30 January 2001.

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**A. CHOICE BETWEEN POSITIVE AND NEGATIVE LISTS**

1. It has been suggested that Appendix I to the Agreement might benefit from simplification, including the possibility of presenting the Annexes in the form of negative lists, starting with Annex 1. The Committee could define the general principles that would guide the Parties in determining which entities should be excluded from the coverage of the Agreement, for example for national security reasons. This would also have the effect of reducing the residual exceptions and derogations under the General Notes to Appendix I of individual Parties. *[Job No. 5189]*

2. The view has been expressed that there was an obvious connection between the need for a general definition of government procurement and the discussion in relation to the Annexes. It was not possible to have a standard solution for every case and scenario. The main question was whether the universe of procurement covered under the Agreement was clearly determined or not. If a positive list was being used, there was a need for a very comprehensive list. *[EC]*

3. The view has also been expressed that it was desirable to maintain the presentation of the Annexes in the form of positive lists for the overall consistency of the Annexes. *[Job No. 5189]* The presentation of the Annexes to Appendix I of individual Parties in the form of detailed positive lists was complex but what was important was that they were clear as compared to simply having a generic definition referring to entities covered by certain types of laws. *[Switzerland; Japan]*

4. In this connection, the point has also been made that Parties had the obligation to ensure that all the entities that had been specified in Appendix I complied with the requirements under the Agreement effectively. A negative list approach could raise certain difficulties for Parties in this respect. *[Job No. 5189]* To have entities positively listed increased their awareness of the Agreement. A comprehensive positive list also gave an indication to other Parties of what entities were covered in different countries and how procurement was being organized. *[Switzerland]*

5. It has also been said that the choice between positive and negative lists of entities was often a matter of practicality and the practicality may differ from system to system. Therefore, the matter needed to be considered on a case-by-case basis. For instance in the US, there was no convenient way of defining coverage in a generic sense since if a negative list of entities was created of all the townships or counties that might not be subject to the Agreement, it could turn out to be a fairly difficult task. *[US]*

6. It has also been stated that, while the Appendices in the form of positive lists were lengthy when compiled into a single document for all Members, the widespread use of electronic posting in readily accessible form on the WTO website had provided improved transparency and access to information for users. According to this view, the loose-leaf process for the Annexes had also worked well. *[Canada]*

**B. ANNEX 4 ON SERVICES**

7. In relation to the coverage of services in Annex 4, one view has been that a negative list approach might be preferable in seeking as comprehensive coverage of services as possible, subject to limited negotiated exceptions whereas a positive list tended to give the impression that the starting-point was to assume that everything was excluded until a decision was made to cover a

type of service. The real issue was the extent of coverage. If coverage was limited and the classification system was very complicated and a detailed analysis was necessary in any particular sector, it may not make any difference whether a positive or negative list was used. On the other hand, if the ambition was to have extensive coverage of services, then a negative list approach would be more appropriate and, in fact, easier to implement, because it would only be necessary to refer to a short negative list and if the service in question was not on that negative list, it would be clear that that service was covered. A detailed analysis would not be required as was the case under a long positive list. *[US]*

8. The point has also been made that there were many questions as to what type of services were covered. If a negative list was used for Annex 4, it would be necessary to define services. There was a question as to whether there was a definition of services that was sufficiently comprehensive that there would be no doubt that a negative list could be sufficiently clear. *[Switzerland]* It has also been said in this connection that, if reference was made to a concrete classification of services, the use of a positive or negative list was only a matter of presentation because there was a clear view of what was covered and what was not covered. *[EC]*

9. The point has also been made that Annex 4 could be presented as a negative list only after the uniform extension of the coverage of the Agreement in the area of services. *[Job No. 5189]*

### **C. LINKAGES BETWEEN THE ANNEXES**

10. The view has been held that, while it might be feasible to present Annexes 1 and 2 in the form of negative lists, positive lists were particularly relevant to Annex 3 entities because the scope of public corporations or enterprises covered changed from country to country. *[Job No. 5189; Japan]*

11. It has been suggested that attention should be focused on the linkages between some of the Annexes, in particular Annexes 2 and 3 since it was not always easy to determine what was covered by which Annex. *[Switzerland]*

### **D. PRESENTATION OF ANNEXES**

12. It has been stated that Annexes were not presented consistently among the Parties. For example, in the case of some Parties, notes relating to Annexes 2, 3 and 4 often appeared in the General Notes. For other Parties, there were similar notes that had actually been incorporated into the Annexes themselves. Consideration could be given to ways in which the approaches could be harmonized in relation to those types of issues which could assist non-Parties and Parties to anticipate where relevant notes could be found in relation to coverage in various Annexes. *[US]*

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