

**REVIEW OF THE AGREEMENT ON GOVERNMENT PROCUREMENT**

**STREAMLINING THE PROVISIONS OF ARTICLES XIII AND XVIII RELATING  
TO THE RECEIPT AND OPENING OF TENDERS, THE AWARDING OF CONTRACTS,  
AND THE DISCLOSURE OF INFORMATION ON CONTRACT AWARDS**

Submission by the United States

The following communication, dated 19 May 2000, has been received from the Permanent Mission of the United States with the request that it be circulated to the Committee on Government Procurement.

**Introduction**

As noted in the Chairman's report on the Committee's informal meeting on 7 March 2000 (Job No. 1454, dated 9 March 2000), the Committee has agreed that its ongoing work under Article XXIV:7(b) will focus in its next meeting on Articles VII-XV and paragraphs 1, 3 and 4 of Article XVIII. In order to facilitate progress, the United States is submitting the following drafting proposal relating to Articles XIII and XVIII of the Agreement's current text. The drafting proposals are followed by a point-by-point explanation of the changes being proposed.

The United States welcomes other delegations' comments on these proposals and hopes that delegations will consider them to be a useful basis for progress. We reserve the right to amend this submission or to propose additional text on these issues in the light of the Committee's discussions and ongoing domestic consultations.

**Proposed Text**

Receipt and Opening of Tenders

1. Procuring entities shall receive and open all tenders under procedures that guarantee the fairness and impartiality of the procurement process.
2. Procuring entities shall not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is caused solely by the entity.
3. 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.

### Awarding of Contracts

1. 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, including any specified time-periods. Parties shall ensure that entities base contract award decisions solely on the requirements and evaluation criteria that have been specified in the notices or tender documentation provided in advance to all participating suppliers.
2. Procuring entities shall award each 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.
3. Procuring entities shall not cancel a procurement process, or terminate or modify awarded contracts in a manner which circumvents the objectives and requirements of this Agreement.

### Announcement of Post-Award Information

1. Procuring entities shall promptly inform suppliers that have submitted tenders of the procurement award decisions and provide opportunities for losing bidders to obtain an explanation of the reasons for not being selected and the relative advantages of the successful supplier.
2. Not later than 90 calendar days after the award of a procurement covered by this Agreement, the responsible procuring entity shall publish a notice in the appropriate publication designated in Appendix II of this Agreement which includes at least the following information about that contract:
  - (a) the name of the procuring entity;
  - (b) a description of the goods or services procured;
  - (c) the name of the winning tenderer;
  - (d) the value of the winning award; and
  - (e) the type of procurement procedure used, and in cases where limited tendering procedures are used, a description of the circumstances justifying the use of such procedures.

### Other Post-Award Information

1. Each Party shall provide detailed information regarding procurement by covered entities and their individual contract awards to any other Party upon request. This information may include such additional information on the award of a contract as may be necessary to determine whether the procurement was conducted fairly and impartially, including information on the characteristics and relative advantage of the winning tender.
2. Parties shall ensure that their procuring entities maintain and make available upon request by any other Party, records of tendering procedures relating to procurements subject to this Agreement. Procuring entities shall maintain such records for a period of at least three years.

### Non-Disclosure of Information

1. Nothing in this Agreement shall prevent Parties from withholding the release of information where release would impede law enforcement, or prejudice fair competition between suppliers or the

legitimate commercial interests of particular suppliers, including the protection of their intellectual property.

## **Section 2: Discussion**

### Receipt and Opening of Tenders

In this draft, the United States seeks to streamline the existing text of Article XIII without reducing its operational effectiveness. We have excluded paragraph 1(a) of the existing Article because it appears to be overly prescriptive, somewhat outdated, and in some respects redundant.

1. Draft paragraph 1 is a streamlined version of the existing Article XIII:3. The second and third sentences of the existing paragraph either appear to be unnecessary or are addressed elsewhere in this proposal.
2. Draft paragraph 2 corresponds to the first sentence of existing Article XIII:2. In our view, the second sentence of the existing paragraph is unnecessary.
3. Draft paragraph 3 corresponds to subparagraph (b) of the existing Article XIII:1.

The United States believes that these general rules for the receipt and opening of tenders are flexible enough to apply to open, "qualified open", selective, and limited tendering situations.

### Awarding of Contracts

1. Draft paragraph 1 corresponds to subparagraphs 4(a) and 4(c) of existing Article XIII. However, the second sentence of existing subparagraph 4(a) does not appear to be necessary, and has been dropped. We also propose making specific reference to time-periods as a condition for participation, in order to ensure that only those contracts conforming to the time-periods set out in notices or tender documentation are considered for participation.
2. Draft paragraph 2 corresponds to subparagraph 4(b) of existing Article XIII.
3. Based on recent experiences of US suppliers, we propose the addition of a new provision, in draft paragraph 3, to ensure that the cancellation of procurement procedures, or the termination or modification of awarded contracts, does not circumvent the objectives and requirements of this Agreement.

Due to possible similarities and overlapping issues, it may be appropriate to incorporate provisions on *decisions on qualification of suppliers* in this section as well.

### Announcement of Post-Award Information

1. Draft paragraph 1 corresponds to paragraphs 2 and 3 of existing Article XVIII.
2. Draft paragraph 2 slightly streamlines existing Article XVIII:1, and provides additional flexibility by extending the time-period in which a post-award notice must be published from 72 days to 90 days.

### Other Post-Award Information

1. Draft paragraph 1 streamlines existing Article XIX:2.
2. Draft paragraph 2 corresponds to existing Article XX:4.

Non-Disclosure of Information

1. This paragraph corresponds to existing Article XIX:4, but has been slightly re-worded for clarity.

---