

**Working Group on Transparency
in Government Procurement**

**WORK OF THE WORKING GROUP ON THE MATTERS RELATED TO
THE ITEMS I-V OF THE LIST OF THE ISSUES RAISED AND POINTS MADE**

Note by the Secretariat

1. This note has been prepared in response to a request made at the informal meeting that was held on 12 March 2002 that the Secretariat prepare, for each of the two substantive meetings in 2002, short background papers summarizing the work that has already taken place in the Working Group on the matters related to the sub-items to be discussed, drawing on and listing the documentation of the Group.
2. This note covers items I to V of the Informal Note by the Chairman, "List of the Issues Raised and Points Made" (Job(99)/6782, dated 12 November 1999), namely definition and scope; procurement methods; information on national legislation and procedures; information on procurement opportunities, tendering and qualification procedures; and time-periods.
3. The aim is to provide a more concise note than the Informal Note by the Chairman as well as to take into account subsequent discussions in the Working Group and papers submitted. Being a summary, this note does not contain all the details of the points made and explanations given. For this information delegations should consult the Informal Note by the Chairman and the other documentation of the Working Group. As requested, a list of the documentation of the Working Group can be found annexed.
4. On items I to V, this note first briefly sets out the information that was considered by the Working Group on provisions in existing international instruments and on national procedures and practices. It will be recalled that at the outset of its work the Working Group sought information from other intergovernmental organizations on relevant international instruments (in particular from UNCITRAL and the World Bank)¹ and requested the Secretariat to provide a note synthesizing the information available on transparency related provisions in existing international instruments on government procurement procedures and on national practices.² Under each of the items, this note then summarizes the discussions in the Working Group, outlining the issues raised and main points made.

¹ WT/WGTGP/W/1-2

² WT/WGTGP/W/6

I. DEFINITION AND SCOPE OF GOVERNMENT PROCUREMENT

(a) Information on provisions in existing international instruments and national procedures and practices

5. The three instruments vary as to their scope and coverage. The Model Law is designed to be applicable, in principle, to all types of procurement of goods, construction and services. What is meant by "goods", "construction" and "services" is listed in the Model Law. At the same time, it recognizes that an enacting State may wish to exempt certain types of procurement from the coverage of its procurement legislation, for example defence- and security-related procurement. The World Bank Guidelines are applicable to the procurement of goods, works and related services, and to consultants' services for a project that is financed in whole or in part by a loan from the IBRD or a credit from the IDA. The Agreement on Government Procurement (GPA) covers the procurement of goods, and of all services and construction services that are specified in lists, found respectively in Annexes 4 and 5 of Appendix I. General Notes at the end of most Parties' schedules provide for a number of exceptions. The Model Law defines "procurement" as the acquisition by any means of goods, construction and services. The GPA applies to procurement by any contractual means, including through such methods as purchase or lease, rental or hire purchase, with or without an option to buy, including any combination of products or services.³

6. In order to take into account the existence of procurement legislation at different levels of government, the Model Law presents two options as to the levels of government to be covered. The first option brings within the scope of the Model Law all governmental departments, agencies, organs and other units within the enacting State pertaining to the central government as well as to provincial, local or other governmental subdivisions of the enacting State. A second option allows States to enact the Model Law only with respect to the organs of the national government. The GPA obligations under the Agreement apply to procurement by the procuring entities that each Party has listed in its schedule in Annexes 1 to 3 of Appendix I, relating respectively to central government entities, sub-central government entities and other entities such as public utilities.

7. The international instruments provide for the size of procurement contracts to be taken into account in determining the requirements to which they are subject. The provisions of the GPA apply to procurement in respect of procurement contracts above certain threshold values. Each Party indicates such thresholds applying to the procurement of goods and services under Annex 1, 2 and 3 entities. The Model Law allows a procuring entity engaging in low-value procurement in which there is unlikely to be interest on the part of foreign suppliers to forgo certain procedural requirements relating to announcements at the international level. Under the World Bank Guidelines, National Competitive Bidding procedures may be preferred to International Competitive Bidding procedures when contract values are small.⁴

8. As regards national practice, the data available indicates that there is often no detailed legislative or regulatory definition of government procurement. In most cases, government procurement is defined simply as the procurement of goods and services by central, provincial and local governments, as well as by other public entities, which in certain cases include "utilities" - e.g. suppliers of energy, water, transport and telecommunications services. Some countries treat the use of public funds to finance purchases either fully or partially as a defining criterion. Some countries have stated that procurement by any contractual means is covered, including purchases, leasing, rental or hire purchase, with or without an option to buy. Other countries have stated that the term "procurement" includes all stages of the process by which government agencies acquire from external sources the goods and services they need to fulfil their mandates.

³ WT/WGTGP/W/6, paras. 10-11

⁴ WT/WGTGP/W/6, para. 12

(b) Discussions in the Working Group

9. Three main types of questions have arisen in the discussion on definition and scope:

- the definition and scope of government procurement for the purposes of the study phase in the Working Group;
- the definition of government procurement that should be used for the purposes of any commitments that may be negotiated; and
- the extent to which government procurement, as defined, should fall within the scope of commitments.

(i) *Definition and scope of government procurement for the purposes of the study phase in the Working Group*

10. With regard to this matter, there appears to have been a general acceptance that a broad conception, without preconceived limitations, could be employed, it being understood that the focus of work is on the transparency of such government procurement.⁵

(ii) *Definition of government procurement for the purposes of rules that may be negotiated*

11. With regard to this matter, two main sets of issues have been discussed:

- the first is whether a definition should be employed based on the language in the GATT and GATS for defining government procurement;
- the other is the scope of the contractual arrangements or transactions entered into by government entities that should be considered to constitute government procurement for these purposes.

12. With regard to the first of these points, the view has been expressed that the Group could draw on the **existing definitions of government procurement in GATT Article III:8 and GATS Article XIII:2** as a basis for developing an appropriate definition in a transparency agreement. In this regard, the point has been made that, while it would be useful to draw on the existing language in GATT and GATS, the mere reference to these two provisions may not be sufficient for the purposes of a future transparency agreement.⁶ Other questions that have arisen have included whether the term "governmental purposes" as contained in these provisions is by itself sufficiently clear.⁷

13. With regard to the question of the **types of contractual arrangements or transactions** entered into by government entities that should be considered government procurement, it has been suggested that acquisition by any contractual means, including, for example, through lease or rental, should be covered.⁸ The main issue that has arisen in regard to this matter is the extent to which concessions and BOT (build-operate-transfer) contracts should be covered and, if covered, how they should be defined. Differing views have been expressed on these matters. Some have taken the view that BOT contracts and concessions should not be covered, expressing the view that concessions generally have a different legal basis, purpose and philosophy from those underlying government

⁵ JOB(99)/6782, para. 4

⁶ WT/WGTGP/M/10, para. 19; WT/WGTGP/M/11, para. 17; WT/WGTGP/W/26; JOB(99)/6782, para. 18

⁷ WT/WGTGP/M/10, para. 19; WT/WGTGP/M/11, para. 17

⁸ JOB(99)/5803

procurement. Some others have expressed the view that BOT contracts and at least some types of "concessions" should be considered government procurement.⁹ In this regard, the point which has been made in the discussion is that this term could refer to a range of situations which might have different relationships to government procurement. What was important was to have a proper understanding of which BOT contracts and "concessions" fell within the general definition of government procurement, in particular what was for "governmental purposes".¹⁰ The view has also been expressed that, given the increased interest in some countries in securing private sector involvement in the supply of services traditionally supplied by the government itself, there would be merit in exploring the scope for transparency principles to apply to concessions in general.¹¹ At the invitation of the Working Group, the Secretariat circulated a Note on various issues involved in concessions and BOT contracts (Job (00)/5657).

- (iii) *The extent to which government procurement, as defined, should fall within the scope of commitments on transparency in government procurement*

14. On this matter, the following main issues have arisen:

- whether the rules should apply to procurements by all or only some government entities;
- whether procurement of services as well as of goods should be covered;
- whether only procurement contracts above a certain threshold value should be covered;
- whether procurement that is not open to foreign competition should be covered; and
- what provision should be made for exceptions.

15. With regard to the first of these questions, **the governmental entities to which the rules of a transparency agreement might extend**, three main views have been expressed:

- entities at all levels of government, including at sub-central levels, should be covered;
- central government entities and entities at the highest level of sub-central government should be covered;
- only central/federal government entities should be covered.¹²

The suggestion has also been made that coverage of sub-central entities by developing countries with federal government structures could be a subject for special and differential treatment.¹³ In the discussion on these ideas, the issues that have been raised include the feasibility of securing agreement and compliance at all levels of government and the balance of rights and obligations between Members with differing governmental structures.¹⁴

⁹ WT/WGTGP/M/10, paras. 25-26; Job (99)/6782, paras. 12 and 14

¹⁰ JOB(99)/6782, para. 17

¹¹ WT/WGTGP/M/11, paras. 19-21

¹² WT/WGTGP/W/26; WT/WGTGP/W/27; Job (99)/5239; Job (99)/5803; WT/WGTGP/M/10, para. 20; WT/WGTGP/M/12, paras 4-6

¹³ WT/WGTGP/M/10, para. 20

¹⁴ JOB(99)/6782, para. 6

16. Another issue on which differing views have been expressed is the **extent to which procurement by state enterprises should be covered**. Among the issues which have arisen in this context have been the extent to which enterprises enjoy monopolistic positions or operate in a competitive environment, the extent to which their procurements can be regarded as for "governmental purposes", burdens which might be imposed on Members and the relationship with the provisions of GATT Article XVII.¹⁵

17. With regard to the **coverage of goods and services**, differing views have been expressed about the coverage of services. Those advocating that services should not be covered by a transparency agreement have said that the issue of procurement of services is the subject of separate work in the context of GATS and that the inclusion of services, an area for which procurement procedures are less systemized in some countries than they are for goods, would make a transparency agreement more challenging for developing countries.¹⁶ In response, it has been said that there is no basis in the Working Group's mandate for distinguishing between goods and services; that transparency is as much an issue in regard to the procurement of services as it is in relation to goods; that, as a practical matter, it was often difficult to distinguish between a goods procurement and a services procurement since many procurements involved a mixture of goods and services; and that the existing international instruments, including those of UNCITRAL and the World Bank, provide for rules covering both goods and services.¹⁷

18. With regard to the question of the use of **possible threshold values** of procurement contracts for the purposes of determining coverage, the main issue has been whether their use might avoid unnecessary possible burdens resulting from a transparency agreement. The following main views have been expressed:

- there should be a minimum threshold below which transparency obligations would not apply;
- such thresholds might be a subject for special and differential treatment, with higher levels for developing countries;
- there is no need for thresholds of general application, but they might apply to certain rules where burdens might be disproportionate to the benefits accruing;
- the rules of a transparency agreement would not result in burdens that would warrant the use of thresholds.¹⁸

19. With regard to the question of the **coverage of contracts not open to foreign competition**, one view has been that the transparency of such contracts is not a legitimate concern for an international agreement and therefore should not be covered. Another view has been that it is important to cover also such contracts since foreign suppliers have an interest in clear information indicating that certain contracts are not open to them.¹⁹

20. With regard to the **question of exceptions**, there has been discussion of whether a transparency agreement should contain a general exception clause along the lines of GATT Articles XX and XXI. One view has been that such provisions should be provided for. Another view has been to doubt the need for them, given the limited nature of the obligations envisaged in a

¹⁵ JOB(99)/6782, para. 6; WT/WGTGP/M/10, para. 21

¹⁶ WT/WGTGP/M/10, para. 22; WT/WGTGP/M/11, paras. 7, 11 and 12

¹⁷ WT/WGTGP/M/10, para. 22; WT/WGTGP/M/11, paras. 6, 9, 10, 13, 14; JOB(00)/5645

¹⁸ JOB(99)/6782, para. 10; WT/WGTGP/M/10, paras. 23-24; JOB(99)/5239; WT/WGTGP/W/26; WT/WGTGP/W/27

¹⁹ WT/WGTGP/M/10, para. 29

transparency agreement. It has also been suggested that exceptions should be envisaged to respond to social and developmental objectives, including procurement for public distribution systems and stabilization programmes for essential commodities. In response, the point has been made that procurement objectives aimed at meeting social and other public policy goals were not inconsistent with the achievement of transparency.²⁰

II. PROCUREMENT METHODS

(a) Information on provisions in existing international instruments and national procedures and practices

21. All three of the international instruments covered by the Secretariat's note on the Synthesis of the Information Available describe the permissible procurement methods and set out the parameters for justified resort to these methods. The principal procurement method foreseen in all three instruments is some form of open procurement. Under certain circumstances, in which the open procurement method is not considered to be appropriate, alternative methods are offered. The special conditions for the use of these other procedures are often related to ensuring adequate transparency. For example, the Model Law contains a requirement that decisions to use alternative methods should be supported in the record of the procurement proceedings by a statement of the grounds and circumstances on which the procuring entity has justified the use of the method in question. Under the GPA, entities are required to prepare a report on each procurement awarded under limited tendering including a statement of the conditions which prevailed.²¹

22. The available information on the national legislation of Members indicates that it generally sets out criteria for determining which type of procurement method would be appropriately used by procuring entities. The basic range of permissible procurement methods is the same in most countries, although there are some variations based on national conditions and procurement policy objectives. Three broad categories of procedures are commonly distinguished: public or open tendering procedures; selective or restricted tendering procedures; and limited tendering, direct contracting, or single tendering procedures. Open and selective tendering procedures appear to be the main procedures in most countries.²² The conditions and circumstances justifying the use of limited tendering commonly specified in national legislation are listed in paragraph 24 of WT/WGTGP/W/6. Typical features of national procedures in regard to the main tendering procedures are set out in paragraphs 22 to 23 of the Synthesis of the Information Available and in the submissions made by Korea, the Czech Republic, Hungary, Japan and Morocco providing information on their respective national procedures and practices.²³

(b) Discussions in the Working Group

23. A common starting-point for the discussion on this matter appears to have been a broad recognition that Members should retain flexibility to use different procurement procedures and that the emphasis should be on ensuring transparency in the choice and use of the method in question rather than on attempting to be prescriptive about the conditions governing which different methods can be used.²⁴

24. In discussions on the relationship between transparency and procurement methods, the following categories of situation have been identified:

²⁰ WT/WGTGP/M/10, paras. 16 and 28; WT/WGTGP/W/26; WT/WGTGP/W/27

²¹ WT/WGTGP/W/6, paras. 14-18

²² WT/WGTGP/W/5; WT/WGTGP/W/6, paras. 20-21

²³ WT/WGTGP/W/7; WT/WGTGP/W/9; WT/WGTGP/W/12; Job No. 939 and WT/WGTGP/W/19

²⁴ JOB(99)/6782; para. 19; WT/WGTGP/W/17; WT/WGTGP/W/26; WT/WGTGP/W/27;; WT/WGTGP/W/31; WT/WGTGP/M/10, para. 31; WT/WGTGP/M/11, para. 25-26

- open procedures under which information on the procurement is made available publicly and all are eligible to participate. It has been said that this method is the most transparent²⁵;
- selective tendering where information on the procurement opportunity is made available publicly as are the selection criteria to be employed. It has been said that this method can be as transparent as the first²⁶;
- selective tendering where information on the procurement opportunity is made available only to pre-selected qualified suppliers²⁷; and
- limited tendering (sometimes called individual, sole source, single source or direct tendering), under which only a single supplier is contacted. It has been said that this method is inherently less transparent. Much of the discussion in the Group on procurement methods has related to the circumstances under which such a method may be employed and how to maximize the transparency in its use.²⁸

25. In regard to possible rules that might be negotiated on procurement methods, the following ideas have been discussed:

- a requirement that each Member should specify in its national legislation the circumstances under which procuring entities may use different procuring methods²⁹;
- an obligation on Members to ensure that their entities comply with these provisions of their national legislation
- a general commitment that, whatever the procurement method used, transparency would be maximized to the extent possible at each stage of the procurement process³⁰;
- in regard to limited tendering:
 - a general requirement that this method only be used in exceptional and justifiable cases;
 - an illustrative list of the circumstances warranting the use of this method;
 - an exhaustive list of the circumstances warranting the use of this method;
 - a requirement to publish notices of invitation to tender and contract award notices; and
 - a requirement on procuring entities to maintain records and provide, in the award of contracts notice, information on the reasons for the use of this method.³¹

²⁵ JOB(99)/6782, para. 22

²⁶ JOB(99)/6782, para. 21

²⁷ JOB(99)/5239

²⁸ JOB(99)/6782, para. 23; WT/WGTGP/W/16

²⁹ JOB(99)/6782, para. 24; WT/WGTGP/M/10, para. 31; WT/WGTGP/W/27

³⁰ JOB(99)/6782, para. 20, WT/WGTGP/M/10, para. 31

³¹ JOB(99)6782, para. 26, WT/WGTGP/W/17

26. With regard to the suggestions made on limited tendering, it has been said that spelling out the exact circumstances and conditions justifying the use of this type of method might go beyond the scope of a transparency agreement and impinge upon the ability of procuring entities to use the most appropriate procurement method in the circumstances of each case.³² In regard to the possible requirement for notices of invitation to tender and contract award notices to be published, the point has been made that this might put undue burdens on procuring entities since limited tendering was often used for small-value procurements.³³

27. A further issue that has been raised in regard to procurement methods is the use of direct negotiation between the procuring entity and suppliers after the submission of initial tenders. In this connection, it has been said that it would be important to retain scope for the use of this method, but that, in its use, transparency should be ensured. This could be done through the provision of advance information on the use of this procedure, through ensuring that all participating suppliers are given information on a non-discriminatory basis and through ex-post information on the contract award.³⁴

III. PUBLICATION OF INFORMATION ON NATIONAL LEGISLATION AND PROCEDURES

28. It should be noted that, in the Chairman's List of Issues on the basis of which the Working Group has been working, the matter of publication is treated separately from that of notification, i.e. the supply of information to other WTO Members. Notification is the subject of Section X in the List of Issues, which will be addressed in a later summary note.

(a) Information on provisions in existing international instruments and national procedures and practices

29. The Model Law and the GPA require the public accessibility of relevant texts. The GPA explicitly requires Parties to publish any law, regulation, judicial decision, administrative rulings of general application and any procedure regarding government procurement in such a manner as to enable other GPA Parties and suppliers to become acquainted with them.³⁵ The Secretariat's note on the Synthesis of the Information Available indicates that the national regulatory frameworks for procurement procedures include: national constitutions; procurement laws; regulations (legislative decrees, cabinet orders, ministerial ordinances implementing various aspects of the basic procurement law); horizontal guidelines on government procurement policies in decentralized procurement regimes; horizontal laws on national budgets or the public sector budget; horizontal laws on financial or budgetary management, public sector control or audit; agency-specific purchasing regulations and guidelines that implement national policies and procedures on procurement; specific laws at the sub-central levels of government; the provisions of regional or other international agreements; separate regulations on procurement of specific goods and services categories and construction works.³⁶

30. Reference has also been made to the existing publication obligations contained in Article X of GATT 1994 and Article III of GATS relating to laws, regulations, judicial decisions and administrative rulings of general application. It has been observed that government procurement is not excluded from the scope of these provisions. The suggestion has been made that any more specific publication requirements that may be negotiated relating to transparency in government procurement should be without prejudice to these existing obligations.³⁷

³² WT/WGTGTP/M/10, para. 31; JOB(99)/6782, para. 26

³³ JOB(99)/6782, para. 26

³⁴ WT/WGTGP/M/10, para. 32

³⁵ WT/WGTGP/W/6, para. 27

³⁶ WT/WGTGP/W/6, para. 30

³⁷ JOB(99)/6782, para. 35; WT/WGTGP/W/26; WT/WGTGP/W/27

(b) Discussions in the Working Group

31. In the discussions on publication, the following main issues have been raised:

- the type of information that should be made available; and
- how this information should be made available.

(i) *The type of information to be made available*

32. The suggestions that have been made generally provide for the publication or public accessibility of laws and regulations.³⁸ In addition, it has been suggested that a number of other types of instrument might be covered by a publication obligation, including requirements that specifically relate to government procurement and are of general application, administrative rulings of general application in connection with procurement, policy guidance and judicial decisions. Some concerns have been raised that an obligation to publish this range of material might be onerous and costly.³⁹ An alternative approach to designating certain types of governmental instruments that has been suggested would be to focus instead on the substance of the information that should be made available rather than on its legal form, namely to require the availability of information which defined the rules of general application to be followed by entities in determining participation in tenders and decisions on awards.⁴⁰

33. Suggestions have also been made specifying that **changes or amendments** to the above material should also be published or made readily and easily available, and indicating the time-frame within which this should be done ("promptly", "in a timely manner").⁴¹

(ii) *How the information should be made available*

34. Two main approaches have been suggested: one is to specify that the information be published, in readily accessible media.⁴² The other would be to require that the information be readily and easily accessible through a public medium, without specifying its "publication". It has been suggested that this latter course could help meet some of the concerns that have been expressed about the burden of publishing administrative rulings and guidelines, judicial decisions, etc.⁴³ It has also been suggested that it should be left up to each Member to decide whether to use electronic media or not.⁴⁴

35. With regard to the **cost** of accessing information, it has been suggested that fees should be levied on a non-discriminatory basis and be limited to the cost of copying and despatch or limited in amount to the approximate value of the service rendered. In response it has been said that the issue of cost is not a matter of transparency. Concern has also been expressed about the need to take into account also the cost of creating the information. Governments should not be denied the possibility of imposing appropriate fees provided that any fees are charged in a non-discriminatory manner.⁴⁵

³⁸ Job Nos. 3245, 4099, 5239, 5803; WT/WGTGP/W/26; WT/WGTGP/W/27; WT/WGTGP/M/10, para. 34

³⁹ JOB(99)/6782, para. 33; WT/WGTGP/M/10, para. 34

⁴⁰ JOB(99)/6782, para. 32

⁴¹ Job Nos. 3245; 4099, 5239, 5803, WT/WGTGP/W/26; WT/WGTGP/W/27

⁴² Job Nos. 5239, 5803; WT/WGTGP/W/27

⁴³ JOB(99)/6782, para. 34; WT/WGTGP/W/26

⁴⁴ JOB(99)/6782, para. 34

⁴⁵ Job No. 5803; WT/WGTGP/W/26; JOB(99)/6782, para. 36; WT/WGTGP/M/10, para. 34

36. With regard to **language**, it has been said that the obligation should be to provide the information in a national language, while leaving Members free to provide information in other languages, including WTO languages.⁴⁶

37. The Working Group has addressed the question of whether there should be a requirement for the establishment of an **enquiry point** from which information on national legislation and procedures can be obtained by interested parties in other Members, including suppliers. Reference has been made to the provisions of Articles III:4 and IV:3 of the GATS and also to those of Article IV:2 of that Agreement and Article V:11 of the GPA which requires that contact/information points be established to facilitate the access of developing countries to information. On this issue, it has been stressed that any requirements for providing contact or enquiry points should be without prejudice to decentralized procurement systems such as those in federal states. The suggestion has been made that, in respect of decentralized national procurement systems, a central enquiry point from which information on individual sub-central enquiry points can be obtained could be designated.⁴⁷

IV. INFORMATION ON PROCUREMENT OPPORTUNITIES, TENDERING AND QUALIFICATION PROCEDURES

(a) Information on provisions in existing international instruments and national procedures and practices

38. The three international instruments that the Working Group has examined each set forth minimum procedures for giving information on tendering opportunities and the relevant procedures that the procurement agency should follow in order to obtain expressions of interest in a specific procurement from potential suppliers. Each of them foresees the publication of a notice of invitation to participate in an official gazette or other official journal. Under the GPA, Parties are required to publish the tender notice in a publicly accessible publication as indicated in each Party's Appendix II to the Agreement. The Model Law and the World Bank Guidelines require procurement notices also to be published in a specialized publication of wide international circulation.⁴⁸ Under the Model Law and the World Bank Guidelines, the procuring entity is required to respond to any request for clarification submitted within a reasonable time, as well as communicating the clarification to all other participating suppliers. Under the GPA, reasonable requests for explanations relating to tender documentation under open and selective procedures must be promptly replied to. Replies to such a request from a participating supplier shall be provided on condition that such information does not give that supplier an advantage over his competitors.⁴⁹

39. The information available to the Group indicates that, although the minimum standard requirements regarding information to be provided are largely the same in international instruments and in national legislation, in national legislation the level of detail of information provided respectively, in initial tender notices and in the subsequent tender documentation, vary from Member to Member.⁵⁰ In national legislation the printed media in which procurement opportunities are advertised differ widely, ranging from government gazettes or official journals to local language newspapers. Additional forms of advertising such as periodic handouts or posting on the notice boards of the procuring entity are also used.⁵¹ Under the GPA, entities must publish also a summary of the main elements of the information in a tender notice in one of the official WTO languages.⁵²

⁴⁶ JOB(99)/6782, para. 37; JOB(99)/5239

⁴⁷ JOB(99)/6782, para. 38; Job No. 5239; WT/WGTGP/M/10, para. 33

⁴⁸ WT/WGTGP/W/6, para. 34

⁴⁹ WT/WGTGP/W/6, paras. 56-57

⁵⁰ WT/WGTGP/W/6, paras. 43-55

⁵¹ WT/WGTGP/W/6, paras. 37-42

⁵² WT/WGTGP/W/6, para. 47

(b) Discussions in the Working Group

40. In the discussions in the Working Group, the importance of timely, sufficiently detailed and readily available prior information on procurement opportunities for ensuring transparency in government procurement has been widely emphasized. The discussion has focused on how this should be best achieved and what provisions might be envisaged in a possible multilateral framework.

41. It has been suggested that the information made available should be sufficient to enable suppliers to assess their interest in a particular procurement and, should they wish to participate in it, to submit responsive bids.⁵³ One general issue, on which differing suggestions have been made, is whether a possible multilateral framework should approach this matter by containing rules about the information that should be made available at each stage of the procurement process, in particular at the stage of issuance of notices of invitation to tender and at the stage of tender documentation, or whether the approach of specifying the information that should be made available in general be adopted, leaving it to each Member to determine the stage at which each component of the information might be supplied.⁵⁴

42. With regard to the specific pieces of information that should be made available, a number of approaches have been suggested:

- to include a specific list of minimum requirements (to be met either at each stage of the procurement process or in total - see preceding paragraph)⁵⁵;
- to provide for an illustrative list of the prior information that should be made available⁵⁶;
- to have no list of prior information, on the grounds that this would be unnecessarily prescriptive, but to rely on general guiding principles of the sort set out at the beginning of the preceding paragraph.⁵⁷

43. With regard to the minimum information that might be specified in notices of invitation to tender and in tender documentation, the following main categories of information have been suggested by some of the Members advocating such a course:

- the name of the procuring entity;
- the goods or services to be procured/the procurement outcome to be achieved;
- the procurement procedure used;
- any (pre-)qualification requirements;
- any restrictions on market access and/or domestic preferences granted;
- the deadlines for the submission of tenders;
- the criteria for evaluation of bids and award of contracts, including technical specifications; and

⁵³ JOB(99)/6782, para. 53; Job No. 5239; WT/WGTGP/W/26

⁵⁴ JOB(99)/6782, para. 53, WT/WGTGP/W/26

⁵⁵ WT/WGTGP/W/26; WT/WGTGP/W/27; JOB(99)/5239; JOB(99)/5803

⁵⁶ JOB(99)/6782, para. 54

⁵⁷ JOB(99)/6782, para. 45; WT/WGTGP/M/10, para. 35

- the date and time for the opening of tenders.⁵⁸

Those who have suggested stage-by-stage requirements have broadly suggested that the first six pieces of information should be provided in the notice of invitation to tender, while the last two, together with amplification of the first six, could be provided in the tender or bid documentation.⁵⁹

44. A point which has been discussed at some length in the Working Group with regard to evaluation criteria is the suggestion that information should be made available on **preferences to national supplies and suppliers** as well as other measures in favour of domestic supplies or suppliers such as offsets. In this regard, the following views have been expressed:

- while the nature and extent of such preferences is not within the scope of the work of the Working Group, the advance provision of information on such preferences is an essential component of transparency since it enables foreign tenderers to assess the extent to which they might have an interest in entering a specific procurement process⁶⁰;
- rules on information on procurement opportunities should only apply in cases where national markets are open to foreign suppliers.⁶¹

45. In regard to the way information on national preferences might be made available, the following views have been expressed:

- full information should be provided in the notices of invitation to tender/tender documentation, by setting it out in detail and/or by making references to applicable laws and regulations⁶²;
- information on national preferences need only be included to the extent it was not adequately provided through laws or regulations of general application.⁶³

46. In regard to the **way in which information should be made available**, one approach has been to suggest that this should be done through publication in a readily accessible medium⁶⁴ while another has favoured a requirement that the information should be publicized through an accessible source.⁶⁵

47. There has been discussion over the extent to which an effort to make **information available at the international level** should be called for. One view has been that the level of availability should be proportionate to the likely level of interest in the procurement, i.e. that where a procurement opportunity is likely to attract international interest, information should be made available through a source to which potential foreign suppliers had access. Another view was that there should be no requirement to publish in international publications; it was up to interested foreign suppliers to keep track of national publications.⁶⁶

⁵⁸ WT/WGTGP/W/26; WT/WGTGP/W/27; JOB(99)/5239; JOB(99)/5803

⁵⁹ JOB(99)/5803

⁶⁰ JOB(99)/6782, paras. 57-59, JOB(99)/5803; WT/WGTGP/M/10, para. 36

⁶¹ JOB(99)/6782, para. 48

⁶² JOB(99)/6782, para. 58; WT/WGTGP/M/10, para. 36

⁶³ JOB(99)/6782, para. 58; WT/WGTGP/M/10, para. 36

⁶⁴ JOB(99)/5239

⁶⁵ WT/WGTGP/W/26

⁶⁶ JOB(99)/6782, para. 51

48. In regard to the media that might be used, there has been a wide view that each government should be free to use **printed and/or electronic media**, with electronic publication an option and not an obligation.⁶⁷

49. In regard to the question of situations where information obligations might not need to apply, the use of **small-value procurements** has been discussed. It has been suggested that publication requirements might not apply to, or might be less strict for, low-value procurements in order to avoid undue administrative costs. Another view has been that there should be no threshold level and that suitably phrased requirements regarding the availability of information would enable Members to avoid undue administrative burdens.⁶⁸

50. The question of the extent to which prior information requirements should apply to procurement conducted under **selective and limited tendering** methods has also been discussed. In this regard, a number of approaches have been suggested:

- certain basic types of information should be provided whatever the procurement method employed for the purposes of achieving maximum transparency⁶⁹;
- the general rules on prior information should only apply to government procurement through open tendering procedures. This is an approach that was suggested in a number of the proposed texts submitted in 1999. It should be noted that some of these texts also suggested rules regarding the transparency of qualification procedures which might be used in selective tendering.⁷⁰

51. With regard to situations where invitations to tender are supplied only to **pre-qualified or pre-selected suppliers**, it has been suggested that there should be a requirement that information on how to qualify or be selected be published in a readily accessible medium at a timing and in a manner which would reasonably allow eligible suppliers to apply for selection.⁷¹ It has also been suggested that there should be some rules regarding the situation where a qualification process covers multiple procurements over a period of time and is not open at all times to applications from interested suppliers, such as periodic publication of an invitation to apply for qualification and the availability of current lists of current qualified suppliers.⁷² It has further been suggested that, where information is made available only to pre-selected or pre-qualified suppliers, all such suppliers should be treated in a non-discriminatory way in this regard.⁷³

52. Regarding **modifications to and clarification of information**, the emphasis in the Working Group has been on non-discriminatory dissemination of any such information. It has also been suggested that any amendments or re-issue of a notice of invitation to tender pursuant to changes in information contained in tender notices and tender documents including those concerning evaluation criteria and technical specifications, should be made available through the same means used for providing the original information and the relevant publications should be given the same circulation as the original document.⁷⁴ In particular, all those suppliers who had originally ordered tender documents or had indicated an interest in the procurement opportunity should have any additional

⁶⁷ JOB(99)/6782, para. 51

⁶⁸ JOB(99)/6782, para. 51

⁶⁹ JOB(99)/6782, para. 46

⁷⁰ JOB(99)/5239; JOB(99)/5803; WT/WGTGP/W/26; WT/WGTGP/W/27

⁷¹ JOB(99)/5239; WT/WGTGP/W/27

⁷² WT/WGTGP/W/27

⁷³ JOB(99)/5803

⁷⁴ JOB(99)/5803; WT/WGTGP/W/27

information transmitted to them through the same means as the one used for providing the original information.⁷⁵

53. As regards clarification of information in tender documents, the point has been made that information provided in response to an individual request for clarification should be transmitted simultaneously to all other participating suppliers. However, it has been pointed out that this might in some cases be impracticable, for instance in cases where the requests from suppliers for further information had been received at different contact points and that this might only be feasible in the case of high-value procurements with limited participation.⁷⁶

54. There has been a discussion in the Working Group regarding whether tender information should be published in a **language** other than national language, in particular where there should be a requirement to provide summary information in a WTO language on procurement opportunities and, if so, which opportunities.⁷⁷ The view has been expressed that requirements concerning publication of notices of invitations to tender should be limited to publication in a national language since the translation into a WTO language of every tender notice would entail Members incurring undue administrative costs and could become too burdensome. Another view has been expressed that procuring authorities should have the discretion to decide whether translation of notices should be limited to those procurement opportunities that might be of interest to international suppliers. On the other hand, it has been suggested that, where possible, tender notices should be published in a WTO language.⁷⁸ A further suggestion has been that, in addition to publication in the official national language, a summary might be published in one of the WTO languages containing the main details of the tender information and small-value procurements could be exempted from this requirement.⁷⁹

55. The Working Group has considered the question of the extent to which **the content of specifications** should be addressed in a transparency agreement. Suggestions have been made that requirements should be specified in a clear and objective manner and defined in terms of required functional performance to the extent possible.⁸⁰ It has also been suggested that, wherever possible, technical specifications based on internationally agreed or other relevant standards should be employed. On the other hand, the relevance of such requirements to transparency has been questioned.⁸¹

56. The question of **advice from suppliers on the development of specifications** has been the subject of suggestions. It has been suggested that such advice should be sought and applied in a non-discriminatory manner and that, if advice has been obtained from a particular supplier, other suppliers should be informed or that supplier should be ineligible to participate in the procurement.⁸²

V. TIME-PERIODS

(a) Information on provisions in existing international instruments and national procedures and practices

57. Each of the three international instruments that the Working Group has reviewed provides that suppliers must be granted a sufficient period of time to prepare their tenders. The Model Law recognizes that the length of that period of time may vary from case to case depending on the circumstances of the given procurement and it is left to the procuring entity to fix the deadline by

⁷⁵ JOB(99)/6782, para. 64

⁷⁶ JOB(99)/6782, para. 63

⁷⁷ JOB(99)/6782, para. 66

⁷⁸ JOB(99)/6782, para. 65; WT/WGTGP/M/10, para. 40

⁷⁹ JOB(99)/6782, paras. 66-67

⁸⁰ WT/WGTGP/W/26

⁸¹ JOB(99)/6782, para 61; WT/WGTGP/M/10, para. 39

⁸² Job No. 5803; WT/WGTGP/W/27

which tenders must be submitted. The GPA prescribes certain minimum deadlines that must be allowed for the preparation, submission and receipt of tenders to enable responsive tendering and for potential suppliers to prequalify. The relevant provisions also contain general considerations that should govern when entities set time-periods for tendering and delivery.⁸³ Most Members' procurement legislation establishes minimum time-periods, with which the purchasing entities must comply. In some countries there are no mandatory requirements and individual government agencies have discretion in setting the minimum time-periods.⁸⁴

(b) Discussions in the Working Group

58. Suggestions made in the Working Group have generally favoured provisions on time-periods that would be couched in terms of the considerations that should be taken into account in setting those periods rather than in terms of prescribing minimum periods. The points have been made that time-periods in national practice varied significantly and that procuring entities needed discretion to establish appropriate periods on a case-by-case basis, having regard to the type of procurement.⁸⁵

59. The suggestion has been made that time-periods should be sufficient to enable interested suppliers to obtain qualification documentation where appropriate and tender documentation and to prepare and submit responsive bids in time.⁸⁶ With regard to the criteria of "sufficiency", the concern has been expressed, that the meaning of the term is unclear and that this might have consequences in a dispute settlement context. In response, it has been clarified that the term should be taken to mean that procuring entities retained considerable flexibility to determine time-periods for individual procurements. A further view has been that the term "reasonable" should be used; this would provide, for instance, for emergency situations in which it might not be possible to provide for adequate or sufficient time-periods.⁸⁷

60. It has also been suggested that some considerations taking into account the characteristics of individual procurements might be specified, in particular the circumstance of the procurement, including the likely level of interest, as well as the complexity of the envisaged procurement.⁸⁸ One concern that has been expressed in this connection is how this would relate to situations in many jurisdictions where time-limits are prescribed by national law.⁸⁹

61. Furthermore, it has been stressed that there should be non-discrimination between potential suppliers with respect to the application of time-periods. The proposed texts suggest that the time allowed for the submission of bids should be the same for all suppliers. On the other hand, the view has been expressed that Members should not be required to set time-periods to suit foreign suppliers, who should be treated on a national treatment and MFN basis.⁹⁰ The question has also been raised as to whether time-periods are an aspect of transparency.⁹¹

62. Finally, the point has been made that time-periods should be specified in tender notices to ensure transparency. Any changes in the time-periods should be made known to all suppliers in the tendering process or the relevant information be made generally available from an accessible source.⁹²

⁸³ WT/WGTGP/W/6, paras. 61-65

⁸⁴ WT/WGTGP/W/6, para. 66

⁸⁵ JOB(99)/6782, para. 69; WT/WGTGP/M/10, para. 42; WT/WGTGP/M/11, paras. 27-28

⁸⁶ WT/WGTGP/W/26; WT/WGTGP/W/27; Job No. 5803; WT/WGTGP/M/10, para. 43

⁸⁷ JOB(99)/6782, para. 71; Job No. 5239

⁸⁸ JOB(99)/6782, para. 70; WT/WGTGP/M/10, para. 43

⁸⁹ JOB(99)/6782, para. 71

⁹⁰ JOB(99)/6782, para. 70

⁹¹ WT/WGTGP/M/10, para. 42

⁹² Job Nos. 3777 and 4099; JOB(99)/6782, para. 71

One proposal also requires that Members should define in advance their policy on whether and in what circumstances late tenders may be accepted.⁹³

⁹³ WT/WGTGP/W/26

ANNEX

**DOCUMENTS OF THE WORKING GROUP ON
TRANSPARENCY IN GOVERNMENT PROCUREMENT**

The Working Group held 13 formal meetings during the period 1997 to 2001. The reports on these meetings (WT/WGTGP/M/1-13) and the annual reports of the Working Group to the General Council (WT/WGTGP/1-5) reflect the work done so far in the Working Group pursuant to the mandate of the Singapore Ministerial Conference in 1996. The discussions in the Working Group on the issues before it have been recorded mainly in the note by the Chair "List of the Issues Raised and Points Made" (Job (99)/6782), last revised in November 1999; and subsequently in the reports of the meetings held in 2000 and 2001, (WT/WGTGP/M/10-12) (List A).

Other documents that have been made available include:

- Members' submissions relating to specific issues. Over the period 1997 to 2000 13 Members have made two or more such submissions. An informal note "List of Proposals on Items III-VII of the Checklist" (JOB(00)/3276), reflecting the proposals made on items III-VII in a succinct form, which identifies the source of the different proposals and summarizes the written and oral comments made on these proposals, most recently revised in May 2000, was prepared by the Secretariat as an auxiliary informal paper for the use of Members wanting to draw on it (List B).
- Information on national procedures and practices submitted by ten Members on national procedures and practices in their countries; the responses to the questionnaire on government procurement of services in the Working Party on GATS Rules and APEC/GPEG Surveys on Government Procurement Systems, updated versions of which are available on the APEC Website (www.apec.sec) (List C).
- Information provided on work in intergovernmental organisations and in the context of regional arrangements (List D).
- Notes by the Secretariat relating to various issues under discussion in the Working Group (List E).

29 May 2002

LIST A –Documents related to the Working Group's work			
	WT/WGTGP/1-5	Annual Reports of the Working Group to the General Council	1997 – 2001
	WT/WGTGP/M/1-13	Reports of the Meetings of the Working Group	July 1997 – September 2001
	JOB(99)/6782	List of the Issues Raised and Points Made – Sixth Revision	12 November 1999
	JOB (00)/3231	Annotated draft agenda for the meeting of 7-8 June 2000	29 May 2000

List B-Members' Submissions Relating to Specific Issues			
2002			
Australia	WT/WGTGP/W/31	Methods of Procurement	15 May 2002
2000			
Informal Note by the Secretariat	JOB(00)/3276	List of Proposals on Items III-VII of the Checklist – – Third Revision	2 May 2000
Switzerland	JOB(00)/5645	Why the Scope of a Future Agreement on Transparency in Government Procurement Should Cover Goods and Services	20 September 2000
United States	WT/WGTGP/W/28	Proposal for a Work Programme for Coordinating International Technical Assistance with Implementation of a Potential Agreement on Transparency in Government Procurement	6 June 2000
1999			
Hungary, Korea, Singapore and the United States	WT/WGTGP/W/27	Preparations for the 1999 Ministerial Conference - The WTO's Contribution to Transparency in Government Procurement	9 November 1999
European Community	WT/WGTGP/W/26	Elements for an Agreement on Transparency in Government Procurement	5 November 1999
Australia	Job No. 5803	Agreement on Transparency in Government Procurement - "Principles-based" Conceptual Draft from Australia	5 October 1999
Japan	Job No. 5239	Transparency in Government Procurement - Draft Text for an Agreement	13 September 1999
Poland	Job No. 3777	Time-limits	29 June 1999
United States	WT/WGTGP/W/23	Domestic Review Mechanisms	24 June 1999
Canada	Job No. 3131	Contract Award Information	2 June 1999
Australia	Job No. 1781	Transparency of Decisions on Qualification	26 March 1999
Norway	Job No. 1067	Publication of Information on National Legislation and Procedures	25 February 1999
Australia	Job No. 1043	Rights and Responsibilities of Government as a Buyer, Value for Money in Government Procurement, Accountability and Due Process	24 February 1999

United States	Job No. 1027	Evaluation Criteria and Technical Specifications	24 February 1999
European Community	Job No. 699	Methods of Procurement	9 February 1999
Venezuela	Job No. 481	Transparency in Government Procurement and the Fight Against Bribery	28 January 1999
1998			
Switzerland	Job No. 3708	Minimal Requirements for Relevant Information to be Published in Tender Notices	22 June 1998
Venezuela	Job No. 3295	Particular Characteristics of Government Procurement, Privatization and Concession-granting Systems	15 June 1998
Norway	Job No. 3245	Contribution to the Working Group on Transparency in Government Procurement Ensuring that Transparency in Procurement Policies and Practices is Achieved	11 June 1998
European Community	WT/WGTGP/W/18	Technical Assistance	25 May 1998
European Community	WT/WGTGP/W/17	Ensuring that Transparency in Procurement Policies and Practices is Achieved	25 May 1998
Australia	WT/WGTGP/W/14	Information on Procedures and Practices on Transparency in Government Procurement	23 February 1998
United States	WT/WGTGP/W/16	Transparency in Procurement Methods	19 February 1998
United States	WT/WGTGP/W/15	Review Mechanisms	19 February 1998
Australia	Job No. 136	Principles of Government Procurement	12 January 1998
1997			
Hong Kong, China	WT/WGTGP/W/10	Information on Procedures and Practices on Transparency in Government Procurement	16 December 1997
Japan	Job No. 6329	Key Elements on Enhanced Transparency	4 November 1997
Switzerland	Job No. 6328	Elements of a Study on Transparency in Government Procurement	3 November 1997
Norway	Job No. 5220	Elements of Transparency under the WTO Working Group on Transparency in Government Procurement	24 September 1997
United States	Job No. 4133	Guiding Principles	21 July 1997
Canada	Job No. 4099	Elements Relating to Transparency in Government Procurement	21 July 1997
European Community	WT/WGTGP/W/5	National Procedures and Practices Relating to Transparency in Government Procurement	21 July 1997
Japan	Job No. 2860	Elements of Transparency in Government Procurement	22 May 1997

LIST C -Information on National Procedures and Practices

2001			
Tunisia	WT/WGTGP/W/30	Public Procurement Regime in Tunisia	9 May 2001
1998			
Turkey	WT/WGTGP/W/21	National Procedures and Practices	2 October 1998
Morocco	WT/WGTGP/W/19	National Procedures and Practices	20 July 1998
Uruguay	WT/WGTGP/W/13	National Procedures and Practices	16 February 1998
Czech Republic	WT/WGTGP/W/12	National Procedures and Practices	16 January 1998

Slovenia	Job No. 3711	Public Procurement in Slovenia	17 June 1998
Japan	Job No. 939	Transparency related proposal by the CCCB in Japan	19 February 1998
1997			
Korea	WT/WGTGP/W/7	National Procedures and Practices	30 October 1997
New Zealand	Job No. 5616	National Procedures and Practices	10 October 1997
Hungary	WT/WGTGP/W/9	National Procedures and Practices	16 December 1997
Poland	Job No. 6691	Elements of Transparency in the Polish Procurement System	3 November 1997
Tunisia	WT/WGTGP/W/8	National Procedures and Practices	31 October 1997

LIST D-Information on the work of Intergovernmental Organizations and in the context of Regional Arrangements

	WT/WGTGP/W/1	Presentation by the Representative of UNCITRAL (the United Nations Commission on International Trade Law) on the UNCITRAL Model Law and the Relevant Activities of the UNCITRAL	10 July 1997
	WT/WGTGP/W/2	Presentation by the Representative of the World Bank on the World Bank Guidelines and the Relevant Activities of the World Bank	10 July 1997
	WT/WGTGP/W/20 and Addenda 1 to 9	Communications received from UNCITRAL, OECD, the Asian Development Bank, the African Development Bank, IMF, APEC Government Procurement Experts Group, the European Bank for Reconstruction and Development, ITC, UNDP and UNOPS providing information on the availability of technical cooperation programmes in the area of government procurement	1998 – 2000
APEC/GPEG	WT/WGTGP/W/24	APEC Non-binding Principles on Government Procurement Developed by the Experts Group	21 September 1999
APEC/GPEG	WT/WGTGP/W/22	APEC Non-binding Principles of Accountability and Due Process	7 April 1999
APEC/GPEG	WT/WGTGP/W/11	APEC Non-Binding Principles on Government Procurement: Transparency	19 December 1997
APEC/GPEG	WT/WGTGP/W/4 S/WPGR/W/21	APEC Government Procurement Experts Group – APEC Surveys on Government Procurement Systems	15 July 1997

LIST E - Notes by the Secretariat on Various Issues

WT/WGTGP/W/3	Transparency-related Provisions in Existing International Instruments on Government Procurement Procedures and in WTO Agreements	9 July 1997
WT/WGTGP/W/6	Synthesis of the Information Available on Transparency-related Provisions in Existing International Instruments on Government Procurement Procedures and on National Practices - Note by the Secretariat	14 October 1997
WT/WGTGP/W/25	Documents of the Working Party on GATS Rules Relating to Concessions - Note by the Secretariat	27 September 1999
Job(00)/5657	Concessions and BOT Contracts – Note by the Secretariat	20 September 2000
WT/WGTGP/W/29	Technical Cooperation Activities of Intergovernmental Organizations - Note by the Secretariat	13 September 2000