

WORLD TRADE ORGANIZATION

RESTRICTED

S/WPGR/W/11/Add.12

10 December 1996

(96-5158)

Working Party on GATS Rules

Original: English

COMMUNICATION FROM THE REPUBLIC OF POLAND

Response to the Questionnaire on Government Procurement of Services

The following communication is being circulated at the request of the Republic of Poland to Members of the Working Party on GATS Rules.

I. EXISTING PROCUREMENT REGIMES

Definition

1. *What is the definition of government procurement employed in completing this questionnaire?*

"Public procurement" - means procuring construction, the delivery of goods and performing services, financed fully or partially with public funds; (Art. 2(4)) The Act of 10 June 1994 on Public Procurement). "public funds" - means the following source of funds:

- a) funds from the state budget or the budgets of self-government units that are allocated for ordinary activity and capital investment activity;
- b) funds as defined in the Budgetary Act as "extra budgetary funds";
- c) funds guaranteed, secured or for which the cost of the credit is co-financed by the state Treasury, the local self-governments or a union of self-governments;
- d) funds granted as foreign aid under international agreements, unless the agreement requires different procedures for using the funds.

The Act applies to public procurements issued by:

- 1) state units and support services created by the state budgetary units (including the ministries and central support offices);
- 2) units of self-governments;
- 3) funds established by state earmarks;
- 4) state and municipal entities that receive any public funds and perform public utility activities;
- 5) co-operatives, foundations and associations to the extent that they dispose of public funds.

The Polish term "zamówienia publiczne" is adopted from the historic reference to public acquisitions. The literal translation is „public orders”, but as defined in the Act on Public Procurement (Dz. U. No. 76, Item 344) it is intended to mean "public procurement".

The definition of "public procurement" encompasses only purchasing activities. It does not include selling government-owned property or granting concessions or licenses unless, within the scope of these activities, the government is actually purchasing goods, services or construction.

Administrative structure

2. *How are government procurement activities administered? To what extent are procurement activities centralized? Please specify the identity of any central procurement agencies and their respective responsibilities.*

The Polish system of public procurement is a decentralized system where the procuring entities are in the very centre of the process of procurement realization.

On 1 January 1995 a central administration agency was created - the Office of Public Procurement, working directly under the Prime Minister. It is a policy making agency and does not conduct any procurements except for its own needs.

The scope of activities of the Office includes:

- approving as provided in Art. 15 the selection of a procedure for conducting a public procurement other than the unlimited tendering procedure; establishing and maintaining the list of arbiters to review the appeals filed in procurement proceedings, and publicizing the list of arbiters in the Bulletin of Public Procurement;
- presenting an annual report to the Council of Ministers concerning the functioning of the public procurement system;
- disseminating, in coordination with appropriate Ministries, the general conditions and forms of contracts for public procurements, the rules and standard procedures for conducting procurements and information related to conducting public procurements;
- preparing drafts of Acts and regulations concerning public procurement;
- recording and maintaining the list of public procurements, and collecting information about procurement planning, signed contracts, and performance of public contracts;
- preparing training programs, and conducting and encouraging training concerning public procurements;
- cooperating with foreign entities on matters concerning public procurement;
- issuing the official Bulletin of Public Procurement.

Laws and regulations in force

- 3.(a) *Please specify the laws, regulations, rules, guidelines, decrees, decisions and other measures governing government procurement. What is the scope of their application? In particular, please describe any exemptions that exist. Please provide a brief summary of the content of each of these measures.*

The main laws concerning the public procurement system in Poland include:

- The Act on Public Procurement with the implementing ordinances and orders;
- The Budgetary Act;
- The Highest Chamber of Control Act;
- The Protection of Economic Turnover Act;
- The Fighting of Unfair Competition Act.

- (b) *Does the procurement regime distinguish between the procurement of goods and services? If so, then how is the application of rules determined in cases of joint procurement involving both goods and services?*

There are no separate procedures for the procurement of goods and services.

Procurement procedures applied

- 4.(a) *What procedures are followed in the procurement process?*

Article 13 of the Act states:

Public procurements shall be conducted according to the following procedures:

- 1) unlimited tendering;
- 2) limited tendering;
- 3) two-stage tendering;
- 4) negotiations-with-retaining-competition;
- 5) request-for-quotation;
- 6) single-source procurement.

The preferred procedure for conducting public procurements is unlimited tendering (Art. 14). Procedures other than unlimited tendering can be used only under the conditions specified in the Act.

- (b) *Under what circumstances are different procedures used? For instance, if the method used depends on the value of the procurement, the thresholds should be given.*

Art. 15 of the Act states:

1. In public procurements valued less than 20.000 ECU and in public procurements financed with less than 20.000 ECU in public funds, unlimited tendering procedures are not obligatory and the following requirements of this Act shall not apply: the requirements related to the publication of announcements in the Bulletin of Public Procurement, written procedures, official records of proceedings, specification of essential provision of the procurement, time periods and deadlines, tender security and protests and appeals.

2. If the amount of the procurement exceeds 200. 000 ECU, the selection of a procurement procedure other than unlimited tendering requires approval by the Chairman of the Office.
3. The Council of Ministers may, by ordinance determine before 30 September of every year, the obligatory thresholds limits reference in paragraphs 1 and 2 for the coming year beginning 1 January.

To determine the appropriate procurement procedure, this Article (15) together with Art. 71, subparagraph 7 divides procurements into four groups according to the estimated value of procurement:

- 1) Procurements valued 1.000 ECU or less - single-source procedures are permitted (Art. 71).
- 2) Procurements valued more than 1. 000 ECU up to 20. 000 ECU - simplified proceedings of the authorized procedures are permitted, only basic activities have to be recorded (Art.26), and use of any procedure other than unlimited tendering is determined by the procuring entity according to the conditions specified in the Act.
- 3) Procurements valued more than 20.000 ECU and less than 200.000 ECU - formal procedures are required and use of a procedure other than unlimited tendering is determined by the procuring entity according to the conditions specified in the Act.
- 4) Procurements valued more than 200.000 ECU - formal procedures are required and use of a procedure other than unlimited tendering requires approval of the Chairman of the Office of Public Procurement.

(c) *What are the time limits for submission of bids?*

The deadline set by the procuring entity for submission of tenders shall not be shorter than:

- 1) in an unlimited tendering
 - 6 weeks after the announcing of the tendering;
- 2) in a limited tendering
 - 4 weeks after the date of sending the invitation for tenders.

In justified cases and on motion of the procuring entity, the Chairman of the Office of Public Procurement may agree to establish shorter deadlines.

All required minimum deadlines must be counted from the date of the official tender publication in the Bulletin of Public Procurement.

Publicity for inviting tenders

5.(a) *How are intended procurements publicised? Are invitations to tender published? If so, where, and in what languages?*

The announcements of public procurements governed by the Act on Public Procurement are published in the Bulletin of Public Procurement issued by the Chairman of the Office of Public Procurement. The Bulletin is published 5-6 days a week. It has been published now for 17 months. The announcements are published in Polish but in especially justified circumstances, the Chairman of the Office of Public Procurement may agree to the preparation of the tender, including the announcement in a language commonly used in international trade.

Announcements in the media are totally to the discretion of the procuring media. Such announcements may be released first after the official announcements in the Bulletin.

(b) *Do the extent and form of publicity differ according to tendering procedures applied and/or on the value of procurement?*

Announcements of all unlimited tenders, irrespective of the value of procurement, must be posted in a public place at the site of the procuring entity. For procurements valued over 20.000 ECU, the announcements also must be published in the Bulletin of Public Procurement.

(c) *What details of the intended procurement are normally published? Is there a minimum set of information that is required to be published? If so, please specify.*

As stated in Art. 20 of the Act, the announcement shall contain at minimum:

- 1) the name and address of the procuring entity;
- 2) the quantity, amount and category of deliveries to be procured, or services to be supplied, or the category, range and location of construction;
- 3) the desired or required time period and deadline for performing the public procurement;
- 4) the information about conditions required of suppliers or contractors;
- 5) a statement of the applicability of national preferences;
- 6) the instructions for obtaining the documents specifying the essential provisions of the procurement and the price, if any, for these documents;
- 7) the place, the time period and the deadline for the submission of tenders;
- 8) the place and the deadline for opening deadlines;
- 9) the amount and form of the tender security;
- 10) contact person at the procuring entity.

(d) *Are there any charges for obtaining the full set of tender documents? If so, please specify and describe how these charges are set?*

The price that there may be charged for the documents specifying the essential provisions of a procurement shall cover only the cost of printing and sending the documents.

(e) *Are electronic means used to advertise procurement opportunities? What is the nature of systems that are in place? Are different tendering provisions applied to contracts advertised in this manner? If so, please describe.*

The Bulletin of Public Procurement is also accessible by the Internet at the address <http://www.urm.gov.pl/uzp/indexuzp.html> .

Requirements laid down for possible suppliers

6.(a) *Are there registration, residence or other requirements for potential suppliers?*

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(b) *What is the nature of any conditions for participation required from suppliers - such as financial guarantees, commercial standing and technical qualifications? Do the conditions of participation vary according to the nature of the tender process and/or the value of the intended procurement?*

To participate in a public procurement other than a proceeding conducted by request-for-quotation, every supplier or contractor has to declare that :

- 1) it has the legal capacity to enter into legal transactions according to legal requirements;
- 2) it has satisfied the legal requirements essential to perform the defined work or activities, if these legal requirements are established by an Act;
- 3) it possesses the knowledge, experience, financial resources, technical competence, personnel and all necessary capacity to perform the procurement;
- 4) it is in a financial situation to ensure performance of the procurement;
- 5) it is not excluded from the procurement proceeding under the provisions of the Act;

For procurements valued up to 20.000 ECU, the procuring entity may, but is not required to, request documentation supporting the declarations. For procurements value over 200.000 ECU, the procuring must request supporting documentation.

(c) *Do there exist lists of approved suppliers? If so, what are the procedures for checking the capability of firms applying for inclusion on tenderers' mailing lists? Are lists of approved suppliers, if any, regularly reviewed/updated?*

No such official lists exist as of now.

Criteria for assessing bids and awarding contracts

7.(a) *What criteria are taken into account in the award of tenders? Are criteria for award of contracts made available in advance to potential suppliers?*

The procuring entity must determine the selection criteria appropriate for the particular procurement and consistent with the principles of the Act, generally defined in the definition of "best offer". The criteria must be defined in the specification of the essential provisions of the procurement. Selection must be made in accordance with the announced evaluation criteria and relative importance of the criteria. Each offer is evaluated and points assigned for each evaluation factor.

(b) *Is procurement subject to any offset provisions, such as local content, technology transfer or countertrade requirements?*

Concerning local content see answer to question 9. Otherwise no.

(c) *Is preference given to any particular enterprises or group of enterprises? If so, please specify.*

No.

- (d) *Do the procurement criteria differ according to sector or region of the economy?*

No.

- (e) *What is the margin of choice or discretion allowed to the purchasing authority? What does the extent, if any, of discretion allowed depend upon?*

Under procurements valued under 200.000 ECU the use of a procedure other than unlimited tendering is determined by the procuring entity. The procuring entity always determines the technical specification and award criteria.

Disclosure of bids received and contracts awarded

- 8.(a) *How are tenders received, registered and opened?*

The specification of the essential provisions of the procurement should contain a definite description of the place, the time period and the deadline for the submission of tenders. During a public procurement proceeding, the procuring entity shall prepare an official record of the procurement proceedings that shall contain information mentioned in Art. 25. The tenders shall be opened at the place and the time specified in announcement of the tendering. The offerors may be present at the opening of the tenders. The name and address of each offeror whose tender is opened, as well as the price of each tender shall be announced immediately to those persons present at the opening of the tenders and recorded immediately in the official record of the tendering proceeding

- (b) *Are entities required to publish details of the contracts awarded and/or notify unsuccessful tenderers?*

After the selection of an offer the procuring entity gives prompt notice of the selection to other offerors, identifying the name and seat of the successful offeror and the price of its tender. An announcement with the above information is also published in the Bulletin of Public Procurement.

- (c) *Are entities required to publish, or provide to unsuccessful bidders, pertinent reasons why their bid was rejected?*

No.

Treatment granted to domestic and foreign services and/or suppliers

9. *What laws, regulations, procedures or practices accord domestic services and/or suppliers treatment more favourable than that accorded to foreign services and/or suppliers, or accord services and/or suppliers of a Member more favourable treatment than those of another Member? Please specify how, if at all, more favourable treatment is accorded. Please also specify the working definition of "domestic" in relation to domestic services and suppliers.*

As stated in Art. 18. 1, of the Act on Public Procurement "domestic as well as foreign suppliers and contractors shall be able to participate in procurement proceedings on equal basis according to the provisions of this Act".

The definition of "domestic suppliers and contractors" - means natural persons residing in Poland, and legal persons and entities established under Polish law without legal personality that have their site in Poland (Art. 2.6).

Under the terms of Art. 18, a company with the participation of foreign capital established under the rules of the Polish law of 14 June 1991 may also qualify as a "domestic supplier of contractor".

These two Articles (2.6 and 18) define the eligibility requirements for national preferences when applied in a public procurement proceeding.

If the value of the procurement does not exceed the amount referred in Art. 15. 1, (see answer to question 4(b) of this questionnaire) the procuring entity may limit participation in a procurement proceeding solely to domestic suppliers and contractors, and foreign suppliers or contractors that have a branch or a representative office in Poland (Art. 18.2.).

When applying national preferences in a procurement proceeding, the procuring entity must inform the suppliers and contractors about the national preference when it starts the procurement procedure. This declaration cannot be changed thereafter.

The Chairman of the Office of Public Procurement may waive the application of national preferences.

The specific rules applying to the national preferences in public procurement proceedings are specified in the Ordinance on applying domestic preferences issued by the Council of Ministers on 28 December 1994 and it includes:

- the following price calculations is used at the moment when applying national preferences in services - 20%;
- in procurement of services it is also obligatory to apply domestic preferences by means of using at least 50% of the value of domestic raw materials and products in the performance of a procurement.

Procedures for hearing and reviewing complaints/appeals

10. *What, if any, are the procedures available for parties, domestic and foreign, to lodge complaints against the award of a contract? Please provide details.*

The procedure starts at the moment the interested supplier or contractor submits a written protest to the procuring entity. Upon resolution or rejection of the protest or in the case of failure to resolve the protest in due time (seven days from the day of filing), the interested supplier or contractor may file an appeal with the Chairman of the Office of Public Procurement.

One of the principal rules of appeals proceedings is speed (the panel of three arbiters reviews the appeal within 14 days). The costs of the appeal proceedings are to be covered by the party defined in the sentence. An appeal is reviewed by a panel of three arbiters selected from the list of arbiters maintained by the Chairman of the Office. One of the arbiters is selected by the supplier or contractor who has filed the appeal, one is selected by the procuring entity and one by the Chairman of the Office. If a party does not select an arbiter the Chairman will

do so. The Chairman appoints the chairman of the panel of arbiters. The arbiters are neutral and do not represent the interests of the nominating party.

As a result of the review the panel shall uphold or reject the appeal and assess the cost of the proceedings. When upholding an appeal, the panel of arbiters may order the procuring entity to do or redo an action, or declare an action invalid except the action of signing the public procurement contract, or cancel the public procurement proceeding. The panel may not discontinue the appeal or allow an agreement between the parties. To the appeals proceedings the Acts of the conciliatory courts established in the Civil Procedure Code are applied. Both sides of the appeals procedure may, within a month from the delivery of the sentence, file a complaint to a public court for annulling the sentence of the arbitration panel.

II. MEMBERSHIP OF PLURILATERAL, REGIONAL AND BILATERAL AGREEMENTS

11. *Is the Member party to any plurilateral, regional and/or bilateral agreements with provisions on government procurement? If so, please describe the relevant provisions.*

- A. Poland has signed the Europe Agreement establishing an association between the Republic of Poland and the European Communities.

Article 67 states:

1. The Contracting Parties consider the opening up of the award of public contracts on the basis of the non-discrimination and reciprocity, in particular in the GATT context, to be a desirable objective.
2. Polish companies as defined in Article 48, shall be granted access to contract award procedures in the Community pursuant to Community procurement rules under a treatment no less favourable than that accorded to Community companies as of entry into force of this Agreement.

Community companies as defined in Article 48 shall be granted contract award procedures in Poland under no less favourable than that accorded to Polish companies at the latest at the end of the transitional period referred to in Article 6.

Community companies established in Poland under the provisions of Chapter II of Title IV shall have, upon entry into force of the Agreement, access to contract award procedures under a treatment no less favourable than that accorded to Polish companies.

The Association Committee shall periodically examine the possibility for Poland to introduce access to award procedures in Poland for all Community companies prior to the end of the transitional period.

3. As regards establishment, operations, supply of services between the Community and Poland, as well as employment and movement of labour linked to fulfilment of public contracts, the provisions of Articles 37 to 58 are applicable.

B. Poland is a party of the Agreement between the EFTA states and the Republic of Poland.

Article 16 states:

1. The States Parties to this Agreement consider the effective liberalization of their respective public procurement markets as a desirable and important objective of this Agreement.
2. As of the entry into force of this Agreement, the EFTA States shall grant Polish companies access to contract award procedures on their respective public procurement markets according to the Agreement on Government Procurement of 12 April 1979, as amended by a Protocol of 2 February 1987, negotiated under the auspices of the General Agreement on Tariffs and Trade. Poland shall take in account the restructuring and development process of its economy, gradually ensure that companies from the EFTA States have access on the same principles to contract award procedures on its public procurement market.
3. As soon as possible after the entry into force of the Agreement, the States Parties to this Agreement shall progressively develop and adjust the rules, conditions and practices governing the participation in public procurement contracts, so to ensure free access and transparency, and that there is no discrimination between the potential suppliers from the States Parties to this Agreement. After a period of decreasing asymmetry in favour of Poland in their relations, a full balance of rights and obligations between the States Parties to this Agreement shall be established not later than at the end of the transitional period.
4. The Joint Committee shall agree or recommend, as appropriate, the practical modalities for this development including, *inter alia*, scope, timetable and rules to be applied, and designation of entities awarding public procurement contracts, that is public authorities, public undertakings and private undertakings which have been granted special or executive rights.
5. The States Parties concerned shall endeavour to accede to the relevant Agreements negotiated under the auspices of the General Agreement on Tariffs and Trade.

C. Poland is a party of the Central European Free Trade Agreement.

Article 24 states:

1. The Parties consider the liberalization of their respective government procurement markets as an objective of this Agreement.
2. The Parties shall progressively develop their respective regulations for government procurement with a view to grant suppliers of other Parties by the end of the transitional period referred to Article I of this Agreement, at the latest, access to contract award procedures on their respective government procurement markets according to the provisions of the GATT Agreement on Government Procurement of 12 April 1979, as amended by a Protocol of Amendments of 2 February 1987.
3. The Joint Committee shall examine developments related to the achievement of the objectives of this Article and may recommend practical modalities of implementing

the provisions of paragraph of this Article so as to ensure free access, transparency and full balance of rights and obligations.

4. During the examination referred to in paragraph 3 in this Article, the Joint Committee may consider, especially in the light of developments in this area in international relations, the possibility of extending the coverage and/or the degree of the market opening provided for in paragraph 2.
5. The Parties shall endeavour to accede to the relevant Agreements negotiated under the auspices of the GATT.

III. ECONOMIC IMPORTANCE OF SERVICES PROCUREMENT

12.(a) Please provide statistics (if available) on the number and value of services procurements

- *on both an aggregate and sectoral basis;*
- *by origin of services and suppliers.*

No such statistics have, as of now, been completed.

(b) Please provide statistics (if available) on the

- *share of services procurement in total procurement;*
- *share of procurement of each service in total domestic output of the service;*
- *share of procurement of each service in total domestic consumption of the service.*

Total domestic consumption is defined as the sum of public and private consumption or the sum of domestic output and net imports (i.e. imports minus exports) of the service in question.

No such statistics have, as of now, been completed.