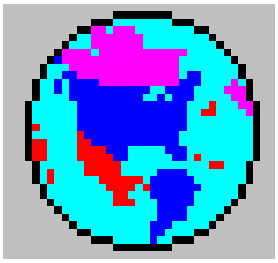
THE LAW OF
REGIONAL ECONOMIC INTEGRATION
IN THE AMERICAN HEMISPHERE



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UNIT XV

Government Procurement

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Guiding Questions

1. *Focus on the practical value of NAFTA Chapter 10, especially for the US and Canadian suppliers. See to it that Mexico is not a signatory to the WTO Agreement on Government Procurement.*

2. *Some obligations in NAFTA Chapter 10 exceed those in the WTO Agreement on Government Procurement and the US-Canada Free Trade Agreement. (For instance, the scope of services covered) On the other hand, in certain aspects, NAFTA Chapter 10 falls short of WTO Agreement on Government Procurement. (For instance, the coverage of sub-central governments)*

3. *Pay due attention to National Treatment and Non-Discrimination (Article 1003), Rules of Origin (Article 1004) and Bid Challenge (Article 1017).*

I. Introduction

1-1. Summary

http://www.sice.oas.org/summary/nafta/nafta10.asp

OAS Overview of the North American Free Trade Agreement

Chapter Ten: Government Procurement

The opening of government procurement markets for the purchase of goods and services by government entities for their own use was a major objective of the NAFTA negotiations. Within North America, these markets have a combined value of about US $1 trillion.

The NAFTA procurement chapter significantly expands upon the obligations set out in the GATT Procurement Agreement and the FTA. It breaks new ground by broadening the scope of liberalized procurement practices to include both services and construction services, an unprecedented advancement in international procurement agreements. Mexico is not a signatory to the GATT Code.

Section A: Scope and Coverage and National Treatment

Article 1001 sets out the scope and coverage of the procurement chapter, which will apply in the following circumstances: the chapter covers procurement by those federal government entities (such as departments or agencies) and enterprises (Crown corporations, utilities, or other parastatal organizations) listed in the annexes. Annex l001.la-l lists those federal government entities subject to the chapter, and it covers nearly all such entities in the three countries. Annex l00l.la-2 lists a smaller number of covered enterprises.

The chapter applies only to covered federal entities and enterprises. It does not bind any provincial or state governments. However, Article 1024(3) provides that the Parties will consult with their provincial and state governments with a view to obtaining commitments, on a voluntary and reciprocal basis, to include procurement by provincial and state agencies within the scope of the chapter.

All goods and services procured by government entities are covered unless specifically exempted. This negative-list approach significantly broadens the coverage of the NAFTA beyond the provisions of the GATT or the FTA. Annex lOOl.lb-l provides that the chapter applies to all goods, with the exception of a limited number of listed exceptions related mainly to the procurement of goods for national security purposes (Article 1018). Annex lOOl.lb-2 provides that the chapter applies to all services that are procured by the covered entities and enterprises subject to the listed exceptions.

Canada and the US have listed their exceptions under section B of annex lOOl.lb-2 by major service categories. Appendix lOOl.lb-2-A states that Mexico has not yet completed its schedule of service exclusions under schedule B of annex lOOl.lb-2l but will do so by July 1l

1995. In the intent chapter ten applies only in respect of those Mexican services set out in a temporary schedule based on the United Nations Central Product Classification (CPC) system. Appendix lOOl.lb-2-B sets out the Common Classification System for services procured by the entities and enterprises of the Parties which will be used for repositioning purposes.

Annex lOOl.lb-3 applies to construction services. It provides that the chapter applies to all construction services set out in appendix lOOl.lb-3-Al except those specifically excluded.

Procurement contracts must meet certain minimum value thresholds: for federal government entities the threshold is US $50,000 for contracts for goods, services, or any combination thereof. Annex 1001.2c(a), however, provides that for Canadian or US entities, the applicable threshold for goods contracts will remain at the FTA level of US $25,000. For contracts for construction services, the threshold is US $6.5 million. For government enterprises, the threshold is US $250,000 for contracts for goods services or any combination thereof and US $8 million for contracts for construction services.

The indexation and conversion of the threshold from non-US currencies will be calculated according to the formula set out in Annex lOOl.lc. "Procurement" is defined broadly in Article 1001 (5) to include procurement by such methods as purchase, lease or rental, with or without an option to buy. However, the definition specifically excludes non-contractual agreements, any form of government assistance, and government provision of goods and services. The Agreement does not cover indirect government procurement through grants, loans or similar measures.

Annex 1001.2a sets out transitional rules for Mexico, enabling it to meet its obligations under chapter ten on a progressive basis. The transitional provisions in this annex include allowing some set-asides for contracts by PEMEX and CFE up to the end of 2002, and measures to assist Mexico to meet its obligations under Article 1019 to furnish information about procurement practices.

Annex 1001.2b provides some general exceptions applicable to the entire chapter. Canada has provided that the chapter does not apply in a number of areas, including certain urban rail and transportation contracts, or set-asides for small and minority businesses. The annex permits the use of some set-asides by Mexico, although it places specified monetary limitations on their use.

Annex 1001.2c states in pan that chapter 13 of the FTA will govern any procurement procedures that begin before January 1l 1994. By virtue of annex 1001.2bl the most favoured-nation obligation of Article 1003 does not apply to procurements covered by Annex 1001.2c.

Article 1002 sets out rules governing the valuation of contracts designed to ensure that the obligations of the chapter are not unfairly avoided. Article 1003 sets out the basic principles of national treatment and non-discrimination. For covered procurements each Party must accord to goods of another Party to suppliers of such goods, and to service suppliers of another Party, treatment no less favourable than the most favourable treatment it accords to its own goods and suppliers, and to goods and suppliers of another Party. In addition, no Party may treat a locally established supplier less favourably than another locally established supplier on the basis of

degree of foreign affiliation or ownership, or discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for the particular procurement are those of another Party.

Article 1004 prevents a Party from applying rules of origin for the purposes of government procurement which are different from those it uses in the normal course of trade.

Article 1005 allows a Party to deny the benefits of the chapter to a service provider which is owned or controlled by persons of a non-Party that has no substantial business activities in any NAFTA country. This provision is similar to the prohibition against "sham" investments set out in Article 1113.

Article 1006 requires each Party to ensure that its covered entities do not impose "offsets" such as the imposition of conditions that encourage local development or improve a Party's balance-of-payments accounts by such methods as local-content requirements, licensing of technology, or investment. This is a stricter requirement than exists under the GATT Procurement Agreement, which discourages, but allows, the imposition of offsets. Article 1007 provides rules to ensure that the technical specifications used by procuring entities are not framed in such a way as to favour domestic goods and suppliers.

Section B: Tendering Procedures

Articles 1008 through 1016 set out the tendering procedures which must be followed for covered procurements. They include rules for the qualification of suppliers, the invitation to participate the time limits for tendering and delivery, the submission, receipt and opening of tenders, and the awarding of contracts. With limited exceptions entities will be required to publish an invitation to participate for all procurements in the publications referred to in annex 1010.1.

Section C: Bid Challenge

Article 1017 maintains the bid challenge system that was established under the FTA. This allows potential suppliers to seek a review of any aspect of the procurement process by an independent reviewing authority.

Section D: General Provisions

Article 1018 provides general exceptions to chapter ten. In fulfilling its obligations under the chapter, no Party will be required to compromise its essential security interests. Similarly, a Party cannot be prevented from taking measures such as to protect public order or safety, to protect human life or health, or to protect intellectual property. This Article largely incorporates the general exceptions set out in Article VIII of the GATT Procurement Agreement. A number of other exceptions are set out in the annexes to chapter 10, as noted above., are not subject to the provisions of the chapter.

Article 1019 obligates the Parties to regularly exchange information about government procurement practices, while Article 1020 provides for technical cooperation, primarily through procurement training and orientation programs.

Article 1021 provides that a Committee on Small Business shall be established. It will report to the Commission about the efforts of the Parties to promote government procurement opportunities for their small businesses. Article 1022 allows a Party to modify its coverage under the chapter only in exceptional circumstances. A Party may be required to provide compensatory adjustments to the other Parties to maintain a level of coverage comparable to that which existed prior to the modification.

Article 1023 provides that the chapter does not prevent a Party from divesting itself of a government entity.

Article 1024 requires the Parties to commence further negotiations before the end of 1998 with a view to further liberalizing their government procurement markets. In such negotiations, the Parties are to seek to add additional government enterprises to the coverage of the chapter, to limit the exceptions, and to review the thresholds. The Parties are also required to increase the obligations and coverage of the chapter to a level at least commensurate with any improvements which may result from current negotiations under the GATT Procurement Code.

Article 1025 provides general definitions applicable to the entire chapter.

1-2. NAFTA Text (Edited Version)

http://www.sice.oas.org/trade/nafta/naftatce.asp

Chapter Ten: Government Procurement

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Section A - Scope and Coverage and National Treatment

Article 1001: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to procurement:

(a) by a federal government entity set out in Annex 1001.1a-1, a government enterprise set out in Annex 1001.1a-2, or a state or provincial government entity set out in Annex 1001.1a-3 in accordance with Article 1024;

(b) of goods in accordance with Annex 1001.1b-1, services in accordance with Annex 1001.1b-2, or construction services in accordance with Annex 1001.1b-3; and

(c) where the value of the contract to be awarded is estimated to be equal to or greater than a threshold, calculated and adjusted according to the U.S. inflation rate as set out in Annex 1001.1c, of

(i) for federal government entities, US$50,000 for contracts for goods, services or any combination thereof, and US$6.5 million for contracts for construction services,

(ii) for government enterprises, US$250,000 for contracts for goods, services or any combination thereof, and US$8.0 million for contracts for construction services, and

(iii) for state and provincial government entities, the applicable threshold, as set out in Annex1001.1a-3 in accordance with Article 1024.

2. Paragraph 1 is subject to:

(a) the transitional provisions set out in Annex 1001.2a;

(b) the General Notes set out in Annex 1001.2b; and

(c) Annex 1001.2c, for the Parties specified therein.

3. Subject to paragraph 4, where a contract to be awarded by an entity is not covered by this Chapter, this Chapter shall not be construed to cover any good or service component of that contract.

4. No Party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of this Chapter.

5. Procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy. Procurement does not include:

(a) non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments; and

(b) the acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions and sale and distribution services for government debt.

Article 1002: Valuation of Contracts

1. Each Party shall ensure that its entities, in determining whether a contract is covered by this Chapter,apply paragraphs 2 through 7 in calculating the value of that contract.

2. The value of a contract shall be estimated as at the time of publication of a notice in accordance with Article 1010.

3. In calculating the value of a contract, an entity shall take into account all forms of remuneration, including premiums, fees, commissions and interest.

4. Further to Article 1001(4), an entity may not select a valuation method, or divide procurement requirements into separate contracts, to avoid the obligations of this Chapter.

5. Where an individual requirement for a procurement results in the award of more than one contract, or in contracts being awarded in separate parts, the basis for valuation shall be either:

(a) the actual value of similar recurring contracts concluded over the prior fiscal year or 12 months adjusted, where possible, for anticipated changes in quantity and value over the subsequent 12 months; or

(b) the estimated value of recurring contracts in the fiscal year or 12 months subsequent to the initial contract.

6. In the case of a contract for lease or rental, with or without an option to buy, or in the case of a contract that does not specify a total price, the basis for valuation shall be:

(a) in the case of a fixed-term contract, where the term is 12 months or less, the total contract value, for its duration or, where the term exceeds 12 months, the total contract value, including the estimated residual value; or

(b) in the case of a contract for an indefinite period, the estimated monthly installment multiplied by 48.

If the entity is uncertain as to whether a contract is for a fixed or an indefinite term, the entity shall calculate the value of the contract using the method set out in subparagraph (b).

7. Where tender documentation requires option clauses, the basis for valuation shall be the total value of the maximum permissible procurement, including all possible optional purchases.

Article 1003: National Treatment and Non-Discrimination

1. With respect to measures covered by this Chapter, each Party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party, treatment no less favorable than the most favorable treatment that the Party accords to:

(a) its own goods and suppliers; and

(b) goods and suppliers of another Party.

2. With respect to measures covered by this Chapter, no Party may:

(a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or

(b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for the particular procurement are goods or services of another Party.

3. Paragraph 1 does not apply to measures respecting customs duties or other charges of any kind imposed on or in connection with importation, the method of levying such duties or charges or other import regulations, including restrictions and formalities.

Article 1004: Rules of Origin

No Party may apply rules of origin to goods imported from another Party for purposes of government procurement covered by this Chapter that are different from or inconsistent with the rules of origin the Party applies in the normal course of trade, which may be the Marking Rules established under Annex 311 if they become the rules of origin applied by that Party in the normal course of its trade.

Article 1005: Denial of Benefits

1. Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to a service supplier of another Party where the Party establishes that the service is being provided by an enterprise that is owned or controlled by persons of a non-Party and that has no substantial business activities in the territory of any Party.

2. A Party may deny to an enterprise of another Party the benefits of this Chapter if nationals of a non-Party own or control the enterprise and:

(a) the circumstance set out in Article 1113(1)(a) (Denial of Benefits) is met; or

(b) the denying Party adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise.

Article 1006: Prohibition of Offsets

Each Party shall ensure that its entities do not, in the qualification and selection of suppliers, goods or services, in the evaluation of bids or the award of contracts, consider, seek or impose offsets. For purposes of this Article, offsets means conditions imposed or considered by an entity prior to or in the course of its procurement process that encourage local development or improve its Party's balance of payments accounts, by means of requirements of local content, licensing of technology, investment, counter-trade or similar requirements.

Article 1007: Technical Specifications

1. Each Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade.

2. Each Party shall ensure that any technical specification prescribed by its entities is, where appropriate:

(a) specified in terms of performance criteria rather than design or descriptive characteristics; and

(b) based on international standards, national technical regulations, recognized national standards, or building codes.

3. Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as "or equivalent" are included in the tender documentation.

4. Each Party shall ensure that its entities do not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in that procurement.

Section B - Tendering Procedures

Article 1008: Tendering Procedures

1. Each Party shall ensure that the tendering procedures of its entities are:

(a) applied in a non-discriminatory manner; and

(b) consistent with this Article and Articles 1009 through 1016.

2. In this regard, each Party shall ensure that its entities:

(a) do not provide to any supplier information with regard to a specific procurement in a manner that would have the effect of precluding competition; and

(b) provide all suppliers equal access to information with respect to a procurement during the period prior to the issuance of any notice or tender documentation.

Article 1009: Qualification of Suppliers

1. Further to Article 1003, no entity of a Party may, in the process of qualifying suppliers in a tendering procedure, discriminate between suppliers of the other Parties or between domestic suppliers and suppliers of the other Parties.

2. The qualification procedures followed by an entity shall be consistent with the following:

(a) conditions for participation by suppliers in tendering procedures shall be published sufficiently in advance so as to provide the suppliers adequate time to initiate and, to the extent that it is compatible with efficient operation of the procurement process, to complete the qualification procedures;

(b) conditions for participation by suppliers in tendering procedures, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of whether a supplier meets those conditions, shall be limited to those that are essential to ensure the fulfillment of the contract in question;

(c) the financial, commercial and technical capacity of a supplier shall be judged both on the basis of that supplier's global business activity, including its activity in the territory of the Party of the supplier, and its activity, if any, in the territory of the Party of the procuring entity;

(…)

Article 1010: Invitation to Participate

1. Except as otherwise provided in Article 1016, an entity shall publish an invitation to participate for all procurements in accordance with paragraphs 2, 3 and 5, in the appropriate publication referred to in Annex 1010.1.

2. The invitation to participate shall take the form of a notice of proposed procurement that shall contain the following information:

(a) a description of the nature and quantity of the goods or services to be procured, including any options for further procurement and, if possible,

(i) an estimate of when such options may be exercised, and

(ii) in the case of recurring contracts, an estimate of when the subsequent notices will be issued;

(b) a statement as to whether the procedure is open or selective and whether it will involve negotiation;

(c) any date for starting or completion of delivery of the goods or services to be procured;

(…)

Article 1011: Selective Tendering Procedures

1. To ensure optimum effective competition between the suppliers of the Parties under selective tendering procedures, an entity shall, for each procurement, invite tenders from the maximum number of domestic suppliers and suppliers of the other Parties, consistent with the efficient operation of the procurement system.

2. Subject to paragraph 3, an entity that maintains a permanent list of qualified suppliers may select suppliers to be invited to tender for a particular procurement from among those listed. In the process of making a selection, the entity shall provide for equitable opportunities for suppliers on the list.

3. Subject to Article 1009(2)(f), an entity shall allow a supplier that requests to participate in a particular procurement to submit a tender and shall consider the tender. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system.

4. Where an entity does not invite or admit a supplier to tender, the entity shall, on request of the supplier, promptly provide pertinent information concerning its reasons for not doing so.

Article 1012: Time Limits for Tendering and Delivery

1. An entity shall:

(a) in prescribing a time limit, provide adequate time to allow suppliers of another Party to prepare and submit tenders before the closing of the tendering procedures;

(b) in determining a time limit, consistent with its own reasonable needs, take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated, and the time normally required for transmitting tenders by mail from foreign as well as domestic points; and

(c) take due account of publication delays when setting the final date for receipt of tenders or applications to be invited to tender.

2. Subject to paragraph 3, an entity shall provide that:

(a) in open tendering procedures, the period for the receipt of tenders is no less than 40 days from the date of publication of a notice in accordance with Article 1010;

(b) in selective tendering procedures not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender is no less than 25 days from the date of publication of a notice in accordance with Article 1010, and the period for receipt of tenders is no less than 40 days from the date of issuance of the invitation to tender; and

(c) in selective tendering procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders is no less than 40 days from the date of the initial issuance of invitations to tender, but where the date of initial issuance of invitations to tender does not coincide with the date of publication of a notice in accordance with Article 1010, there shall not be less than 40 days between those two dates.

3. An entity may reduce the periods referred to in paragraph 2 in accordance with the following:

(a) where a notice referred to Article 1010(3) or (5) has been published for a period of no less than 40 days and no more than 12 months, the 40-day limit for receipt of tenders may be reduced to no less than 24 days; (…)

Article 1013: Tender Documentation

1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders, including information required to be published in the notice referred to in Article 1010(2), except for the information required under Article 1010(2)(h). The documentation shall also include:

(a) the address of the entity to which tenders should be submitted;

(b) the address to which requests for supplementary information should be submitted;

(c) the language or languages in which tenders and tendering documents may be submitted;

(d) the closing date and time for receipt of tenders and the length of time during which tenders should be open for acceptance;

(e) the persons authorized to be present at the opening of tenders and the date, time and place of the opening;

(f) a statement of any economic or technical requirements and of any financial guarantees, information and documents required from suppliers;

(g) a complete description of the goods or services to be procured and any other requirements, including technical specifications, conformity certification and necessary plans, drawings and instructional materials;

(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transportation, insurance and inspection costs, and in the case of goods or services of another Party, customs duties and other import charges, taxes and the currency of payment;

(i) the terms of payment; and

(j) any other terms or conditions.

2. An entity shall:

(a) forward tender documentation on the request of a supplier that is participating in open tendering procedures or has requested to participate in selective tendering procedures, and reply promptly to any reasonable request for explanations relating thereto; and

(b) reply promptly to any reasonable request for relevant information made by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract.

Article 1014: Negotiation Disciplines

1. An entity may conduct negotiations only:

(a) in the context of procurement in which the entity has, in a notice published in accordance with Article 1010, indicated its intent to negotiate; or

(b) where it appears to the entity from the evaluation of the tenders that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation.

2. An entity shall use negotiations primarily to identify the strengths and weaknesses in the tenders.

3. An entity shall treat all tenders in confidence. In particular, no entity may provide to any person information intended to assist any supplier to bring its tender up to the level of any other tender.

4. No entity may, in the course of negotiations, discriminate between suppliers. In particular, an entity shall:

(a) carry out any elimination of suppliers in accordance with the criteria set out in the notices and tender documentation;

(b) provide in writing all modifications to the criteria or technical requirements to all suppliers remaining in the negotiations;

(c) permit all remaining suppliers to submit new or amended tenders on the basis of the modified criteria or requirements; and

(d) when negotiations are concluded, permit all remaining suppliers to submit final tenders in accordance with a common deadline.

Article 1015: Submission, Receipt and Opening of Tenders and Awarding of Contracts

1. An entity shall use procedures for the submission, receipt and opening of tenders and the awarding of contracts that are consistent with the following:

(a) tenders shall normally be submitted in writing directly or by mail;

(b) where tenders by telex, telegram, telecopy or other means of electronic transmission are permitted, the tender made thereby must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the supplier and a statement that the supplier agrees to all the terms and conditions of the invitation to tender;

(c) a tender made by telex, telegram, telecopy or other means of electronic transmission must be confirmed promptly by letter or by the dispatch of a signed copy of the telex, telegram, telecopy or electronic message;

(d) the content of the telex, telegram, telecopy or electronic message shall prevail where there is a difference or conflict between that content and the content of any documentation received after the time limit for submission of tenders;

(e) tenders presented by telephone shall not be permitted;

(f) requests to participate in selective tendering procedures may be submitted by telex, telegram or telecopy and if permitted, may be submitted by other means of electronic transmission; and

(g) the opportunities that may be given to suppliers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be administered in a manner that would result in discrimination between suppliers.

In this paragraph, "means of electronic transmission" consists of means capable of producing for the recipient at the destination of the transmission a printed copy of the tender.

2. No entity may penalize a supplier whose tender is received in the office designated in the tender documentation after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the entity. An entity may also consider, in exceptional circumstances, tenders received after the time specified for receiving tenders if the entity's procedures so provide.

3. All tenders solicited by an entity under open or selective tendering procedures shall be received and opened under procedures and conditions guaranteeing the regularity of the opening of tenders. The entity shall retain the information on the opening of tenders. The information shall remain at the disposal of the competent authorities of the Party for use, if required, under Article 1017, Article 1019 or Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures).

4. An entity shall award contracts in accordance with the following:

(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

(b) if the entity has received a tender that is abnormally lower in price than other tenders submitted, the entity may inquire of the supplier to ensure that it can comply with the conditions of participation and is or will be capable of fulfilling the terms of the contract;

(c) unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation;

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation; and

(e) option clauses shall not be used in a manner that circumvents this Chapter.

5. No entity of a Party may make it a condition of the awarding of a contract that the supplier has previously been awarded one or more contracts by an entity of that Party or that the supplier has prior work experience in the territory of that Party.

6. An entity shall:

(a) on request, promptly inform suppliers participating in tendering procedures of decisions on contract awards and, if so requested, inform them in writing; and

(b) on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier.

(…)

Article 1016: Limited Tendering Procedures

1. An entity of a Party may, in the circumstances and subject to the conditions set out in paragraph 2, use limited tendering procedures and thus derogate from Articles 1008 through 1015, provided that such limited tendering procedures are not used with a view to avoiding

maximum possible competition or in a manner that would constitute a means of discrimination between suppliers of the other Parties or protection of domestic suppliers.

2. An entity may use limited tendering procedures in the following circumstances and subject to the following conditions, as applicable:

(a) in the absence of tenders in response to an open or selective call for tenders, or where the tenders submitted either have resulted from collusion or do not conform to the essential requirements of the tender documentation, or where the tenders submitted come from suppliers that do not comply with the conditions for participation provided for in accordance with this Chapter, on condition that the requirements of the initial procurement are not substantially modified in the contract as awarded;

(b) where, for works of art, or for reasons connected with the protection of patents, copyrights or other exclusive rights, or proprietary information or where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the entity, the goods or services could not be obtained in time by means of open or selective tendering procedures;

(…)

Section C - Bid Challenge

Article 1017: Bid Challenge

1. In order to promote fair, open and impartial procurement procedures, each Party shall adopt and maintain bid challenge procedures for procurement covered by this Chapter in accordance with the following:

(a) each Party shall allow suppliers to submit bid challenges concerning any aspect of the procurement process, which for the purposes of this Article begins after an entity has decided on its procurement requirement and continues through the contract award;

(b) a Party may encourage a supplier to seek a resolution of any complaint with the entity concerned prior to initiating a bid challenge;

(c) each Party shall ensure that its entities accord fair and timely consideration to any complaint regarding procurement covered by this Chapter;

(d) whether or not a supplier has attempted to resolve its complaint with the entity, or following an unsuccessful attempt at such a resolution, no Party may prevent the supplier from initiating a bid challenge or seeking any other relief;

(e) a Party may require a supplier to notify the entity on initiation of a bid challenge;

(f) a Party may limit the period within which a supplier may initiate a bid challenge, but in no case shall the period be less than 10 working days from the time when the basis of the complaint became known or reasonably should have become known to the supplier;

(g) each Party shall establish or designate a reviewing authority with no substantial interest in the outcome of procurements to receive bid challenges and make findings and recommendations concerning them;

(h) on receipt of a bid challenge, the reviewing authority shall expeditiously investigate the challenge;

(i) a Party may require its reviewing authority to limit its considerations to the challenge itself;

(j) in investigating the challenge, the reviewing authority may delay the awarding of the proposed contract pending resolution of the challenge, except in cases of urgency or where the delay would be contrary to the public interest;

(k) the reviewing authority shall issue a recommendation to resolve the challenge, which may include directing the entity to re-evaluate offers, terminate or re-compete the contract in question;

(l) entities normally shall follow the recommendations of the reviewing authority;

(m) each Party should authorize its reviewing authority, following the conclusion of a bid challenge procedure, to make additional recommendations in writing to an entity respecting any facet of the entity's procurement process that is identified as problematic during the investigation of the challenge, including recommendations for changes in the procurement procedures of the entity to bring them into conformity with this Chapter;

(n) the reviewing authority shall provide its findings and recommendations respecting bid challenges in writing and in a timely manner, and shall make them available to the Parties and interested persons;

(o) each Party shall specify in writing and shall make generally available all its bid challenge procedures; and

(p) each Party shall ensure that each of its entities maintains complete documentation regarding each of its procurements, including a written record of all communications substantially affecting each procurement, for at least three years from the date the contract was awarded, to allow verification that the procurement process was carried out in accordance with this Chapter.

2. A Party may require that a bid challenge be initiated only after the notice of procurement has been published or, where a notice is not published, after tender documentation has been made available. Where a Party imposes such a requirement, the 10-working day period described in

paragraph 1(f) shall begin no earlier than the date that the notice is published or the tender documentation is made available.

Section D - General Provisions

Article 1018: Exceptions

1. Nothing in this Chapter shall be construed to prevent a Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.

2. Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on trade between the Parties, nothing in this Chapter shall be construed to prevent any Party from adopting or maintaining measures:

(a) necessary to protect public morals, order or safety;

(b) necessary to protect human, animal or plant life or health;

(c) necessary to protect intellectual property; or

(d) relating to goods or services of handicapped persons, of philanthropic institutions or of prison labor.

Article 1019: Provision of Information

1. Further to Article 1802(1) (Publication), each Party shall promptly publish any law, regulation, precedential judicial decision, administrative ruling of general application and any procedure, including standard contract clauses, regarding government procurement covered by this Chapter in the appropriate publications referred to in Annex 1010.1.

2. Each Party shall:

(a) on request, explain to another Party its government procurement procedures;

(b) ensure that its entities, on request from a supplier, promptly explain their procurement practices and procedures; and

(c) designate by January 1, 1994 one or more contact points to

(i) facilitate communication between the Parties, and

(ii) answer all reasonable inquiries from other Parties to provide relevant information on matters covered by this Chapter.

(…)

Article 1025: Definitions

1. For purposes of this Chapter:

construction services contract means a contract for the realization by any means of civil or building works listed in Appendix 1001.1b-3-A;

entity means an entity listed in Annex 1001.1a-1, 1001.1a-2 or 1001.1a-3;

goods of another Party means goods originating in the territory of another Party, determined in accordance with Article 1004;

international standard means "international standard", as defined in Article 915 (Definitions - Standards-Related Measures);

limited tendering procedures means procedures where an entity contacts suppliers individually, only in the circumstances and under the conditions specified in Article 1016;

locally established supplier includes a natural person resident in the territory of the Party, an enterprise organized or established under the Party's law, and a branch or representative office located in the Party's territory;

open tendering procedures means those procedures under which all interested suppliers may submit a tender;

selective tendering procedures means procedures under which, consistent with Article 1011(3), those suppliers invited to do so by an entity may submit a tender;

services includes construction services contracts, unless otherwise specified;

standard means "standard", as defined in Article 915;

supplier means a person that has provided or could provide goods or services in response to an entity's call for tender;

technical regulation means "technical regulation", as defined in Article 915;

technical specification means a specification which lays down goods characteristics or their related processes and production methods, or services characteristics or their related operating methods, including the applicable administrative provisions. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a good, process, or production or operating method; and

tendering procedures means open tendering procedures, selective tendering procedures and limited tendering procedures.

II. Comparative Insight (WTO Government Procurement Code)

2-1. Overview

http://www.wto.org/english/tratop_e/gproc_e/over_e.htm

OVERVIEW OF THE AGREEMENT ON GOVERNMENT PROCUREMENT

To download a text of the agreement, visit
http://www.wto.org/english/tratop_e/gproc_e/agrmnt_e.htm

Introduction

[1] Procurement of products and services by government agencies for their own purposes represents an important share of total government expenditure and thus has a significant r_le in domestic economies. While ensuring best value for money will be secured through an open and non-discriminatory procurement regime, governments sometimes seek to achieve certain other domestic policy goals through their purchasing decisions, such as promotion of local industrial sectors or business groups. Measures to this effect may be either explicitly prescribed in national legislations, for example prohibitions against the purchase of foreign goods or services or from foreign suppliers, preference margins, set-asides and offsets, or in the form of less overt measures or practices which have the effect of denying foreign products, services and suppliers the opportunity to compete in domestic government procurement markets, including excessive use of selective tendering, non-open technical specification requirements and, in particular, lack of transparency in tendering procedures including contract awards. Such discriminatory government procurement procedures and practices can lead to distortions in international trade.

[2] Government procurement has been effectively omitted from the scope of the multilateral trade rules under the WTO, in the areas of both goods and services. In the General Agreement on Tariffs and Trade, originally negotiated in 1947, government procurement was explicitly excluded from the key national treatment obligation. More recently, government procurement has been carved out of main commitments of the General Agreement on Trade in Services. Since it is estimated that government procurement typically represents 10-15% of GDP, this represents a considerable gap in the multilateral trading system.

[3] A growing awareness of the trade-restrictive effects of discriminatory procurement policies and of the desirability of fulfilling these gaps in the trading system resulted in a first effort to bring government procurement under internationally agreed trade rules in the Tokyo Round of Trade Negotiations. As a result, the first Agreement on Government Procurement was signed in 1979 and entered into force in 1981. It was amended in 1987, with this amended version entering into force in 1988. In parallel with the Uruguay Round, Parties to the Agreement held negotiations to extend the scope and coverage of the Agreement. The Agreement on Government Procurement (1994) (GPA) was signed in Marrakesh on 15 April 1994 - at the same time as the Agreement Establishing the WTO. The new Agreement entered into force on 1 January 1996. The GPA is one of the "plurilateral" Agreements included in Annex 4 to the Agreement Establishing the WTO, signifying that not all WTO Members are bound by it. [The list of present membership]

[4] According to the statistics collected under the Tokyo Round Agreement, that Agreement applied annually to a total value of contracts of around US$30 billion in 1990-94. Under the new Agreement, the value of procurement that is opened up to international competition is estimated to have increased by ten times, with the extension of rules to cover procurement of services as well as goods and to cover sub-central entities and public utilities as well.

Main features

[5] The GPA establishes an agreed framework of rights and obligations among its Parties with respect to their national laws, regulations, procedures and practices in the area of government procurement. The cornerstone of the rules in the Agreement is non-discrimination. In respect of the procurement covered by the Agreement, governments Parties to the Agreement are required to give the products, services and suppliers of any other Party to the Agreement treatment "no less favourable" than that they give to their domestic products, services and suppliers and not to discriminate among goods, services and suppliers of other Parties (Article III:1). Furthermore, each Party is required to ensure that its entities do not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership and do not discriminate against a locally-established supplier on the basis of country of production of the good or service being supplied (Article III:2). In order to ensure that the basic principle of non-discrimination is followed and that access to procurement is available to foreign products, services and suppliers, the Agreement lays heavy emphasis on procedures for providing transparency of laws, regulations, procedures and practices regarding government procurement.

Scope and coverage

[6] The Agreement does not apply to all government procurement of the Parties. The 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 utilities;

- of goods; and

- all services and construction services that are specified in positive lists, found respectively, in Annexes 4 and 5 of Appendix I;

- in respect of procurement contracts above certain threshold values. Each Party indicates the levels of minimum thresholds that apply to the procurement of goods and services under Annexes 1, 2 and 3 entities (Article I:4). [Table on thresholds]. The thresholds as expressed in national currencies of Parties to the Agreement for 1996/97 are available in documents GPA/W/12 and Addenda 1-7 WTO documents on-line.

[7] The Agreement authorizes Parties to modify the mutually agreed coverage of Appendices I to IV, subject to the procedures for rectification and modification specified in Article XXIV:6. Since its signature in April 1994, the Agreement's scope has been expanded through the incorporation in it of the results of a series of bilateral agreements between individual Parties. A loose-leaf system for Appendices to the Agreement is designed to reflect the up-to-date status of

the Appendices as such changes occur.

[8] When reading the schedules in Appendix I to ascertain whether a particular procurement contract is covered by the Agreement, it is important to check not only whether the procuring entity is covered, the threshold level and, if the contract is for a service, whether that service is covered, but also the General Notes at the end of most Parties' schedules which provide for a number of exceptions. It should be noted that exceptions from the obligations of the Agreement are also allowed for developing countries in certain situations (Article V) and for non-economic reasons, for example to protect national security interests, public morals, order or safety, human, animal or plant life or health or intellectual property, etc. (Article XXIII).

[9] The Agreement (Article IX:11) requires that notices of invitation to participate in an intended procurement make it clear, either in the notice itself or in the publication in which it appears, whether the procurement in question is covered by the Agreement.

Tendering procedures

[10] The Agreement contains a number of detailed procedural obligations which procuring entities have to fulfil to ensure the effective application of its basic principles (Articles VII to XVI). The purpose of these procedural requirements is to guarantee that access to covered procurement is effectively open and that an equal opportunity is given to foreign supplies and suppliers in competing for government contracts.

[11] The Agreement allows the use of open, selective and limited tendering procedures, provided they are consistent with the provisions laid out in Articles VII to XVI.

- Under **open procedures** all interested suppliers may submit a tender (Article VII:3(a)).

- Under **selective tendering procedures** only those suppliers invited to do so by the entity may submit a tender (Articles VII:3(b) and X). To ensure optimum effective international competition, purchasing entities are required to invite tenders from the maximum number of foreign suppliers. Safeguards to ensure that the procedures and conditions for qualification of suppliers do not discriminate against suppliers of other Parties are set out in Article VIII. For example, any conditions for participation in tendering procedures by suppliers shall be limited to those that are essential to ensure the firm's capability to fulfil the contract and shall not have a discriminatory effect. Once a year the entities using the selective tendering method are required to publish, in a publication indicated in Appendix III to the Agreement, their lists of qualified suppliers, and to specify the period of validity of those lists and the conditions that need to be met for inclusion of interested suppliers in the lists (Article IX:9).

- Under **limited tendering procedures** the entity contacts the potential suppliers individually (Article VII:3(c)). The Agreement closely circumscribes the situations in which this method can be used, for example in the absence of tenders in response to an open tender or selective tender or in cases of collusion, when the product or service can be supplied only by a particular supplier, or for reasons of extreme urgency brought about by events unforeseeable by the entity (Article XV).

[12] Entities may hold **negotiations** with suppliers making tenders, provided this is indicated in the initial tender notice or it appears from the tender evaluation that no one tender is the most advantageous and subject to safeguards to ensure that such negotiations do not discriminate between suppliers (Article XIV).

[13] The Agreement prescribes certain minimum **deadlines** that must be allowed for the preparation, submission and receipt of tenders to enable responsive tendering (Article XI:2). These must be set long enough to allow all suppliers, domestic and foreign, to prepare and submit tenders before the closing of the tendering procedures. In general the minimum shall be 40 days from the date of publication of an invitation to tender. The minimum time-limits for receipt of tenders may be reduced to 25 or even 10 days in certain well-defined circumstances.

[14] In the **tender documentation** the purchasing entity is required to give all necessary information related to the procurement in question to enable potential suppliers to submit responsive tenders, including information required to be published in tender notices and other important information, for example economic and technical requirements, financial guarantees and the criteria for awarding the contract and procedural information such as the closing date and time for receipt of tenders (Article XII).

[15] The objective of the procedural rules for **submission, receipt and opening** of tenders is to ensure fairness, equity and transparency in the procurement process (Article XIII:1-3). All tenders solicited under open and selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings.

[16] Only tenders that conform to the essential requirements of the tender notice or documentation and are from a supplier which complies with the conditions for participation can be considered for **award**. Entities have the obligation to award contracts 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 specific evaluation criteria set forth in the notices or tender documentation. An entity that has received a tender abnormally lower than other tenders may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract (Article XIII: 4).

[17] The modes of transmission of data foreseen under the relevant provisions of the Agreement are telex, telegram, facsimile. The Agreement recognizes the fact that its provisions do not take into account the rapidly emerging use of information technology in government procurement. In order to ensure that it does not constitute an obstacle to technical progress in this area, the Agreement calls for regular consultations in the Committee regarding developments in information technology and, if necessary, negotiation of modifications to the Agreement itself (Article XXIV:8).

Other provisions for open procurement

[18] The use of offsets - measures to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements - are explicitly prohibited in the Agreement. Notwithstanding this, developing countries may negotiate, at the time of their accession, conditions for the use of offsets provided these are used only for the qualification to participate in the procurement process and not as criteria for awarding contracts (Article XVI).

[19] The Agreement contains obligations on **technical specifications** in order to prevent entities from discriminating against and among foreign goods and suppliers through the technical characteristics of products and services that they specify (Article VI). Technical specifications

shall be in terms of performance rather than design, and be based on international standards, where they exist, or otherwise on national technical regulations, recognized national standards, or building codes.

Prior information

[20] Prior to the actual tendering process, Parties are required to publish an invitation to participate in the form of a **tender notice** in a publicly accessible publication indicated in Appendix II to the Agreement. The purpose is to inform all interested suppliers about the procurement opportunity and the relevant aspects of the procurement in question. Entities at central government level in Annex 1 are required to use a notice of proposed procurement, whereas other entities in Annexes 2 and 3 may use a notice of planned procurement (Article IX).

Post-award information and publication

[21] Information must also be provided, after the award of the contract, on the award decision in the form of a notice, giving information on such matters as the nature and quantity of the products and services in the contract award, the name and address of the winning tenderer, and the value of the winning award or the highest and the lowest offer taken into account in the award of the contract (Article XVIII:1).

[22] Moreover, in response to a request from a supplier from a Party to the Agreement, the procuring entity must provide prompt and pertinent information on: its procurement practices; an explanation of the reasons why a supplier's application to qualify was rejected; why its existing qualification to tender was brought to an end; and on the characteristics and relevant advantages of the tender selected (Article XVIII:2). However, entities are entitled to withhold certain information on grounds of confidentiality (Article XVIII:4). The Agreement provides for the protection of confidential information (Article XIX:4). In addition, the government of an unsuccessful tenderer, Party to the Agreement, may seek such additional information on the contract award as is necessary to ensure that the procurement was made fairly and impartially (Article XIX:2).

[23] There is a general requirement to publish laws, regulations, judicial decisions, administrative rulings of general application and any procedures regarding government procurement covered by the Agreement. The relevant publications are listed in Appendix IV (Article XIX:1). As a further element of transparency under the Agreement, each government must collect and provide to the other Parties, through the Committee, statistics on its procurement covered by the Agreement (Article XIX:5).

Special rules for developing countries

[24] The Agreement recognizes the development, financial and trade needs of developing countries, in particular least-developed countries, and allows special and differential treatment in order to meet their specific development objectives (Article V:1). Development objectives of developing countries should be taken into account in the negotiation of coverage of procurement by entities in developed and developing countries (Article V:3-7). Article V also contains provisions on: technical assistance (Article V:8-11); establishment of information centres giving information on procurement practices and procedures in developed countries (Article V:11); special treatment for least-developed countries (Article V:12 and 13); and review of the

application of Article V (Article V:14 and 15).

Enforcement

[25] **Disputes between Parties** under the Agreement are subject to the procedures of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (Article XXII:1). Because of the plurilateral nature of the Agreement, Article XXII contains a number of special rules or procedures (Article XXII:3, 5 and 6). Of particular interest is the provision disallowing so-called "cross-retaliation" - the suspension of concessions or other obligations under the GPA as a result of disputes arising under the other WTO Agreements as well as suspension of concessions or other obligations under any other WTO Agreement because of any dispute arising under the GPA (Article XXII:7). Moreover, under the Agreement the DSB has the authority to authorize consultations among parties to the dispute regarding remedies when withdrawal of violating measures is not possible (Article XXII:3).

[26] As a new and unique feature of the enforcement procedures in the WTO system, Article XX of the GPA sets out mandatory requirements for the establishment of a domestic **bid challenge system**, giving suppliers believing that a procurement has been handled inconsistently with the requirements of the GPA a right of recourse to an independent domestic tribunal. Parties may confer the authority to hear challenges by suppliers on national courts or on an impartial and independent review body. In the event that a bid challenge is heard by a review body which does not have the status of a court of law, either its decisions must be subject to judicial review or it must follow the procedures/criteria laid down in detail in the Agreement (Article XX: 6(a)-(g)). The challenge body must have the authority to order the correction of a breach of the Agreement or compensation for the loss or damages suffered by a supplier, but this may be limited to costs for tender preparation or protest. Pending the outcome of the challenge, it must be able to order rapid interim measures, including the suspension of the procurement process, to correct breaches of the Agreement and to preserve commercial opportunities (Article XX:7 (a)-(c)).

2-2. Members (Plurilateral Agreement)

http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm

The committee handling the plurilateral agreement, and its observers

Parties to the agreement (committee members)

Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, United States

Negotiating accession

Bulgaria, Estonia, Jordan, Kyrgyz Republic, Latvia, Panama, Chinese Taipei

Observer governments

Argentina, Australia, Bulgaria, Cameroon, Czech Republic, Chile, Colombia, Croatia, Estonia, Georgia, Jordan, Kyrgyz Republic, Latvia, Lithuania, Malta, Moldova, Mongolia, Oman, Panama, Poland, Slovak Republic, Slovenia, Turkey

Observers — intergovernmental organizations

International Monetary Fund
Organization for Economic Cooperation and Development
International Trade Centre

III. Reform Agenda (FTAA)

www.sice.oas.org/ftaa/toronto/forum/wksrec/rgovpr%5Fe.asp

Fifth Western Hemisphere Trade Ministerial and Business Forum
Toronto, Canada - November 1999

RECOMMENDATIONS AND CONCLUSIONS FROM THE GOVERNMENT PROCUREMENT WORKSHOP

MAIN ISSUES

1. Businesses in the hemisphere need universal access to government procurement.

2. Transparency is essential.

3. Bid protests and dispute mechanisms are required.

4. Reciprocity in implementation is essential.

AGREED RECOMMENDATIONS

1. The workshop reaffirms the government procurement recommendations of the 1998 ABF, and reiterates the need to have an agreement that applies to all goods and services and all countries in the hemisphere.

2. The FTAA members will grant to all goods, services, construction and suppliers in the member countries, treatment that is equally favourable to that granted to their own goods, services, construction and suppliers, subject to the exclusions delineated in the 1998 ABF recommendations on government procurement.

3. Transparency in government procurement should include the fullest possible publication/distribution of each country's laws, policies, rules and practices.

   The following elements were agreed upon:

   a. Adequate and timely notice

   b. Neutral standards

   c. Objective criteria

   d. Public bid opening

   e. Award based on the pre-established criteria

f. Dispute settlement and bid protest including arbitration.

4. FTAA and sub-regional and bi-lateral agreements may co-exist but not conflict.

5. Value thresholds should be established that balance the need to exclude small purchases but provides opportunities for small and medium-sized firms to bid.

6. In addition to traditional methods, governments should leverage the "Internet". (See business facilitation measures)

7. Consideration should be given to training and accreditation of government officials in procurement procedures.

BUSINESS FACILITATION MEASURES

1. Per Recommendation number three, the following transparency elements should be adopted:

    a. Adequate and timely notice

    b. Neutral Standards

    c. Objective criteria

    d. Public bid opening

    e. Award based on the pre-established criteria

    f. Dispute settlement and bid protest including arbitration.

2. Government procurement should be made available via the internet, encompassing: specification, tenders, evaluation criteria, standards and regulations. Each country should establish appropriate access that lists and links the government procurement sites. The goal is to develop a comprehensive data-base which comprises the procurement activity.

3. Consideration should be given to the use of "model" procurement laws developed by UNCITRAL or other inter-governmental bodies.

4. Eliminate the requirement for "consularization" of documentation and similar requirements for bid submittals to government entities.

AREAS OF DIVERGENCE

Application of the Agreement to government procurement below the central/national government level was not agreed.

Chair: John T. Mc Carter, USA Vice Chair: Jose Enrique Mejia Ucles,

Honduras

Rapporteur: Bob Olivero, Canada

Vice Rapporteur: Francisco Pate, Argentina

Additional Resources and References (Optional Reading)

Beverly A. Fuortes & Rebecca Mei Reese, New Opportunities for U.S. Companies to Sell Goods and Services to the Mexican Government: A Look at the NAFTA Government Procurement Chapter, 653 PLI/COMM 271(1993)

The authors argue that "NAFTA Chapter 10 is not a panacea for all problems encountered by NAFTA suppliers" and that "it is not comprehensive as the parties would like."

The authors also highlight that NAFTA Chapter 10 is significant to the US and Canadian Suppliers considering that Mexico is not a signatory to the 1994 UR Government Procurement Agreement, and that obligations in the NAFTA going beyond those in existing international agreements on government procurement, including the 1994 UR Agreement on Government Procurement as well as the U.S.-Canada Free Trade Agreement.

Paul D'Arelli, Entering the Construction Services Industries in Mexico: Laws Affecting Foreign Participation, NAFTA, and Other Concerns, 7 TRANSNAT'L L. 227 (1994)

"Although many U.S. contractors and developers are hesitant to confront the unfamiliar culture and business practices in Mexico, some U.S. firms have already successfully penetrated the construction services market by forming alliances with Mexican partners. After carefully assessing the market, U.S. contractors are realizing that "Mexico is a land of poor roads, faulty telephone lines, crumbling sewers and horrendous pollution-in short, a land of opportunity.""