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Committee on Government Procurement
Negotiations under Article XXIV:7 of the GPA 1994

LEGAL CHECK OF THE PROVISIONALLY AGREED REVISED AGREEMENT ON GOVERNMENT PROCUREMENT: POINTS FOR CONSIDERATION BY DELEGATIONS*

NOTE BY THE SECRETARIAT

Revision

In the informal closing session held on 15 February 2007, the Secretariat was asked to identify, by mid-March, any issues regarding the legal drafting of the text of the provisionally agreed revised Agreement on Government Procurement (GPA/W/297) and legal issues in relation to the Final Provisions that might merit consideration by delegations (Chairman's statement in the informal closing session, Job No. 1058 of 16 February 2007, paragraph 7).

Attached is a list of such issues. As envisioned in the informal closing session, the list has been prepared by the Secretariat to the Committee on Government Procurement in consultation with the Secretariat's Legal Affairs Division.

The attention of delegations is drawn to two "horizontal" drafting issues. First, in some but not all places in the text, commas have been placed before "and" or "or" at the end of a sequence of items. To avoid the risk of unintended meaning being given to this difference, a single approach might be considered. The practice in other WTO agreements, as reflected in the WTO style guidelines[1], is not to place such commas unless necessary for purposes of clarity. It might also be noted that in some places where language has been modelled on other WTO legal provisions commas have been added, even though no difference in meaning may be intended. Examples are the definitions of "standard" and "technical specification" in Articles I(r) and (t)(ii). These appear to be modelled on Articles 1 and 2 of Annex 1 of the WTO Agreement on Technical Barriers to Trade. However, in both instances, the new GPA provisions contain commas after the word "marking" which are not found in the TBT provisions.

Second, the new Agreement at several places refers to "each Party's Appendix I" or "a Party's Appendix I". However, under the present (1994) Agreement, there is only one Appendix which is common to all the Parties. If it is the intention to keep the same structure of the Appendices, one solution might be to refer to "a Party's Appendix I Annexes" or similar in the relevant places, especially now that each Party's General Notes will be put in an Annex.[2]

It should also be noted that the Secretariat has not provided any comments in regard to Article XXII:16-18, as these paragraphs appear to set out options that are still under active consideration by delegations.

As outlined in the Chairman's statement in the informal closing session, delegations are invited to reflect on the points in this Note and to identify any other points meriting consideration, **if possible by end-March**. Any points submitted by delegations will be circulated by the Secretariat to all participants in the negotiations. The points raised by the Secretariat and by delegations will then be

[1] According to Part 3.1 of the WTO Editorial Manual, "[a] comma is not placed before "and" at the end of a sequence of items unless one of the items contains another "and", unless it is necessary for clarity...". WTO Editorial Manual, Version 5.0, 1 March 2007.

[2] In particular, such words might be inserted in Articles I(n), II:2(a)(i), II:2(e), II:3 (chapeau), II:4 (chapeau), II:4(f), IV:3 and IV:5.

* Pursuant to the relevant Decision of the Committee on Government Procurement (GPA/CD/5 (16/11/2023)), this document (informal document symbol: negs234) was derestricted on 8 November 2023.

discussed and any consequential rectifications agreed (or otherwise) by delegations in a plurilateral format, in the course of the planned meetings in the week of 16-20 April.

ATTACHMENT

SPECIFIC POINTS REGARDING THE DRAFTING OF THE TEXT

The following legal and linguistic rectifications might be considered in regard to specific provisions in the provisionally agreed text:

Preamble:

Following the style of the WTO Agreement, the first line of the Preamble might read: "The *Parties* to this Agreement (hereinafter referred to as "the Parties")".

It might be appropriate, in the Preamble, to make reference to the legal basis of the negotiations leading to the revised GPA. This might be done, for example, by inserting the words "pursuant to Article XXIV:7(b) and (c) of the 1994 Agreement on Government Procurement (hereinafter referred to as "the 1994 Agreement")" after "these objectives" in the recital beginning "Having undertaken...".

Article I:

In Article I(a), should "commercial goods and services" read "commercial goods or services"? If so, in the same definition, "goods and services" might read "goods or services". The same point arises in Article XI:7.

In Article I(b), in the light of developments concerning issues to be addressed in the coverage negotiations, further consideration might be given to the appropriateness of a definition of "construction services contract". Currently, this term is not used in the text of the Agreement, although the term "construction services" is used in Articles I(q) and II:4(e). In the event that a definition is retained, "U.N." might be replaced by "United Nations".

In Article I(g), (l) and (p), "where" might be replaced by "whereby".

Does the definition of "limited tendering" in Article I(g) adequately cover what is intended? For instance, would it be helpful to include language along the following lines: "**limited tendering** means a procurement method whereby the procuring entity only contacts a supplier or suppliers of its choice."?

In Article I(k), the term "offsets" might be defined in the singular form in the light of the use of "offset" in the singular in Article IV:3(b) of the Agreement.

In Article I(n), the reference to "each Party" might be understood as requiring that an entity has to be covered for **all** Parties. Accordingly, and in view of the above-noted point regarding the unity of Appendix I, this definition might be revised to read: "**procuring entity** means an entity covered under Annex 1, 2 or 3 of Appendix I in respect of a Party".

In Article I(o), the word "relevant" might be inserted before "conditions for participation".

In the light of the definition of "qualified supplier" in Article I(o), the definition in Article I(i) might read as follows: "**multi-use list** means a list of qualified suppliers that the procuring entity intends to use more than once". Similarly, the definition in Article I(p) might read as follows: "**selective tendering** means a procurement method whereby only qualified suppliers are invited by the procuring entity to submit a tender".

In Article I(r), the comma after "recognized body" should be deleted (as superfluous).

Article II:

Article II:2(a) refers to "goods ... as specified in each Party's Appendix I". In the event that Parties decide not to add a specific annex on goods (see Article II:4 and footnote), consideration might need to be given to the adequacy of the reference to goods in paragraph 2(a) of this Article.

Since Article II:2 purports to provide a comprehensive definition of covered procurement, subparagraph II:2(e) might refer to Article III (Exceptions to the Agreement) in addition to the other provisions cited.

In Article II:4 (chapeau and subparagraph (f)), "annexes" might be in initial capitals.

In Article II:4(d), should it be made clear that Annex 4 does not include construction services?

Since the chapeau to Article II:6(b) already refers to "estimated total value", is it necessary to repeat this in sub-subparagraph (ii)? If not, Article II:6(b)(ii) might read as follows: "where the procurement provides for the possibility of option clauses, the value of such optional purchases".

In the chapeau to Article II:7, "hereafter" might be replaced by "hereinafter". The same point arises in Article IV:1 (chapeau).

In Article II:7(a) (third line), the words "where possible" might be placed within commas.

In Article II:8(c), the words "is it" should read "it is".

Article III:

Negotiators might consider changing the title of Article III to "General and Security Exceptions", given that certain other provisions also contain exceptions. The words "to the Agreement" are, in any case, anomalous since the exceptions are part of the Agreement.

In Article III:2(d), the word "natural" might be inserted before "persons with disabilities", in the light of the definition of "person" in Article I(m).

Order of Article IV and Article V:

Consideration might be given to reversing the order of the current Articles IV and V, given that the latter contains general principles and the former contains some exceptions to the application of these principles. As an example, currently, the general prohibition against the use of offsets (in Article V:6) comes after the provision on the use of offsets by developing countries (in Article IV:3(b)).

Article IV:

In Article IV:4, the word "for" at the end of the chapeau might be moved to the beginning of subparagraphs (a) and (b), respectively.

Article IV:6 might refer to "the Committee on Government Procurement established by Article XXI:1 of the Agreement (hereinafter referred to as "the Committee")" rather than "the Committee".

Article V:

The header to paragraphs 1 and 2 of Article V refers to "National Treatment and Non-Discrimination". Notwithstanding that the same wording is used in the 1994 Agreement, would it be more appropriate to refer simply to "Non-discrimination" since this term is generally understood to include both national treatment and MFN (both of which are covered in the paragraphs themselves)?

Article V:2(a) prohibits treatment of a locally established supplier less favourably than another locally established supplier on the basis of "degree of foreign affiliation or ownership". Might this wording be interpreted as giving rights to non-Parties to the Agreement? If so, would the intent of this provision be made more clear by substituting the words "on the basis of affiliation with, or ownership by persons of, another Party"?

In Article V:2, the word "nor" after the semicolon in subparagraph (a) should be changed to "or".

In Article V:5, the words "no Party may" might be changed to "a Party shall not" consistent with the formulation in Articles V:2 (chapeau) and V:6.

In Article V:7, a colon might be inserted after the word "apply to" (in the first line) and semicolons, rather than commas, used after the words "importation"; "charges"; and "formalities".

Article VI:

In Article VI:1(a), "clauses" might be used in the singular, rather than the plural, the same as "law", "regulation", "judicial decision", etc.

Also in Article VI:1(a), "notices and tender documentation" might read "notices or tender documentation".

Article VII:

In the chapeau to Article VII:1, the comma after "at least" (in the fourth line) might be removed.

In Article VII:1(a), (b) and the chaussette, the text might refer to "entities listed in Annex 1, 2 or 3" rather than to "entities in Annex 1, 2 or 3". The same point arises in Article VII:5 and in Article XI:8.

In Article VII:2(c), "recurring contracts" might read "recurring procurements" (in the light of the definition in Article II:7).

In Article VII:3 (third line), "the notice" might read "the summary notice" (to distinguish it from the notice of intended procurement which is mentioned in the same sentence).

In Article VII:4, the following words might be added at the end of the first sentence: "hereinafter referred to as "notice of planned procurement"". This will anchor the cross-references in Articles VII:5 and XI:4(a).

In Article VII:5, it is unclear if the word "it" (second line) refers to the procuring entity or to the notice of planned procurement. To remedy this, the relevant words might read "provided that the entity includes in the notice of planned procurement".

Also in Article VII:5, "the information in paragraph 2" (also in the second line) might read: "the information referred to in paragraph 2".

Article VIII:

In Article VIII:2(c), the term "may not" might be changed to "shall not". The same point arises in Articles IX:11 and XVII:2.

Article IX:

In Article IX:3, should "foreign suppliers" read "suppliers of another Party"? This would follow the approach in Article IX:5.

The heading to Article IX:12 might read "Annex 2 and 3 Entities" rather than "Annexes 2 and 3 Entities".

Article X:

In Article X:2(a), "specify the technical specifications ..." might read "frame the technical specifications..."?

In Articles X:9, the term "notice" might be amended to read "notice of intended procurement"? The same point arises in Articles X:11, XII:1(b) and XII:2(a).

Article XI:

In Article XI:1 (last sentence), "common" might be changed to "the same".

In Article XI:4(b), "procurements of a recurring nature" might read "recurring procurements" (given the definition in Article II:7).

In Article XI:7 (fifth line), the reference to "commercial goods and services" might read "commercial goods or services", particularly if the same change is made in the definition of this term in Article I(a).

Article XIII:

In Article XIII:1 "the other Parties" might be changed to "any other Party" – consistent with Article V.

In Article XIII:1(a), the words "provided that the requirements of the tender documentation are not substantially modified" might be moved to a chaussette to that subparagraph.

In Article XIII:1(c) (both the chapeau and subparagraph (c)(i)), should "goods and services" read "goods or services"?

In Article XIII:1(c)(i), "can not" should read "cannot".

In Article XIII:1(c)(ii), should "such separation" read "such a change"?

In Article XIII:1(d), "could not" should read "cannot".

In Article XIII:1(f), the commas after "production" and "viability" might be removed.[3]

Also in Article XIII:1(f), should "to incorporate the results of field testing and to demonstrate that ..." read "to incorporate the results of field testing or to demonstrate that ..."?

Article XV:

In Article XV:4, the term "must" (used twice in this paragraph) might be replaced by "shall".

Also in Article XV:4, "satisfies the conditions" might read "complies with the conditions" (to harmonize with the language in Article XV:6 (see below)).

In the chapeau of Article XV:5, "contract and" should be changed to "contract and that".

In Articles XV:5 and XV:6, are the expressions "capable of undertaking the contract" and "capable of fulfilling the terms of the contract" intended to be equivalent? If so, should they be harmonized?

In Article XV:6, "can comply with the conditions" might read "complies with the conditions".

In Article XV:6, "conditions of participation" might read "conditions for participation" (as elsewhere in the Agreement).

Article XVI:

In Article XVI:1 (third line), "that" might be replaced by "why".

The heading to Article XVI:4 "Collection and Report of Statistics" might be changed to "Collection and Reporting of Statistics".

[3] See, in this regard, the footnote to Article XV:1(e) in the 1994 Agreement.

Article XVII:

In Article XVII:2, "may not provide information to a particular supplier that might prejudice fair competition between suppliers" might read "shall not provide to any particular supplier information that might prejudice fair competition between suppliers".

Article XVIII:

In the title of Article XVIII and paragraph 6(f) of Article XVIII, "supplier challenges" might read "challenges by suppliers".

In the chaussette to Article XVIII:1, "in which it has" might be changed to "in which the supplier has".

In Article XVIII:2 (second to fourth lines), the words "a breach of this Agreement ... implementing this Agreement" might be replaced by the words "a breach or a failure as set out in paragraph 1". The same change might be made in Article XVIII:7(b) (first to fourth lines).

Also in Article XVIII:2 (fifth line), "each Party" might be changed to "the Party concerned". Currently, the wording implies that all Parties must encourage the procuring entity and supplier to seek resolution of the complaint.

In Article XVIII:6(b), for the sake of consistency with other WTO agreements, the definition of participants might be introduced with the words "hereinafter referred to as".

In Article XVIII:6(e), the comma after "shall" should be deleted.

Article XIX:

In Article XIX:1, the definition of "modifying Party" might be introduced with the words "hereinafter referred to as".

In Article XIX:1(b), "provided in" might be changed to "provided for in".

In Article XIX:3, the definition of "objecting Party" might be introduced with the words "hereinafter referred to as".

In Article XIX:3(a) and (b), it might improve clarity to refer, respectively, to "paragraph 8(b)" and "paragraph 8(c)" instead of referring to "paragraph 8" in both instances.

In Article XIX:6, should "Notwithstanding Article V:1(b) ... " read "Notwithstanding Articles V:1(b) and V:2(b) ... "?

Article XIX:8(a) should end with a semicolon rather than a colon.

In regard to Article XIX:8(c), should the word "of" be inserted before "substantially equivalent coverage" to implicate the words "level of" earlier in the sentence?

Article XX:

Negotiators might consider whether the punctuation in Article XX:1 should follow Article 4.2 of the DSU, assuming that there is no intention to have a different meaning. The DSU provision reads as follows:

> "Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation ...."

Article XXI:

In Article XXI:1, it might be preferable to state "There shall be a Committee on Government Procurement" (as in Article IV:2 of the WTO Agreement) or "There is hereby established a Committee

on Government Procurement" (as in Article 16.1 of the Anti-Dumping Agreement) rather than the current formulation "A Committee on Government Procurement ... shall be established".

In regard to Article XXI:3(b), "General Council of the WTO" might read "General Council pursuant to Article IV:8 of the WTO Agreement".

In Article XXI:4, the words "to the Secretariat" might read "to the Committee".

Article XXII:

In regard to Article XXII:1, the wording of this provision (dealing with acceptance of the new Agreement) is similar to the 1994 Agreement (Article XXIV:1) but differs from the related language used in the WTO Agreement (Article XIV:1). Nonetheless, if Parties prefer this, no legal problem is foreseen. One question that might merit consideration is whether the "by or" in the phrase "by or on" is necessary. Presumably, "on" would be sufficient if all Parties intend to sign the new Agreement on the same day. Another question is whether an original party to the conclusion of the negotiations which, for any reason, cannot sign on the designated day, should not be afforded a further period in which to sign, prior to the deadline for ratification. As things stand, it would appear that such a party would need to negotiate its accession to the new Agreement under Article XXII:5.

In Article XXII:2 (first and second lines), "the Agreement on ... ("1994 Agreement")" might read "the 1994 Agreement" (given that this will now have been defined in the Preamble).

In Article XXII:2 (third line), "for those Parties" might be deleted (as redundant and possibly misleading).

In Article XXII:2 (fourth line), "shall be terminated" might read "shall be deemed to be terminated".

In regard to Article XXII:3, this provision appears to raise three questions:

- First, is it the intention of the negotiators that the new Agreement would apply only to covered procurement that has commenced after the entry into force of the Agreement? If so, the word "only" might be inserted after the word "apply" in the first line of this provision.

- Second, would the current wording mean that there would be no right of recourse with regard to procurement that has commenced under the 1994 Agreement, given that the application of the 1994 Agreement will be precluded by paragraph 2? Is this what is intended?

- Third, is the time of commencement (referred to in the second line) sufficiently clear?

Consideration might be given to deleting Article XXII:4 from the provisionally agreed text. The header "Provisional Application" would seem inappropriate because, under Article 25 of the Vienna Convention on the Law of Treaties, provisional application takes place before entry into force. The text of Article XXII:4 might be deleted because the revised Agreement will bind only its Parties and, in their respect, the 1994 Agreement will cease to apply under Article XXII:2.

In Article XXII:5, "between that Member and the Parties" might be changed to "between that Member and the Committee on Government Procurement". Negotiators might also consider whether the second and third sentences of this Article are strictly necessary or can be left to the terms of accession to be agreed (as under the WTO Agreement). Regarding the two options in the last sentence, namely [on the 30th day following] "the deposit of its instrument of accession" and "the date of its accession to this Agreement", the first option corresponds to normal WTO procedure and would seem preferable, even if the second option corresponds to the 1994 Agreement (Article XXIV:2).

Also in regard to Article XXII:5 (fourth line), the term "an acceding Member" might be changed to "a Member acceding to it" (for greater clarity).

In Article XXII:6, "any provisions" should read "any provision".

In Article XXII:9, "The Parties" might read "Each Party" (similarly to Articles XXII:7 and 8).

Also in Article XXII:9, "discriminatory measures and practices" might read "discriminatory measures" (given that the definition of "measure" in Article I(h) includes a "practice").

In Article XXII:10, the word "thereto" should be deleted.

A full stop is missing at the end of Article XXII:13.

In Article XXII:14, "effective use" might read "effectiveness of the use".

In Article XXII:20, the words "from the same date ... ceases" might be replaced by "the date on which it ceases".

In regard to the "Done ... " clause following Article XXII:25, "hereto" might be replaced by "to this Agreement".

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