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SYNTHESIS OF THE RESPONSES TO THE QUESTIONNAIRE ON GOVERNMENT PROCUREMENT OF SERVICES

Note by the Secretariat

This note presents a synthesis of the responses received so far to the *Questionnaire on Government Procurement of Services* (S/WPGR/W/11). Responses have been circulated as separate documents as addenda to document S/WPGR/W/11. The annex to this note gives the list of the responses received so far and the reference under which they have been circulated.

In certain cases, this synthesis refers to the responses of individual Members to illustrate specific aspects of procurement regimes. The references are selective rather than exhaustive, i.e. the references do not necessarily include all Members whose regimes have the relevant features. The references also do not imply a definitive interpretation of provisions in Members' procurement regimes. The following abbreviations are used:

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| EC | European Communities and their Member States |
| HK | Hong Kong |
| Korea | Republic of Korea |
| NZ | New Zealand |
| US | United States |

I. DEFINITION

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

Several Members have stated that there is no legislative or regulatory definition of government procurement (Colombia, NZ). In most cases, government procurement is defined simply as the procurement of goods and services by the central, provincial and local governments, as well as by other public entities, which in certain cases include "utilities" - i.e. suppliers of energy, water, transport and telecommunications services (EC, India, Norway, Switzerland). While some Members have included all state procurement for the purpose of the current survey, others have limited coverage to federal government departments (Canada). One Member has taken the procurement of services covered by the GPA as its definition (Japan), while another has treated the use of public funds to finance purchases either fully or partially as the defining criterion (Poland).

Some have stated that the term "procurement" includes all stages of the process by which government agencies acquire from external sources the resources they need to fulfil their mandates (Australia). Others have indicated, explicitly or implicitly, that procurement generally does not include non-contractual agreements or any form of government assistance (Korea, US). One Member has noted that procurement includes both purchases and sales, as well as any contract concerning leasing, rental, work or supplies (Argentina).

II. 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.

(See response to Question 3)

III. 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.

(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?

A dominant theme is the centralization of rule-making, and the decentralization of operational functions. In general, there are national (and sometimes provincial) legislation and/or guidelines on procurement, but the responsibility for award and execution of contracts remains with each contracting entity. In one case, the rules of the regional integration agreement apply to procurement above certain threshold values while national laws apply to procurement below the threshold values (EC). National laws themselves may only apply to procurement above specified threshold values (Norway). The national rules differ in depth, in certain cases specifying relatively detailed procedural obligations, while in other cases they contain only general guidelines. In some Members, a national public procurement agency is responsible for monitoring and enforcement of procurement laws and the determination of

procurement policy (Hungary). In a few cases, however, there are no laws or regulations relating specifically to procurement and each entity is free to determine its own procurement procedures within the general parameters set by the government's purchasing policy (NZ).

The actual procurement of services is invariably decentralized, and tends to take place close to the end-users. However, in certain cases, procurement above specified thresholds (Korea) and procurement of particular services, like construction services (Norway), takes place through a central specialized agency.

In the large majority of cases, the procurement regime does not distinguish between the procurement of goods and services (Brazil, Chile, many Member states of the EC, Japan, Korea, Mexico, Poland, Singapore, Switzerland). In some cases, even though the basic regime is the same, there may, nevertheless, be specialized additional rules that apply to specific services such as after-sales services (India), consultancy (HK), design contests (France), construction, major systems, and utilities (US).

In a limited number of cases, there is one regulation for the procurement of goods, one regulation for the procurement of services and one for the procurement of constructions and construction works (Norway, EC, Hungary) even though the differences between regulations may not be significant. The threshold values for service contracts and for goods contracts are usually the same. The threshold for construction works may be higher. If an entity wishes to purchase something which is considered partly a service and partly a good, the contract is regarded as a goods contract if the value of the goods exceeds the value of the service involved and vice versa. In order to be covered by the works regulation, the service has to bear the character of a works contract, i.e. concern work on buildings and similar projects. Services are sometimes treated as the residual category, i.e. a contract that is neither a supply nor a works contract is deemed to be a service contract.

In one case, the procurement of services is decentralized to departments and agencies while the procurement of goods is relatively centralized (Canada). In one Member, preferences are applied by state governments only to goods and related services, and not to procurement of services alone (Australia). In another case, the regime distinguishes not only between goods and services, but also between specific types of services, for instance between construction works, consultancy, professional services, execution of artistic works, telecommunication services and postal services (Colombia).

IV. PROCUREMENT PROCEDURES APPLIED

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

The basic range of permissible procurement procedures are the same in most Members, though there are some variations. As anticipated in the questionnaire, three broad categories of procedures are commonly distinguished: (i) public or open tendering procedures under which all interested parties may submit a tender; (ii) selective or restricted tender procedures under which participation is limited to a certain number of selected suppliers, and only these suppliers are invited to submit a tender; (iii) limited tendering, private contract or single tender in which the awarding authority contacts suppliers individually, and sometimes only a single supplier. Some Members have specified that the terms of the contract may be determined through negotiations in the context of limited tendering (Chile, India), while others seem to allow the possibility of negotiations also in other cases (EC, Poland).

In some Members, even in open tendering procedures, only qualified suppliers are invited to participate (Brazil, Japan). One Member conducts a stratified tendering procedure (Mexico). In the first "technical" phase, only the aspects of bids pertaining to the required technical specifications of the product or service in question are examined. Those bids which meet the technical requirements

set forth in the bidding conditions qualify for the second "financial phase", where price is the dominant criterion. Several Members sometimes employ design or other "contests" in the case of service contracts (Brazil, EC). Under this procedure, the contracting authority may acquire a plan or design selected by a jury after having been put into competition with or without the award of prizes. Design contests can be organized as a part of another procedure leading to the award of a service contract, or can constitute an independent procedure on their own (EC). Other members have mentioned, without further explanation, procedures such as "two-stage tendering", "negotiations-with-retaining-competition" (Poland), and "repeat orders" (India).

In one Member, public sector purchasers use, on a voluntary basis, the services of several private sector supply brokerage companies which specialise in servicing the purchasers through consolidated period supply contracts which are established through competitive tendering (NZ).

In one Member, it is stipulated by law that technical specifications generally be free from any restrictive requirements so as to allow maximum competition among potential suppliers (US). The order of preference for specifications is: (1) voluntary standards; (2) commercial item descriptions in the acquisition of commercial items; (3) government product descriptions stated predominantly in terms of functions to be performed or performance required; (4) government product descriptions stated predominantly in terms of material, finishing schematics, tolerances, operating characteristics, component parts and other design requirements.

(It is possible that other Members have not addressed this aspect of their procurement regimes because it was not explicitly covered in the questionnaire.)

(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.

Even though the basic range of procurement methods are the same in most Members, there are significant differences in the conditions under which a purchasing agency can resort to different procedures. In some Members, the procuring agency has significant discretion in choosing the precise procurement procedure within the parameters of the government's purchasing policy and guidelines (NZ, Australia). In most Members, public or selective tendering procedures are the rule, and selective tenders are exceptions which may be resorted to in special circumstances. In some cases, these circumstances are specified in the plurilateral agreement to which the Member is party, while in other cases these are specified in national legislation. It is also often the case that procurers have greater discretion, and more freedom to resort to less competitive methods, if procurement is below specified thresholds - either specified in a plurilateral agreement or the national legislation.

Whether a contracting authority uses an open procedure, a selective procedure or a project competition can also depend on the type of service which is to be procured and the complexity of the procurement (US). If there are tenders for basic services that are easy to compare and contracts are awarded according to price only, an open procedure tends to be used. If evaluation of the tenders would be time consuming, entities tend to use selective procedure to ensure that excessive time is not spent on evaluation (Norway). This is also the case when the service in question cannot be defined sufficiently precisely.

Several members permit selective tendering when only a limited number of bidders are suitable for fulfilling the contract due to the particular nature of the subject of public procurement. In one Member, in the case of a construction project above certain thresholds, a contract official may restrict qualification of a bidder on the basis of past performance of the participants (Korea). In other cases, however, selective or limited tendering are permitted only when there are at least some minimum number (sometimes three) of qualified bidders suitable for submitting a bid (EC, Korea, Hungary).

The conditions on limited tendering imposed in certain Members are based on provisions in plurilateral agreements, but even Members not party to such agreements frequently stipulate similar conditions. These include: no satisfactory offers have been obtained in the open or selective procedure; tenders submitted have been collusive; for works of art or when for reasons of protection of intellectual property there is only one supplier possible; as a result of unforeseen circumstances the procurement becomes too urgent to organise an open or selective procedure; additional deliveries by the original supplier which are intended either as parts or replacements for existing supplies; unforeseen circumstances making additional construction services necessary which cannot be separated from the initial order, etc. Some Members have also stated that limited tendering may be used when it is not in the public interest to call for tenders by advertisement (India). Others permit such methods when procurement is confidential or sensitive (Singapore). One member allows a private contract when it is pursuant to a private group contract with small and medium enterprises (Korea).

The conditions for resort to negotiations vary between Members. In some Members, these conditions are similar to those under which limited tendering is permitted (Chile, Hungary). In one Member, negotiated procedures are sometimes used in the utilities sector after the publication of calls for competition (Norway). In the same Member, state entities can also use negotiated procedures when it is extremely difficult to specify the tender documentation to such an extent that bids can be compared. In yet another Member, negotiations are undertaken in extreme urgency to meet the "emergent demand within a given time frame where sources of supplies are known" (India).

One Member has stated that contracts involving foreign assistance or credit may be subject to the regulations of the competent entities, *inter alia*, in matters relating to procurement procedures and systems (Colombia). Another Member states that international tenders shall take place only when they can be justified by the entity, subject to market research, when the resources are obtained through foreign credits, or when the contract is covered by international agreements (Mexico).

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

Most Members require that suppliers submit their bids before the deadline mentioned in the notice for tenders. The actual deadline varies. Several Members have time limits which are in line with the provisions of a plurilateral agreement. Minimum limits along the following lines are frequently observed: 1) public or open tendering procedure: 40 days after publication; 2) selective tendering procedures: 25 days after publication for submission of applications for participation, and 40 days after invitation to submit for submission of bids: Some Members, who give procurers freedom in defining procedures within the parameters of general guidelines, do not stipulate precise time limits (Australia, NZ).

In some Members, time limits differ according to the entity (Chile), the value of the procurement (Korea), the complexity of the procurement (US), and the service in question (EC, Chile). One Member stipulates a longer time limit for contracts advertised both locally and overseas than for contracts advertised only locally (Singapore) while another makes a similar distinction between international and domestic tenders (Mexico). In one Member, required time limits have been recently reduced for commercial, off-the-shelf acquisitions and are to be reduced further as more procurements are conducted electronically (US).

The time limit for receipt of tenders may be fixed, in some cases, by mutual agreement between the contracting entity and the selected candidates, provided that all tenderers are given equal time to prepare and submit tenders (EC). One Member allows, in justified cases, the inviter of bids to extend the deadline for submitting the bids on one occasion - provided that the extension of the deadline is published in an announcement prior to the expiry of the original deadline, and the reason for extending the deadline is indicated (Hungary). In some cases, the inviter of bids may apply an accelerated

procedure in the course of procurement by invitation or negotiation when this is justified by extraordinary urgency, but the circumstances must not arise from the negligence of the inviter of bids, and an accelerated procedure may not be applied in construction projects (Hungary).

V. PUBLICITY FOR INVITING TENDERS

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

In most cases, procurement opportunities are advertised in some form of official gazette and/or newspapers of wide circulation. The former is frequently obligatory, and the latter at the discretion of the procurer. Often these means are supplemented by publication in relevant trade journals or magazines, contact points on government procurement (Japan), periodic handouts (US) and notice-boards (Argentina). Some Members also require the publication of preliminary summary information or periodic indicative notices containing the essential characteristics and value of the contracts that are to be awarded over the following 12 months (US, EC). In some cases, while it is compulsory for federal entities to publicise notices, provincial and local governments may do so on a voluntary basis (Norway). Only in one Member are there no central laws, regulations, or rules for publication of notices (NZ).

There is little uniformity in language requirements. Sometimes it is only the language of the country in question, while in other cases the use of one or more foreign languages is also required.

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

Predictably, invitations to tender are invariably published in the case of open or public procedures, may be published in the case of selective procedures, but are not published in the case of private contracts. In one member, the time-frame for publication differs between public and selective tendering procedures (Argentina). Publishing requirements are usually less rigorous for procurements falling below certain thresholds (EC, US). For instance, notices in the official gazette are only published in some Members for procurements above the threshold values, while notices for other procurements are publicised in local, regional or national newspapers (Norway). The thresholds may differ according to the service in question (Canada). In one Member, invitations to tender for "non-priority services" contracts (presumably covering services deemed to be less "tradeable") are not published, while invitations in the case of certain utilities like transport and telecommunication may not be published (EC). Some Members state that the extent and form of publicity does not depend on tendering procedures (Japan, Colombia) or on the value of procurement (Australia, India, Chile, Colombia, Japan).

(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.

The type of information that must be made available in notices publicising procurement opportunities is similar for most Members though there are differences in the degree of detail. Most responses mention information such as name and contact address of inviting entity: clear description of the service to be provided; tender opening and closing dates; duration of contract and/or time limit for completion of the services; address of enquiry point for further information and tender documentations; deposits and guarantees required; technical standards, qualifications and any special conditions of participation in the tender; and criteria for the award of the contract. In some cases, the information required to be published differs for public works from those for other service (Argentina, Mexico).

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

Practice with regard to charges for obtaining tender documents varies somewhat. Some Members do not charge any fees, while others leave open the possibility of doing so. In most cases where fees are charged, however, their level has to be related to the actual cost of provision of tender documentation. In some cases, a deposit may be required for documents which are handed out free of charge but must be returned to the procuring entity (EC). In some Members, advertised tender sets are sold on payment of fees which depend on the value of the procurement (India, Argentina). In one case, the Government's purchasing guidelines state that the price charged or deposit required, if any, for tender or related documents should not be so high as to discourage *bona fide* competent contractors or producers from participating in the tendering proceedings (NZ).

(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 use of electronic means for publicising procurement opportunities is not uniform. While some Members have made a substantial investment in the development of electronic information systems, several others have only taken preliminary, experimental steps in this direction. In some cases, only tenders above certain thresholds are advertised electronically (Norway), and these threshold may differ according to the service sector concerned (EC). In other cases, information for electronic databases is still being provided voluntarily by the purchasing agencies (HK, NZ). Some agencies have "home pages" on the Internet and include tender notices at these websites (HK, US).

In one Member, it is planned to create electronic data interchange (EDI) networks which will be able to automatically update inventories, invoice customers, pay suppliers, advertise federal government requirements and perform many other tasks that are now time, labour, and paper intensive (US). It is estimated that the new electronic purchasing could cut the Member's federal procurement costs by 10 percent by 1997 and speed delivery times by a third. Another Member has created an "open bidding service" which is a user-friendly automated bidding system designed to give potential suppliers fast, equal access to information on government contracting opportunities (Canada). A third Member has begun work on an electronic public procurement network aiming to make the process more efficient, more reliable, less time-consuming, and ultimately more cost effective, both for procurers and suppliers (EC).

One Member has stated that its legal system does not currently permit the use of electronic means to participate in tendering procedures, but a new system is being created through which invitations to tender may be consulted electronically (Mexico). Another Member has stated that the use of electronic means to advertise government procurement opportunities is not provided for statutorily (Argentina).

VI. REQUIREMENTS LAID DOWN FOR POSSIBLE SUPPLIERS

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

(There is significant overlap in the responses to parts (a), (b) and (c), which should be read together.)

Registration requirements

Members' procurement rules differ significantly in respect of registration requirements, which are compulsory in certain Members and do not exist in others. In certain Members (Colombia, India, Japan, Korea, Poland, Singapore) all local and foreign suppliers interested in participating in public sector tenders are required to register as government contractors or be qualified as such. Several Members state that their compulsory registration system is non-discriminatory, in that it is equally and objectively applicable to both local and overseas suppliers (Singapore). In some Members, non-registered firms could be allowed to participate only in *ad hoc* tenders for non-recurring services or works contracts (India, Singapore). In one Member, who operates a compulsory registration scheme, unregistered suppliers can only be considered if local expertise is lacking, or in cases where the local contractors are unable to execute their contracts or are unable to reach a certain high standard (Singapore). The registration system in this Member is to be reviewed with a view to eliminating any discriminatory effects.

Some Members have provided reasons for the operation of registration systems. One states that the objective of the system is to facilitate the qualification process. The system helps the procuring entity to create a readily available pool of information on each registered firm, which reduces the time needed to examine qualifications during the tender evaluation. The registered suppliers also benefit because they are not burdened by the need to provide the same information each time they participate in a public tender (Singapore). Another Member has stated that the registration system helps to reduce the risk that the designated supplier will not be able to implement the contract properly. Furthermore, once the competition is narrowed down to qualified suppliers, it is possible to evaluate bids only on the basis of price, which helps to enhance the transparency of the procurement procedures (Japan). Another Member maintains a register of small-scale industries who benefit from preferential procurement (India).

There are many Members who do not normally require registration or qualification, but nevertheless allow it in certain situations. For instance, one Member allows for lists of registered suppliers for certain services if the procurement falls below specified sectoral thresholds (Canada). Another states that in the utilities sector, contracting entities may use lists of qualified suppliers (Norway) while in another registration is essential for construction services (Argentina).

Residence requirements

Residence requirements seem to be relatively rare. In some Members, it is required that foreign natural persons without domicile in the country or foreign legal persons without a branch in the country must accredit an agent domiciled in the country who is duly empowered to submit tenders and sign contracts and also to represent them legally and in non-legal matters (HK, Colombia). In one Member, the inviters of bids may prescribe in the invitation that only bidders resident in the country may take part in the procedure (Hungary). In another Member, in order to conclude a contract with the State, a firm must normally be established in the country, but foreign firms are exempted from this requirement in the case of international tenders (Argentina). One Member has stated that the government may sometimes require the contractor to be within a certain distance of the site of contract performance where there is a legitimate need of the contracting entity to have the contractor in close proximity (US).

(For the relationship between local establishment and national treatment, see Question 9).

(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?

Many Members require that potential suppliers provide evidence of their ability to fulfil the contract, for instance through demonstrating financial soundness, professional and technical qualifications and experience, adequate production capacity, and meeting any necessary legal requirements. For instance, contracting state entities may require a tax declaration from suppliers to show that the supplier has met all tax obligations (Norway), statement from banks, professional risk indemnity insurance (EC), etc. In some cases, the submission of bid security, an amount to be determined in advance, may be required, and failure to make a submission may render the bid non-responsive (Canada, Hungary, Mexico). Fines and other penalties imposed on the supplier for delay or non-performance can be applied against these guarantees (Chile).

The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability. The contracting authority may specify which references it wishes to receive, or the production of certificates issued by independent bodies attesting conformity of the service with certain quality assurance systems. In some cases, tenderers may be required to prove their enrolment in one of the professional or trade registers. Furthermore, legal persons may be required to indicate the names and relevant professional qualifications of the staff to be responsible for the performance of the service. In some cases, if tenders are submitted by groups of service providers, a specific legal form can be required once the contract has been awarded, even though it may not be required in order to submit the bid (EC). In some Members, tenderers have to comply with health, safety and employment equity considerations (Canada, Switzerland). Additionally, for sensitive procurements, a contractor may have to have appropriate security clearance, which may also be obtainable by foreign suppliers.

Some Members give credit for past performance (Singapore), while others only use inadequate past performance as a basis for disqualification (Mexico). One Member has put in place an "endorsed supplier arrangement", under which suppliers of information technology and major office machine products under common use arrangements have to demonstrate a commitment to world best practice in terms of quality standards and service, and long-term value adding activities in countries party to the relevant regional integration agreement (Australia). Some Members identify the natural and legal persons who are not entitled to submit tenders. These could include persons who have family or business ties with the civil servant involved in the procurement process and persons who, individually or through the corporate group to which they belong, issue opinions, expert appraisals or assessments in connection with the settlement of disputes (Mexico). In some Members, entities have freedom to establish the objective requirements for participation which they deem necessary (Colombia, NZ).

(For reciprocity conditions in procurement, which amount to requirements to be services suppliers of particular countries, see Question 9).

(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?

Members do not usually make a sharp distinction between registration or qualification requirements and the maintenance of lists of approved suppliers. Some allow lists of approved suppliers to be used only in exceptional cases, and then the recourse to lists must be justified and approved (US). Certified registration in official lists by the competent bodies usually constitutes a presumption of suitability in terms of the criteria for qualitative selection (EC). The guidelines for procurement in

one Member, advise organisations which purchase items specifically designed and manufactured to meet their requirements, to consider developing a list of "approved suppliers" (NZ). This process would involve potential suppliers being evaluated under appropriate criteria. It is argued that while building up an "approved supplier" network could be expensive, there could be long-term benefits in consolidating effective relationships with reliable suppliers. However, to ensure fairness, organisations are advised to be careful to avoid exclusivity, and ensure that lists are continually reviewed.

Companies or firms seeking registration or qualification are usually required to make a declaration (Colombia, Poland) and/or have their background, finances and ability to provide a satisfactory service checked by the registration authorities (Japan, Poland). In some cases, a non-refundable registration fee is charged (Singapore). Where such lists are maintained, they are valid for a certain period, are regularly updated, and interested suppliers are given adequate opportunities to be included (Colombia, India, Japan). Qualifying criteria usually have to be published annually together with the list. Suppliers may apply for admission at any time or at regular intervals. If the procuring entity refuses to accept a supplier on the list, it may be possible to challenge this decision before an independent body (Switzerland).

One member maintains "common use arrangements" (CUAs) which are standing offers with companies to supply goods and services based on pre-negotiated terms and conditions and at agreed prices (Australia). Issues such as trade terms, delivery arrangements, discount schedules and all other contract details are agreed prior to suppliers being added to the lists. CUAs cover most requirements for recurring needs across departments and are continually monitored to ensure that suppliers meet required standards.

VII. 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?

In general, contracts are awarded on the basis of criteria such as lowest price, best value for money spent or the economically most advantageous tender. The latter are based on evaluation of price, quality, technical merit, qualifications and experience, aesthetic and functional aspects, service and technical assistance, environmental impact, date of delivery, *et cetera*. In a couple of cases, it is mentioned that the procuring entity estimates a price which serves as the standard for awarding contracts (Japan, Korea).

It is invariably required that all the criteria for the award of contracts be made available in advance through publication in the tender notice or in the tender documents. In some cases it is also required that if criteria other than price are to be taken into account, their relative importance must be specified in advance where possible (Poland, EC).

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

In most cases, procurement is not subject to any offset provisions. Defence procurement may well be the most significant exception (Norway, NZ). In one Member, certain industry development programs involve offsets (Australia), while in another there is a provision in consultancy contracts which requires that government staff be trained (HK).

(Criteria which relate to local content requirements are discussed under Question 9).

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

In general, preference is not given to any particular group of enterprises. However, in some cases, preferences are given to small and medium sized enterprises. In one Member, it is required that awards of any size be set aside for small business participation when there is a reasonable expectation that offers will be obtained from at least two small businesses and awards will be made at fair market prices (US). In another Member, state entities are authorized to give preference in selection, other things being equal, to local cooperatives, micro-enterprises, foundations, communal action associations and similar entities of the place where the contract is to be implemented (Colombia). In one Member, small-scale sector bidders are entitled to a price preference of up to 15 per cent over the large scale sector, as were public sector undertakings until recently (India).

(See also Question 6)

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

In most cases, procurement criteria do not differ according to the sector or region. However, in one case, geographical location is designated in the context of a labour surplus area set-aside (US). Another Member allows for conditions in the invitation for bidding which further the objectives of job creation, the development of underdeveloped regions, the protection of the environment, as well as increasing the chances of participation for small and medium size enterprises (Hungary). In one Member, evaluation criteria in procurements that are not subject to international agreements may be used to achieve industrial and regional benefits, as long as the benefits are sought in a non-discriminatory manner with respect to regions for which there exists a general framework of regional development (Canada). In one Member, even though there is no change in the basic criteria for procurement there is a special regime for exploration and exploitation of natural resources, and for trading, industrial and marketing activities by State entities that carry out such activities (Colombia). One Member has specified that there may be a restriction on participating in tendering by "location of principal office" for contracts below certain thresholds (Korea). In one Member, certain regions are given concessions in taxes and duties by the central/state government (India).

(For differences in preference margins associated with provincial or local procurement, see question 9).

(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?

In general, the purchasing authority is required to follow the pre-specified evaluation criteria and make a decision solely on the basis of these criteria. In some cases, where criteria other than price are used, discretion is reduced by recourse to stratified procedures, i.e. qualifying suppliers in advance on a non-discriminatory basis using non-price criteria, and then following straightforward price competition (Japan, Mexico). In some cases, however, the purchasing authority has some discretion in defining the criteria and/or choosing the specific procedure followed (Colombia, Hungary, Poland). One Member has mentioned that the procuring authority has the right to cancel the tender at any stage prior to the definitive award provided it has good cause to do so, or to make a preliminary award of all or part of the items.

In one case, only procurements above a certain threshold are subject to review by a state administrative authority to ensure compliance with administrative regulations (Chile). In another case, financial responsibility is delegated to Ministers or Chief Executives depending on the value of the procurement and associated payments (NZ).

(For situations in which a procurer may enter into negotiations, see Question 4)

VIII. DISCLOSURE OF BIDS RECEIVED AND CONTRACTS AWARDED

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

Members have a lot in common concerning the basic principles of how tenders are received, registered and opened. In some cases, the principles must be in accordance with international agreements. It is frequently required that the date, time and place of opening, as well as the persons allowed to be present at the opening, must be published in the tender notice (EC, Norway, Poland). Most emphasize the importance of preserving the secrecy of bids prior to the closure of tenders, for instance through sealed envelopes or sealed tender boxes. Most Members specify that a proper record be kept of all bids, usually through a registration system or a record of proceedings at a public bid opening meeting. The record, in some cases, is required to include at least the following information: names of persons attending the opening procedure, names of tenderers, submission dates of offers, prices offered, and variety of offers (Switzerland). It is also invariably required that impartial observers be present at bid opening, e.g. more than one official must be present or the bids must be opened publicly.

In one Member, where a stratified tendering procedure is employed, tenders are received in two sealed envelopes (Mexico). The first envelope contains the documentation by which it is possible to identify and confirm the existence and participation of the bidder, and a description of the required technical specifications of the product or service in question. The second envelope contains the financial bid for the product or service together with the bid security document. During the first phase, known as the "technical phase", all of the bids are opened in the presence of the participants, and their contents verified. Only those which meet the technical requirements set forth in the bidding conditions are qualified for their second or financial phase, where the final decision is made. Another Member has elaborated that, in negotiated procurements, prices are kept confidential until an award is made. The reason for doing so relates to the proprietary nature of the pricing information. An additional concern is that the knowledge of prices could lead to a situation in which the incumbent contractor has an unfair advantage over its competitors which could affect the integrity of the procurement system (US).

There are also some cases in which the individual purchasing agency is free to determine its own procedures for receiving, opening and registering tenders in accordance with best practice and certain guidelines (Colombia, NZ).

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

There is similarity in post-award procedures, but there are also some variations. Most responses indicate that all bidders are informed of the award of a contract within a fixed time period individually, through public notice or in both ways (Norway). But in some cases, there is no requirement for entities to publish details of the contracts awarded or to notify unsuccessful tenderers (Chile, Korea, NZ, Singapore). In one case, unsuccessful tenderers are informed of the decision if the award was not made in a public hearing (Colombia).

In some cases, the contracts are published in summary form in the official press (Brazil). Some require that more information be published, for instance the type of procedure, the nature and quantity of services procured, name and address of the procuring entity, date of award, name and address of the winning tenderer, price of the winning award or the highest and lowest offer taken into account in the award of the contract (Japan, Switzerland). Relevant information on the contract award may, in certain cases, be withheld if this would have harmful effects on the winning firm, might prejudice

fair competition between suppliers, impede law enforcement or otherwise be contrary to the public interest (EC, Switzerland). In one case, the requirement to publish depends on the value of the contract (Australia).

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

Such information is usually not published. But in most instances it is possible for unsuccessful bidders to obtain information on the reasons why their bids did not succeed and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer, either as a matter of course or on request (sometimes in writing) (EC, Norway). This requirement sometimes exists in international agreements. In some cases, the request must be received within stipulated time limits (US). One Member states that debriefings may also assist suppliers who have won contracts previously and want to know how they performed against the evaluation criteria so as to continue to enhance their performance (Australia).

In several Members, there is no legal requirement for an entity to inform unsuccessful bidders of the reasons why their bid was not selected (Poland, Singapore). In one such Member, tenderers may nevertheless learn about aspects of the tender or competition through the freedom of access to information provided by law, or by recourse to the right of petition (Colombia). In one Member, where there are no laws and regulations governing procurement, communication to unsuccessful tenderers of reasons for not being selected is nevertheless encouraged under the Government's purchasing guidelines where tenderers request this (NZ). In another Member, even though there is no legal requirement, in practice it is customary to provide the reasons for rejecting bids at the request of the interested parties (Chile). In one Member, the competent authority is required to record the reason for rejection of the bids but unsuccessful tenderers are not informed (India). In another Member, even though there is no obligation to inform, nevertheless, if an interested party contests the preliminary award, the tendering authorities must make the full proceedings of the tender available to that party for examination (Argentina).

IX. 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.

The responses of several Members indicate that there are no laws, regulations or procedures which accord domestic services and/or suppliers preferential treatment, or discriminate in any way between the services and service suppliers of other Members (Chile, HK, India, Japan, Korea, India, NZ). In some of these Members, government entities must nevertheless ensure the participation of suppliers of domestic origin, without prejudice to the objective selection procedure (Colombia, NZ). In some cases, preference to nationals is only relevant in the case of otherwise equal bids, as a "tie-breaker" (Brazil, Colombia). In some other cases (Colombia, Hungary), it is only when foreign suppliers submit otherwise equal bids that preference is given to those who incorporate greatest local content (in terms of human resources or other components) and/or offer the best conditions of technology transfer.

Most of the Members who responded to the questionnaire grant no less favourable treatment to services/service suppliers of other Members in the context of bilateral, regional or plurilateral

agreements (except Argentina, Brazil and India). The granting of national treatment on a reciprocal basis is a recurrent theme - even in the context of international agreements on procurement. Treatment of services/service suppliers of Members not party to such agreements is frequently not clearly specified. In certain Members, foreign suppliers may be refused the right to participate in international tenders if an agreement has not been concluded with their country (EC). In certain cases, there is a clear preference rule which may differ according to the category of purchases (EC, Hungary, US). In some cases, for the purpose of price comparison, the price of the good of foreign origin includes current import duties and other taxes and charges required for it to be imported by a private importer without special privileges (Argentina, Brazil).

In certain cases, the central government does not grant preferences but provincial and local governments do (Australia). In some Members, procurement below certain thresholds may be limited to domestic suppliers (Poland). Some Members apply domestic source requirements only to specific services sectors, e.g. in the transportation sector (US). Purchases for specific uses, most notably defence-related, may also require procurement from domestic sources. In some cases, a local content policy is operated provided there is adequate competition, which is usually taken to mean the existence of three or more suppliers.

The notion of domestic is defined in some cases to mean those services which are wholly or partly produced in the country in question (NZ) or in the case of certain regional integration agreements, in any member state party to the agreement (EC). In some cases, bids are considered domestic provided local content is in excess of 50 per cent (Hungary, Mexico). In certain cases, domestic services include services provided through commercial presence established in the country and companies owned or controlled by nationals of the country, as well as by nationals who are resident in the country (Japan.). In certain other countries, companies with foreign capital participation may be termed domestic for the purpose of procurement provided they are established under national law and/or their principal business takes place in the country (EC). In one case the definition of domestic in the case of construction services includes an examination of ownership, nationality of directors and place of incorporation (US).

X. 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.

All Members have procedures available for potential suppliers to lodge complaints at any time throughout the procurement cycle and against the award within fixed time limits. There is usually provision in the procurement legislation for effective legal remedies. Review procedures are available in most cases to any person who has or had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. But some responses seem to suggest that certain remedies may be available only to suppliers from countries with which the country in question has concluded an agreement on government procurement. Only a few countries have explicitly noted that the procedures are available to both domestic and foreign suppliers (US).

For aggrieved suppliers, there is usually a prescribed sequence in which different types of controlling agencies may be invoked: internal controls of the procuring entity, independent administrative control, judicial control or political control. Any supplier who claims to be unfairly treated is usually first encouraged to take up the matter directly with the entity concerned. If this does not provide satisfactory results, the formal procedure is to bring an action against the contracting entity before either an independent review body or competent national judicial court (Norway, Switzerland). In

some cases, where review bodies at first instance are not judicial in character, it is required that their decision be subject to judicial review.

In one case, the Ministry of Commerce which has responsibility for the government's purchasing policy, may also investigate complaints of unfair treatment (NZ), while in other cases it is the Ministry of Finance (Singapore), Ministry of Comptrollership and Administrative Development (Mexico), auditor-general (Brazil), commissions against corruption (HK), or other organs which make up the system of internal control. In another case, there is no provision for appeal through administrative channels, but complaints may be brought before courts (Colombia). In some Members, suppliers may complain to an ombudsman (Australia). In this case, agencies are not compelled to accept a recommended remedy, but if the agency does not act upon the recommendations adequately, the ombudsman may report to the Prime Minister and then to Parliament. Some Members have also mentioned arbitration or mediation procedures which have the effect of "out-of court" settlements (Korea).

Review bodies frequently have, firstly, power to take interim measures at the earliest opportunity, including measures to suspend the procedure for the award of a contract or the implementation of any decision taken by the contracting entity. Secondly, they may set aside decisions taken unlawfully. Thirdly, they have the power to award damages to persons injured by the infringement. In some cases the court or independent review body is empowered to stop an ongoing procurement procedure before the contract has been awarded, but not to revoke an award (Switzerland). In other cases, for instance, in some Members in the utilities sector, procurement procedures cannot be stopped during the process, but the court may fine contracting entities who are found guilty of breaking the rules, and adjudge indemnities to the complaining enterprises (Norway). Suppliers may also challenge the cancellation of the award of a contract (US).

Parties to international agreements sometimes also have the possibility of launching complaints to surveillance authorities set up in the context of the agreement in addition to national procedures (EC).

ANNEX

Government Procurement

Current Situation of the Responses to the Questionnaire

| <u>Responses</u> | <u>Country</u> |
|---|--------------------------|
| S/WPGR/W/11/Add.1 S/WPGR/W/11/Add.1/Corr.1 | Norway |
| S/WPGR/W/11/Add.2 | Switzerland |
| S/WPGR/W/11/Add.3 | Brazil |
| S/WPGR/W/11/Add.4 | New Zealand |
| S/WPGR/W/11/Add.5 | Japan |
| S/WPGR/W/11/Add.6 | United States |
| S/WPGR/W/11/Add.7 | Canada |
| S/WPGR/W/11/Add.8 | Colombia |
| S/WPGR/W/11/Add.9 | Hong Kong |
| S/WPGR/W/11/Add.10 | EC & their Member States |
| S/WPGR/W/11/Add.11 | Australia |
| S/WPGR/W/11/Add.12 | Poland |
| S/WPGR/W/11/Add.13 S/WPGR/W/11/Add.13/C.1 | Republic of Korea |
| S/WPGR/W/11/Add.14 | India |
| S/WPGR/W/11/Add.15 | Chile |
| S/WPGR/W/11/Add.16 | Singapore |
| S/WPGR/W/11/Add.17 | Hungary |
| S/WPGR/W/11/Add.18 | Mexico |
| S/WPGR/W/11/Add.19 | Argentina |