

Assistance for Trade Reform

Trip Report on Training in Transparency in Government Procurement

PREPARED BY
Jeanmarie Meyer

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TRIP REPORT

Project: Capacity Building in Transparency in Government Procurement

Consultant: Jeanmarie Meyer, JD., LL.M.

Period of Performance in Egypt: 11 – 22 January 2004

Summary of Performance: The consultant conducted daily trainings sessions covering the issues raised and points made in the meeting of the WTO Working Group on Transparency in Government Procurement since it began its work in 1996. The sessions were attended by all members of the CD/WTO staff working on the trade issues in procurement as well as members of the public procurement department in the Ministry of Finance. The sessions were conducted in a workshop format allowing significant opportunity for the participants to share their respective expertise and analyze the issues and problems in the context of the procurement laws and practices in Egypt.

Key Accomplishments: Although Egypt has actively participated in the meetings of the Working Group on Transparency in Government Procurement, it has not formed its own position on many of the issues. Instead, Egypt has generally just joined in the positions expressed by other developing countries. Questions have been raised as to whether these positions were actually the best positions for Egypt. This training was intended to build capacity of the ministry so that they fully understand the issues and can develop a reasoned position for Egypt based upon the circumstances and interests of Egypt. The training accomplished this objective. As a result of the training, Egypt should be able to develop its own position on the issues raised in developing an Agreement on Transparency in Government Procurement. To sustain this effort, the Consultant has prepared a paper summarizing the key questions under each issue that Egypt needs to consider and address in formulating its position (attached). In addition, the training sessions were the first opportunity that the staff of the Ministry of Foreign Trade met with and discussed the issues with the staff of the Ministry of Finance who in the end will have a key role in implementing a future Agreement on Transparency in Government Procurement.

Agreement on Transparency in Government Procurement: The Key Questions for Developing the Elements of the Agreement

Prepared by: Jeanmarie Meyer, JD. LL.M.
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Introduction

The Working Group on Transparency in Government Procurement (WGTGP) was established in December 1996 by a decision at the WTO Ministerial Conference in Singapore. The WGTGP was tasked “to conduct a study on transparency in government procurement practices, taking into account national policies, and based on this study, to develop elements for inclusion in an appropriate agreement.” At the 2001 Doha Ministerial Conference, the Ministers clarified the mandate of the WGTGP stating that: “negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers.”

Pursuing international rules of transparency in government procurement reflects the growing awareness of the importance of government procurement in the global economy. An OECD study in 2002 estimates total government expenditure to represent 14 to 20 percent of a country’s gross domestic product and estimated government spending on tradable goods and services at more than US \$2,000 billion annually. Efforts to bring government procurement under internationally agreed rules began in 1973 with the negotiations at the Tokyo Round. This resulted in the first plurilateral agreement, the GATT Government Procurement Code which entered into force in 1981. This code was extensively revised in the Uruguay Round of negotiations and the new Government Procurement Agreement (GPA), also a plurilateral agreement, went into effect on 1 January 1996. Only a few states have joined the United States and the states of the European Union in signing onto the GPA.

As a trade agreement, the GPA is intended to increase market access in national procurements, yet most of the text of the agreement is concerned with various aspects of procurement proceedings. The GPA establishes a framework of common procurement procedures and guarantees the opportunity for unsuccessful bidders to challenge procurement decisions and obtain timely redress in the event of inconsistencies with the rules of the GPA. This reflects the recognition, learned by disappointing experiences, that it is necessary to ensure that the procurement systems are transparent, fair and objective in order to give meaning to any trade agreement covering government procurement. However, the market access features of the GPA have deterred many countries from signing on. Therefore, it is hoped that international rules of transparency in government procurement can be established through a new agreement that is not intended to broaden access to the procurement market but rather is focused solely on creating international rules of transparency in government procurement.

WGTGP began its study of transparency in government procurement with its first meeting in 1997. During 1997 and 1998, the WGTGP identified twelve key elements of a potential

agreement on the basis of the relevant provisions of the existing GPA, the World Bank Guidelines on government procurement, the UNCITRAL Model Law on Procurement of Goods, Construction and Services and various national laws and practices. Since this time the WGTGP has continued to meet regularly to study and discuss how to develop an agreement on transparency in government procurement. The twelve key issues remain the basic framework for these meeting. Despite seven years working at this task, during which period numerous papers and non-papers have been submitted by many different nations, the WGTGP still faces many questions about how to formulate an Agreement on Transparency in Government Procurement (TGP).

The 12 Issues Raised and Points Discussed by the Working Group on Transparency in Government Procurement

I. DEFINITION AND SCOPE OF GOVERNMENT PROCUREMENT

The coverage of the TGP is difficult to define and requires analysis on several dimensions. First, should the TGP define the scope of coverage or should coverage be determined by each country either in reference to its own laws or in appendices attached to the TGP?¹ Second, if coverage is defined by the terms of the TGP, should it refer to procuring authorities that should be included or excluded? Should the TGP apply only to central authorities or should sub-central be included? Should state enterprises be included? Third, which purchases should be included or excluded? Should the agreement exclude all procurements below set thresholds? Should thresholds be high or low? Fourth, should the agreement cover goods and services or should procurements of services be excluded? Would it be difficult to separate services procurements from goods and vice versa if the coverage was divided? Fifth, should the agreement apply to domestic as well as foreign procurement? If only foreign procurements are covered, how should this term be defined? Would it include procurements that are open to foreign suppliers but in which a competitive preference is given to domestic suppliers? Would it apply on a case-by-case basis only if a foreign supplier actually competed in the procurement? Sixth, what type of transactions should be included or excluded from coverage? Should the TGP cover transactions granting concession? Should BOT (Build-Operate and Transfer) contracts be excluded? Should any type public-private partnership arrangements be excluded from coverage?

II. Procurement Methods

A method of procurement refers to a step-by-step set of procedures and rules for conducting a particular procurement and awarding a procurement contract. It is generally recognized that a national procurement system needs more than one method of procurement to satisfy its procurement needs effectively and efficiently. While there is no internationally recognized, uniform system of procurement methods, most procurement methods could be classified

¹ The Government Procurement Agreement consists of the main text plus four appendices. Appendix I defines the coverage of the parties' obligations in four Annexes. Annex 1 contains a list (positive or negative) of the covered (or excluded) central government entities. Annex 2 contains a list (positive or negative) of the covered (or excluded) sub-central government entities. Annex 3 contains a list (positive or negative) of all other covered (or excluded) entities that procurement in accordance with the agreement. Annex 4 specifies those services covered (or excluded) by the agreement. Annex 5 specifies covered construction services. In Appendices II, III, and IV the parties list the publications it will use to publish tender notices, qualification lists and procurement rules and procedures, respectively.

according to the procedures and rules for competition: fully open, selective (or restricted), and direct (or single source). The conditions for limiting competition may be regulated but again this is not uniform. However, since restricted tendering and single source are inherently less transparent procedures, abusive use of such procedures could undermine the purpose of the TGP. This raises several questions that are being asked in constructing the TGP. Should the TGP prescribe a list of defined procurement methods and conditions for use? If this is not acceptable, how far should the TGP go to ensure transparency? Should it set limits or rules for restricting competition? Should it set out a non-binding list of conditions for using single source? Should it require documented reasons for using any method other than those requiring open competition?

III. Publication of Information on National Legislation and Procedures

This issue raises some questions of process and scope. Should the TGP define a standard of accessibility of the information? Where and how does the information need to be available? Should the TGP require that the information be available in a WTO language? Should the TGP require that each country identify an enquiry point? How should the TGP define the scope of information that needs to be accessible? Should it include administrative procedures? Should it include administrative and judicial decisions?

IV. Information on Procurement Opportunities, Tendering and Qualification Procedures

There is no question that the TGP should require transparency in notice of procurement opportunities. Further, suppliers need to have information about the procurement in order to submit a tender. Generally this detailed information is provided in some form of tender documents that the supplier requests after getting notice of the tender. However, how should the TGP define those requirements? Should the TGP provide general principles regarding what needs to be pre-disclosed and give countries the flexibility to decide what to set out in announcements and in the tender documents? Or, should the TGP provide detailed illustrative or binding lists for the minimum contents for the announcements and the tender documents separately? Further, should the TGP require pre-disclosure of national preferences? Could pre-disclosure be satisfied simply by reference to the provisions of the law governing national preferences? Should the TGP define where and how notice of procurement opportunities need to be published? Should the TGP require publication of all or certain notices in media of international circulation and in one of the WTO languages? Should the TGP set language requirements for the tender documents? Should the TGP define rules, procedures or standards for clarifying and amending the tender documents? Further, what rules or procedures might the TGP set out to ensure adequate transparency of a register or list of qualified bidders and information on how to be included in the register or list?

V. Time Periods

This issue refers to the time period that suppliers have for preparing tenders, specifically, the period between notice of the procurement opportunity and the deadline for submission of tenders. Should the TGP provide guidelines for setting the time period? Or, should the TGP fix minimum time periods according to the type of procurement? Or, should the TGP require that minimum time periods be fixed in each country's national law? Should the TGP set out special circumstances to justify reducing time limits?

VI. Transparency of Decisions on Qualifications

There are three elements to this issue. First, there are questions to be answered about qualification requirements. Should the TGP require pre-disclosure of qualification requirements? Should the TGP require that qualification requirements be the same for all participants? How might the TGP provide for exceptions in favor of domestic suppliers? Should the TGP provide a binding or illustrative list of qualification criteria in an attempt to harmonize the elements of qualification? Since the qualification process is easily manipulated, should the TGP require that qualification requirements be defined in objective terms? Second there are questions related to use of qualified bidders lists. Should the TGP require that information about how to be included on the list be readily accessible to all potential suppliers? Should the TGP provide any standards to ensure that new bidders have an opportunity to get on the list? Thirdly, there are important questions related to the transparency of the qualification process. Should the TGP require disclosure of information on how the qualification process is conducted? Should the TGP require that unsuccessful suppliers be able to find out why they were disqualified? Should the TGP require that suppliers be granted the right to challenge a qualification decision?

VII. Transparency of Decisions on Contract Awards

There also are three elements to this issue. First, there are questions to be answered about evaluation criteria. Should the TGP require advanced notice of evaluation criteria and the methodology for applying the criteria? Should the TGP require that the pre-disclosed criteria and methodology be strictly followed in making the award decision? Should the TGP define a standard for permitted award criteria such as allowing only criteria that is objective and quantifiable? Or, should the TGP set out a binding or illustrative list of award criteria? Second, there are questions involving the receipt of tenders and the tender opening. Should these procedures be addressed in the TGP? Should the TGP require public opening of tenders? Should the TGP require that late tenders be rejected? Should the TGP set standards for clarifying or changing tenders after the tender opening? Third, there are questions focused squarely on the transparency of awards. Should the TGP require publication of award decisions? Should the TGP provide a binding or illustrative list of what should be set out in the notices? Should the TGP provide that unsuccessful suppliers must have the right to a debriefing to learn why they did not win the contract?

VIII. Domestic Review Procedures

Domestic Review Procedures are intended to be a mechanism for suppliers to defend their rights in a particular procurement. Should the TGP require countries to establish domestic review procedures? If required, what standards should be set out in the TGP? Should the TGP require that an independent body conduct the review? Should the TGP require that the body be capable of a quick review and response? Should the TGP provide that suppliers must first seek review with the procuring authority before it can appeal to the independent body (principle of exhaustion)? Should the TGP require that foreign suppliers be able to complain? Should the TGP define the scope of review? Should review cover violations of national laws and procedures? Should the review cover violations of TGP provisions? Should the TGP require that domestic review procedures provide for suspensions of the procurement proceeding pending the resolution of the complaint in order to preserve the remedies? Should the TGP describe the remedies that need to be available to supplier, such as correction of the procedures or damages?

IX. Other Matters Related to Transparency

Four topics are included in the discussion of “other matter.” The first involves record-keeping. Should the TGP set out record-keeping requirements? What records should be required? How long should they be maintained? Second, should the TGP make any references to information technology? If yes, what could it say about the use of technology to increase transparency of procurement? Third, should the TGP require any information, records, procedures or any other rules related to procurement to be available in an official WTO language? Fourth, should the TGP have any special provisions defining or prohibiting corruption practices?

X. Information to be Provided to Other Governments

What information should the TGP require Governments to provide to other Governments? Should the TGP require submission of all procurement laws and regulations? In an official language of the WTO? Or, should the TGP require countries to provide only a list of laws and regulations? Should any requirement also apply to laws and regulations of sub-level governments? Should Governments be required to submit information on particular procurements and explain how the award decision was made in compliance with the TGP? Lastly, should the TGP set out any statistical reporting requirements?

XI. WTO Dispute Settlement Procedures

The Dispute Settlement Procedures (DSP) in the WTO apply to disputes arising under the WTO agreements including the GPA. However, the GPA provisions contain a number of special rules and procedures. The first question now is whether the DSP should apply the context of the TGP? Second, if the DSP is to apply, what could be reviewed and how? Should compliance with the national law in a particular procurement proceeding be subject to dispute? Should disputes be limited to whether the national laws are consistent with the provisions of the TGP? Should disputes review whether the country is failing to implement its law and instead is engaging in the pattern of practice that is in violation of the TGP? Should the TGP proscribe remedies? If yes, which remedies might be provided?

XII. Technical Cooperation and Special and Differential Treatment for Developing Countries

Special and Differential Treatment for Developing Countries can not be defined until the terms of the TGP are defined. However, some questions are considered at this stage. Should developing countries be granted: a longer transition period? higher thresholds? exemption from application to sub-central governments? exemption from any requirements as applied to services? Regarding Technical Cooperation, since there is general agreement that it should be demand-driven, there is a need to define the areas and form of such cooperation. Possible areas are: Information technology, legal reform, capacity and institution building, human resource development including development of suppliers and support for developing and implementing domestic review procedures. Possible forms of cooperation include training, preparing handbooks and management guides, workshops, conferences, seminars, study tours.