



Domestic Preferences in Government Purchases

PREPARED BY
Thomas Hutcheson

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FROM THE AMERICAN PEOPLE



Assistance for Trade Reform

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MEMORANDUM

To: Mona El Garf
From: Thomas Hutcheson
Subject: Domestic Preferences in Government Purchases
Date: 3 January 2006

Summary

WTO rules allow governments to give preferences to domestic suppliers of goods and services. While there is some economic justification for this practice when most sectors of the economy are protected, the potential for inefficiency and corruption argue for only modest and totally transparent preference. Most develop countries – where levels of protection are quite low in any case -- and a small but growing number of developing countries have no preference vis a vis suppliers from countries granting reciprocal treatment. This is codified in the Agreement on Government Procurement (GPA).

Egypt's domestic preference takes the form of a stated percentage rate – 15% -- that acts like a “tariff” on any government purchase from abroad. The form of the Egyptian preference is admirably straightforward, more so than many other countries, where preferences are stated but not quantified. On the other hand, the margin in Egypt is among the largest of countries that state a percentage margin.

As pointed out below, a preference works like a tariff and its level should depend on the general level of tariffs. Therefore if revising the level of preference is under consideration, tying the preference margin explicitly to the tariff schedule could be advantageous. Specifically, the current level of preference is close to the fourth band of the Egyptian tariff – 12% and could be defined in that way so that as Egypt's tariffs are reformed over time – presumably downward – the preference margin would fall as well.

Introduction

The rules of GATT specifically exempted purchases made by governments and the agencies controlled by them from the national treatment rule and this exemption was carried over into

the WTO. Government agencies importing goods for their own needs are also not obliged to extend MFN treatment to external suppliers of such products but only to give them fair and equitable treatment. These provisions permit Members' purchasing agencies to offer preferences to domestic producers without regard to normal commercial considerations of price, quality, delivery etc.

Most governments use this exemption to allow some preference for domestic suppliers over foreign suppliers of goods and services purchased by the government. The extent of this varies widely, being restricted to purchases of the central government only or extended to sub-national units of government and parastatal entities. Sometimes the preference applies to only some classes of good and services or only when purchased for certain uses; sometimes it applies across the board. Sometimes the preference is "absolute:" the domestic supplier is preferred if it is "possible" to procure from the domestic supplier; more often the preference is expressed as percentage of the cost which the government is willing to pay to the local supplier for the same good or service.

The Agreement on Government Procurement (GPA)

Policies that require government purchasing agencies to buy locally increase government expenditure and add to the burden on taxpayers and can foment inefficiencies in the supplying sectors. In addition, preferences for domestic suppliers, especially if not clearly limited by quantitative rules, can lead to corruption. These considerations, among others, led some WTO member countries to negotiate an "Agreement on Government Procurement." (GPA)

The Agreement's most important obligation requires purchasing entities to extend to imported products, services and suppliers national and MFN treatment. The first prevents them from giving price or other preferences to domestic suppliers; the second prohibits them from discriminating among outside supplying countries.

The Agreement is not, however, one of the 'core' WTO agreements, but is a 'plurilateral' agreement applying only among the 36 countries which have joined. Developed countries dominate its current membership. Only three developing or transitional economies – Hong Kong, Singapore and the Republic of Korea – have joined, although 9 others are negotiating membership.

Coverage of the Agreement

The obligations that the Agreement imposes will apply only to purchases made by the procurement entities that have been listed by each member country in its annexes. The entities listed include: Ministries, departments and other central government offices; Sub-national organizations such as municipalities, corporations and other local bodies; In the

case of federal States, government departments and agencies at provincial and State level; Public utilities supplying electricity and drinking water, and running airports, ports and urban transport. It is open to member countries to specify in the annexes the products and services to be covered by the Agreement.

In most cases, the Agreement will apply to all goods purchased by the listed entities. The main exceptions are purchases by departments of defense or defense requirements; purchases made by such departments of non-defense requirements are, however, covered. Some countries also have preferences for "small businesses" or specific ethnic groups which in practice are also domestic preferences.

Only a few services are included, however, in the annexes. The most important of these is likely to be construction services, which all members have submitted to the disciplines of the Agreement. Among other services listed:

- Management consultancy and related services;
- Market research services;
- Computer and related services;
- Accounting and auditing services;
- Advertising services;
- Building cleaning services;
- Publishing and printing services.

Procedural provisions

In order to ensure the implementation of these substantive obligations and to provide fair and equitable opportunities for trade to interested domestic and foreign suppliers, the Agreement lays down a number of procedural rules. In particular, it requires entities making purchases above specified threshold limits:

- To do so only by inviting tenders;
- To ensure that foreign suppliers have a fair and equitable opportunity to participate in the tendering process; and
- To award the contract to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender "is either the lowest tender or which in terms of the specific evaluation criteria set forth in the notice is determined to be most advantageous".

Special provisions for developing countries

The Agreement does provide for special and differential treatment for developing countries. Developing countries may negotiate terms of accession to the Agreement that allow them additional time to bring their practices into conformity with the Agreement. They may stipulate, for instance, that the discipline of the Agreement should apply only to a specified number of purchasing agencies. Furthermore, they can negotiate "exclusion from the rule of

national treatment" certain products or services for which they wish to continue to offer a domestic preference.

Services Procurement

Government procurement of services is currently outside the scope of the GATS, which states that MFN, market access and national treatment provisions do not apply to the laws and regulations on government procurement (Article XIII). Multilateral negotiations on government procurement of services were required to start within 2 years from the WTO coming into force. They started in late 1995 and are continuing, being handled by the Working Party on GATS Rules.

Any agreement between Egypt and the United States involving domestic preferences in government procurement would likely involve most of the elements in the GPA, although the specific provisions could well be different. As background for possible free trade agreements in the Western Hemisphere, the Inter-American Development Bank prepared a Map of Issues in Preferences in Government Procurement. Most of the issues outlined in the Map concern making government procurement transparent enough to permit potential foreign suppliers to compete. The Map is shown in Annex A along with a brief description of the US policy or situation on each issue.

Economic Justification of Domestic Preferences

Tariff and other import restrictions introduce distortions among prices of domestic goods and services. The "protection" created by import restrictions allows one sector of the economy to draw resources away from other sectors that have less or no protection. Production of goods with high protection, thus, is favored and that of those with low or no protection, particularly exports, is at a disadvantage. In general, the smaller the differences in levels of protection, the smaller are the distortions in resource allocation. In this context a modest amount of domestic preference for good purchased (almost always duty free) by government has considerable justification. Beyond that this level of preference should be greater than zero and less than the maximum tariff rate, however, exactly how much preference could be justified on these grounds is difficult to say.

Egypt

Egypt, like most other countries, has a preference for domestic purchases. It is expressed as a 15% margin above the cost of the imported good or service that the government is willing to pay to the domestic supplier. Any lack of transparency in purchasing and contracting, of course, acts to increase this margin. To put Egypt's practice in context, Table 1 below shows domestic preferences in 35 countries and the European Union. As can be

seen, Egypt's preference margin is among the highest, particularly among middle-income countries.

In the future, Egypt should consider revising its local preference rules. As preference works like a tariff, an approach would be to tie the preference to the level of tariffs on goods.

Specifically, the current level of preference is close to the fourth band of the Egyptian tariff – 12% – and it could be defined in that way so that as Egypt's tariffs are reformed over time – presumably downward – the preference margin would fall as well.

Table 1

Country	Preference (applied to non-GPA countries, if applicable)	Observation	Signatory of the GPA
Argentina	Applicable tariff rate		No
Australia	10%	for SME, some sub national	No
Bolivia	10%		No
Botswana	LPNR	30 of Gov purchases from local SSE	No
Brazil	0		No
Canada	LPNR		Yes
Chile	0%		No
China	LPNR		No
Colombia	0%	if reciprocated, previously 25%	No
Costa Rica	0%	local incorporation is required in construction	No
Cote d'Ivoire	LPNR		No
Egypt	15%		No
El Salvador	0%	local legal representation required	No
European Union	0		Yes
Guinea	15%		No
Hong Kong	0		Yes
Hungary	0%		No
India	15%	30% for shipping Purchasing agencies not required to prefer domestic suppliers, but are allowed to do so	No
Indonesia	LPNR		No
Korea	0		Yes
Malaysia	10%	for Bumiputra suppliers	No
Mali	15%		No
Mexico	LPNR		No
Morocco	15%	only World Bank	No
New Zealand	0		Yes
Norway	0		Yes
Peru	10%		No
Philippines	LPNR	no applied to USA	No
Poland	20		Yes
Romania	0%	previously 20%	No
Singapore	0		Yes
South Africa	10% - 20%		No
Sri Lanka	7.50%	"local" = > 51% local content	No
Thailand	3-7%		No
United States	6-12%	GPA does not apply to goods procured for foreign assistance	Yes

LPRN = Local Preference, No Rate specified

Government Procurement Issues Map as Applied to US Government Procurement (2002):

1.1 Definition?

Procurement is generally defined in terms of purchasing for the direct benefit and use of government entities. The Office of Federal Procurement Policy (OFPP) Act (41 USC 403) defines procurement on the following basis:

The term procurement includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and close-out.

Procurement generally does not include non-contractual agreements or any form of government assistance, including cooperative agreements, grants loans, equity infusions, guarantees, fiscal incentives, and governmental provisions of goods and services to persons or governmental authorities not specifically covered under US annexes to the WTO Government Procurement Agreement (GPA) and NAFTA Chapter 10.

1.2 To what public entities and institutions does public sector procurement apply?

Public sector procurement defined broadly includes purchasing by federal, state and municipal governmental authorities. However, the US procurement system is not centralized, except with respect to US federal executive agencies. The answers provided in response to this inventory generally refer to procurement by federal executive agencies

1.3 Which methods of procurement are included in the definition (e.g. purchase, lease, rental)?

According to US obligations under the GPA and NAFTA, procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services is included in the definition of procurement.

1.4 Does the procurement regime distinguish among the procurement of goods, services, public works, and "other procurements?"

The United States generally does not distinguish among procurement of goods, services public works and "other procurements" in terms of competitive and transparent procedures. The same transparent procurement regulations apply to all types of contracts listed above. Please see response to Question 3 below. The United States does have some specialized rules for services, construction, major systems, utilities, purchases under \$100,000 and commercial item acquisitions, which are set forth in specific provisions of the Federal Acquisition Regulations (FAR), but even these specialized rules are still within the general umbrella of procedures and requirements on transparency and competition.

2.1. Entities and institutions.

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respect to US federal executive agencies. The answers provided in response to this inventory generally refer to procurement by federal executive agencies

2.2. Methods of Procurement (e.g. purchase, lease, rental)

The United States generally does not distinguish among procurement of goods, services public works and "other procurements" in terms of competitive and transparent procedures. The same transparent procurement regulations apply to all types of contracts listed above. Please see response to Question 3 below. The United States does have some specialized rules for services, construction, major systems, utilities, purchases under \$100,000 and commercial item acquisitions, which are set forth in specific provisions of the Federal Acquisition Regulations (FAR), but even these specialized rules are still within the general umbrella of procedures and requirements on transparency and competition.

3.1 Legal framework

United States Code, Titles 10 and 41 contain the bulk of the laws upon which the FAR is based. On an annual basis, authorization and appropriation acts passed by Congress and signed by the President may provide additional authority and requirements.

The FAR System codifies and publishes uniform policies and procedures for acquisition by all U.S. executive agencies (central government entities). The FAR System consists of the FAR itself, which is the primary legal document, and agency-specific acquisition regulations that implement or supplement the FAR. The FAR does not permit agency acquisition regulations that unnecessarily repeat, paraphrase, or otherwise restate the FAR; limits agency acquisition regulations to those necessary to implement FAR policies and procedures within an agency; and provides for coordination, simplicity, and uniformity in the U.S. Federal acquisition process. The FAR is available on the Internet at <http://www.arnet.gov>.

3.2 Exemptions to the elements of coverage?

There are only certain conditions where contracting without providing full and open competition is allowed. The conditions include:

1. only one responsible source and no other supplies or services can meet agency requirements;
2. unusual and compelling urgency;
3. industrial mobilization, engineering, developmental, or research capability, or expert services;
4. international agreement;
5. authorized or required by statute, e.g., national industries for the blind and severely handicapped; Federal prison industries (UNICOR); government printing and binding;
6. national security;
7. public interest, which is rarely used because it requires notification to Congress not less than 30 days prior to contract award.

The Department of Defense (DOD), in particular has specific requirements to procure from domestic sources which are set forth in the Defense Federal Acquisitions Regulations (DFAR) and are exempt from US obligations under the WTO, GPA, and NAFTA, chapter 10.

3.3 How the application of rules is determined in cases of joint procurement involving goods, services, and/or public works

FAR provisions generally apply to any combination of goods and services, although there may be specialized additional rules that apply to specific services.

4. How central government procurement activities are administered, including appropriate description of the centralization or decentralization of that procurement

Although federal executive agencies are covered by the same framework of laws and regulations on their procurement activities, they generally conduct procurements individually, except when procuring from GSA or DLA supply schedules

5.1 Application of any of the following procurement procedures: (i) 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) private contract or single tender in which the awarding authority contracts suppliers individually, and sometimes only a single supplier

The general rule is full and open competition, although there may be specific circumstances in which selective tendering or single tendering may be permissible. See the response to Question 3.2 above.

Additionally, in complex procurements, procuring officials may develop a draft Request for Proposal (RFP) and send it out to interested suppliers for comment. This process is open to all interested suppliers. Depending on the comments received, the RFP may be altered. If a change is made after the solicitation is issued, the change is generally transmitted through an amendment to the solicitation.

5.2 Additional types of procedures applied to procurements

Two main procurement procedures are used based on the level of complexity of the goods or services being procured. Simplified acquisition procedures are used for procurements expected to be less than \$100,000, and sealed bid or negotiation procedures are used when the procurements are expected to be above \$100,000. Irrespective of the procedure used, the emphasis is on ensuring transparency throughout the process. Procedures are predictable. The Competition in Contracting Act (CICA) requires that criteria for award of a contract be set forth in the solicitation. If the agency changes the criteria without advising the offerers, the procurement may be protested. Bid deadlines are the same for all offerers. Where the procurement is conducted using price and other factors, the unsuccessful offerers may request, in writing, debriefings from the contracting officer. If the price is the only decision factor, the unsuccessful offerers will be notified in writing of the number of bidders, the number of proposals and the total contract price of the items in the award.

By law, technical specifications are generally to be free from any restrictive requirements so as to allow maximum competition among potential offerers. 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.

Solicitations generally contain detailed specifications (although the trend recently has been towards commercial item acquisition), as well as contact points for obtaining more detailed information. The Commerce Business Daily (CBD), in which most Federal solicitations are published, includes initial notifications of the intent to procure certain supplies and services. Specific requirements and specification information are contained in the solicitation document

itself. The CBD will only contain a brief description, along with information regarding whether a particular procurement is using a performance or design-based specification.

5.3 Under what circumstances are the above-noted procedures applied?

Credit card purchases are generally used below US\$2,500; simplified procedures between US\$2,500 and US\$100,000; sealed bidding and negotiation over US\$100,000.

5.4 Time limits for submission of bids

Generally 15 days before the issuance of solicitation, and the solicitation must allow at least 30 days response time. However, according to the complexity of the procurement the response time can be extended. Additionally, the required time has been reduced for commercial, off-the-shelf (COTS) acquisitions and will be reduced in the future for procurement that is conducted electronically.

6.1 Publicity of the procurement

Two statutes require public notice in the CBD: 15 USC 637 (c) and 41 USC 416. These statutes are implemented in 48 CFR 15.201, "Synopsis of Proposed Contract Actions." There are 12 exceptions to the synopsis-publishing requirement. These are listed in 48 CFR 1 subpart 5.202. In addition, at the discretion of the Federal government entity, invitations to tender can be publicized through periodic handouts, announcements in newspapers, trade journals, magazines, or other mass communication media. The Federal Government is increasingly looking to the use of electronic means of publication, which promises to greatly increase commercial access to information on procurement opportunities. The Federal Acquisition Streamlining Act (FASA) of 1994 specifically requires the establishment of a government-wide electronic system. (BIZOPS) Additionally, individual agencies, such as NASA, provided their solicitations over the Internet.

Publication of invitations to tender

Notices are published in the Business Commerce Daily [Now FedBizOps] at least 15 days before issuance of the solicitation, and the solicitation must allow at least 30 days response time. In addition, at the discretion of the Federal government entity, invitations to tender can be published through periodic handouts, announcements in newspapers, trade journals, magazines, and other mass communication media. The Federal Government is increasingly looking to the use of electronic means. No mention is made as to the languages used in the notices.

6.2 Extent and form of publicity

Publishing requirements are less rigorous for procurements falling below the small acquisition threshold of \$100,000

6.3 Minimum standard set of information

Includes but not limited to: contracting office address, subject, proposed solicitation number, opening and closing response date, contact point/contracting officer, and description of goods and services.

6.4 Advertising through electronic means

Tender notices are posted on an electronic bulletin board in addition to being published as noted in the CBD. Some agencies, such as NASA, have Home Pages on the Internet and include tender notices at these websites. For example, the NASA Home Page has now been linked to the APEC Home Page.

In October 1993, President Clinton sent a memorandum to all Federal agencies directing them to streamline procurement through "electronic commerce". The central component of electronic commerce is EDI, computer-to-computer exchange of business data.

The use of EDI allows organizations to generate, receive and process data with minimum human intervention. EDI networks will be able to automatically update inventories, invoice customers, pay suppliers, advertise federal government requirements and many other tasks that are now time, labor, and paper intensive. It is estimated that the new electronic purchasing could cut federal procurement costs by 10 percent by 1997 and speed delivery times by a third.

In order to implement EDI, FASA calls for the establishment of a government-wide Federal Acquisition Network (FACNET) within five years. This network will open up the acquisition process to any business with a personal computer. Agencies have been given an incentive to implement the new system quickly because they may not use the new simplified acquisition procedures for contracts greater than \$50,000 until they have developed "interim FACNET capability." This means that, at a minimum, they must be able to provide widespread public notice of solicitations and receive responses to those solicitations and related requests for information.

After December 31, 1999, agencies may not use the simplified acquisition procedures for contracts greater than \$50,000 until they have implemented a "full FACNET capability." This means that an agency must be able to conduct 75% or more of its acquisitions above \$2,500 and below \$100,000 through EDI. Once there is full government-wide use of electronic commerce, the requirement to publish contract notices in the CBD will be waived for all contracts below \$250,000 that are conducted using electronic commerce. [Superseded by FedBizOpps: <http://www.eps.gov/spg/>]

6.5 Charges for obtaining tender documents

Solicitations are provided free of charge to anyone who is interested in making an offer. A subscription to the CBD or account on an electronic bulletin board, however, is not free.

7.1 Registration, residence, or other requirements

Generally, the United States does not have registration, residence or other requirements for potential suppliers. However, on a particular procurement, the government might require the contractor to be within a limited distance of the site of contract performance. This requirement would be in the solicitation and applicable to all bidders and would only relate to a legitimate need of the contracting entity to have the contractor in close proximity. Additionally, for sensitive procurements, a contractor may have to have appropriate security clearances, which may be obtainable by foreign suppliers.

7.2 Conditions for participation

Offerers must be determined to be "responsible" by the contracting officer. This entails a review of the contractor's financial, technical and managerial capabilities in order to predict the probability of whether the contractor will be able to perform the terms of the contract.

7.3 Lists of approved suppliers

The United States responds that generally federal entities do not use source lists for qualified suppliers. However, in exceptional cases an entity can establish a source list provided that the extenuating circumstances are duly justified in writing by the head of the entity. Potential foreign suppliers from designated countries under the terms of the WTO GPA may be included in source lists. Additionally, the law contemplates the possibility of qualified bidders lists (QBL's), qualified manufacturers lists (QML's) and qualified products lists (QPL's). Entities must specifically justify and

document the need for establishing such lists and all interested suppliers must be provided an opportunity to be included in such lists.

7.4 Prequalification of suppliers

Part 9 of the FAR provides for the possibility of qualified bidders lists (QBLs), qualified manufacturers lists (QMLs) and qualified products lists (QPLs). Entities must specifically justify and document the need for establishing such lists and all interested suppliers must be provided an opportunity to be included in such lists.

8.1 What criteria are considered in award of tenders? Are criteria made available in advance to potential suppliers?

Criteria for award, known as evaluation factors, are found in section "m" of the solicitation, as published in the CBD

8.2 Is procurement subject to any offset provisions, such as local content, technology transfer or other trade-related requirements? If so, please describe the requirements, including the procurements to which they are applied.

Federal executive agencies do not apply offsets, but there are certain Buy American requirements, set asides and other restrictions.

8.3 Preferences to particular enterprises or groups

The United States provides a preference under the Buy American Act to domestic products. However, products of countries that are signatories to the WTO, NAFTA and the U.S. Israel FTA are exempt from the Buy American Preference in accordance with the Trade Agreements Act. The TAA requires that procurement of products from countries that are not signatories to the WTO GPA and have not taken on equivalent reciprocal obligations be prohibited from Federal goods contract that are covered by the GPA. Amendments to TAA contained in the Uruguay Round Agreements Act (URAA) of 1994 permit the President to waive the purchasing prohibition and apply Buy American Preference to countries that are not signatories of the GPA but agree to apply equivalent competitive procurement procedures and effective anti-corruption measures. Finally, The Small Business Act requires that awards of any size shall 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

8.4 Different criteria according to sector or regions of the economy

Generally, criteria do not differ according to sector or region of the economy. However, where there is a labor surplus area set-aside, geographical location is designated.

8.5 Margin of discretion allowed to the purchasing authority

Contracts are always awarded on the basis of specified criteria in the solicitation. These criteria may be weighted for purposes of making the best overall value awards. Preferences under the "Buy American Act" Negotiated procedures are generally only used to select a supplier from the competitive range.

9.1 Reception, registration, opening and disclosure of tenders

The responses to sealed bids are opened publicly. However, in negotiated procurements, the prices are kept under wraps until an award is made. The reason for doing this relates to the proprietary nature of the pricing information. In addition, the knowledge of the prices could lead to a situation in

which the incumbent contractor has an unfair advantage over its competitors. This would impact on the integrity of the procurement system. Accordingly, the only time when prices are disclosed is in a sealed bid situation.

9.2 Obligation to publish and/or communicate awarded contracts

The contracting officer shall award a contract with reasonable promptness to the successful bidder by transmitting written or electronic notice of the award to that bidder. Within three days after the date of the contract award, the contracting officer shall notify, in writing or electronically, each bidder whose proposal is determined to be unacceptable or whose offer is not selected for award. Additionally, a post-award notice must be published in the CBD.

9.3 Provision of pertinent reasons for rejection

When a contract is awarded on the basis of competitive proposals, an offerer, upon its written request received by the agency within three days after the date on which that offerer has received notice of contract award, shall be debriefed and furnished the basis for the selection decision and contract award. When practicable, debriefing requests received more than three days after the offerer receives notice of contract award shall be accommodated. However, accommodating such untimely debriefing requests does not extend the time within which suspension of performance can be required, as this accommodation is not a "required debriefing" as described in FAR Part 33. To the maximum extent practicable, the debriefing should occur within five days after the receipt of the written request. Debriefings of successful and unsuccessful offerers may be done orally, in writing, by electronic means, or any other method acceptable to the contracting officer.

At a minimum, the debriefing information shall include: (1) the entity's evaluation of the significant weaknesses or deficiencies in the offerer's proposal, if applicable; (2) the overall evaluated cost or price and technical rating, if applicable, of the successful offerer and the debriefed offerer; (3) the overall ranking of all offerers when any ranking was developed by the agency during the source selection; (4) a summary of the rationale for award; (5) for acquisitions of commercial end items, the make and model of the item to be delivered by the successful offerer; and (6) reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed. The debriefing shall not include point-by-point comparisons of the debriefed offerer's proposal with those of other offerers.

10.1 Definition of domestic in relation to domestic goods, services, public works and suppliers

A product is domestic when more than 50% of the content is manufactured in the United States and the product itself is manufactured in the United States (Buy American Act). With respect to construction services the definition includes an examination of ownership, nationality of directors and place of incorporation

10.2 National treatment

Local content requirements: In general, the Buy American Act of 1933 requires that domestic end products be acquired for public use. Executive Order 10,582, December 17, 1954 (as amended) implements the statutory preference by stating that an offered price of a domestic product is unreasonable and that an award can be made for a foreign product if the price exceeds the price of a foreign product by 6%. Moreover, the Executive Order authorizes a federal agency to use any factor to determine that the offered price of a domestic product is excessive. For example, a factor of 12% is used by many civilian agencies to determine whether a price offered by a small business firm is unreasonable. Generally, federal agencies other than DOD use the six or 12% evaluation factor to determine if the offered price of a domestic product is unreasonable. DOD uses a 50% factor.

Procurement subject to U.S. international obligations is exempt from Buy American Act preferences by Presidential action authorized under the Trade Agreements Act (TAA) of 1979. Authority under the TAA has been used to implement obligations under the WTO GPA, NAFTA, the U.S.-Israel Free Trade Agreement and the WTO Agreement on Civil Aircraft. Additionally, the Buy American Act does

not apply to procurement of services or procurement by state and local governments, although many of these sub-federal jurisdictions apply their own preferential procurement policies.

In addition to the Buy American Act, appropriations and authorization legislation, particularly for DOD, may require procurement from domestic sources, as discussed under question 3(b) above.

Preferences for small and medium size enterprises: There is no preference for medium size companies. The Small Business Act requires that awards of any size shall 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. This is the so-called "Rule of Two" for application of set-asides.

Purchasing prohibition: The TAA requires that procurement of products from countries that are not signatories to the WTO GPA and have not taken on equivalent reciprocal obligations (e.g., under NAFTA Chapter 10) be prohibited for federal goods contracts that are covered by the GPA. This provision is intended to provide incentive to WTO members to join the GPA. The prohibition affects approximately \$20-\$30 billion in procurement opportunities annually. Amendments to the TAA contained in the Uruguay Round Agreements Act (URAA) of 1994 permit the President to waive the purchasing prohibition and apply Buy American preferences in its place for countries that are not signatories to the GPA but agree to apply equivalent competitive procurement procedures and effective anti-corruption measures. This authority has yet to be exercised.

10.3 Most favored nation

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11. Procedures for hearing and reviewing complaints/appeals

There are procedures available for potential suppliers, domestic and foreign, to lodge complaints during any step of the procurement process. These apply to all U.S. Federal executive entities. An interested party can protest: (a) a solicitation or other request by an agency for offers for a contract for the procurement of property or services; (b) the cancellation of the solicitation or other request; (c) an award or proposed award of a contract; (d) a termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

The interested party can file protest with the General Accounting Office (GAO). The GAO issues its recommendation on the protest within 125 days from date of filing of the protest with GAO, or within 65 days under an accelerated review procedure. The GAO can suspend the procurement process while it reviews a case to ensure that all suppliers' interests are not prejudiced.

For controversial issues that arise under a contract, the contractor and the Federal government entity are encouraged to resolve the issues through mutual agreement – alternative dispute resolution. A

contractor also has the option of filing a claim with the contracting officer and filing an appeal with the Agency Board of Contract Appeals or a suit in the Federal Court of Claims.