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## Transparency in government procurement

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**WORKING PAPER NO. 129**

**TRANSPARENCY IN GOVERNMENT PROCUREMENT**

**ANWARUL HODA  
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April, 2004



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## Foreword

Transparency in Government Procurement is one of the four ‘Singapore’ issues, which were included in the agenda of the Doha Round of multilateral trade negotiations, which was launched in 2001. At the 5<sup>th</sup> Ministerial Session held at Cancun, September 2003, it became clear, however, that many WTO members were yet not reconciled to the expansion of the scope of WTO to cover any of the Singapore issues. The future of this subject as an item on the agenda of the Doha Round is now uncertain.

This study has been undertaken with a view to investigating the implications for India of a possible agreement on Transparency in Government Procurement in the WTO, having regard to the procurement laws, policies and practices in the country. The study examines from the India’s perspective the specific elements of a possible agreement taking into account the proposals that have been made in the course of more than six years of deliberations in the relevant Working Group. By way of background it provides an analysis of the provisions on government procurement in the General Agreement on Tariffs and Trade (GATT 1994) and General Agreement on Trade in Services (GATS). In order to help an understanding of the issues the study also provides an outline of the negotiation, evolution and operation of the plurilateral agreement on government procurement in the WTO.

The study finds that there are serious problems in respect of the relationship between trade and an agreement on transparency in government procurement, which does not have any provisions on market access. It suggests that India could nevertheless agree to participate in the negotiations in the area if it secures by way of *quid pro quo* appropriate concessions in the other major areas of negotiations in the Doha Round.

In conclusion, the study makes recommendations for India’s stand on specific elements in a possible future agreement on Transparency in Government Procurement.

The study should contribute to a deeper understanding of the issues involved in the WTO debate on the subject, among policy makers, researchers and members of the business community in India.

We are very grateful to the Sir Ratan Tata Trust for funding our research on WTO issues.

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April 2004

# **Transparency in Government Procurement**

## **I Introduction**

While in their purchase operations, as in all other activities, governments endeavour to maximise the use of scarce financial resources, the 'cost minimizing objective underlying competitive bidding requirements is frequently offset to a greater or less degree by other objectives' (Hoekman 1997). Some of these objectives are to promote the development of domestic industry or to assist particular types of enterprises, such as those in cottage and small-scale, co-operative and public sectors. In order to enable greater freedom to pursue these objectives government procurement (purchase of goods for use in government) was excluded from the application of the key provisions of MFN and national treatment in GATT 1947. As a result government procurement remained excluded from the mainstream of liberalisation in successive rounds of multilateral trade negotiations during the first three decades of the existence of GATT 1947. It was not until the Tokyo Round (1973-79) that a beginning was made in applying these fundamental principles to this area. However from the outset the Agreement on Government Procurement has remained only a plurilateral agreement, with a limited membership. During the Uruguay Round some attempts were made to encourage developing countries to accede to the Agreement. The EC made a proposal in July 1989 on 'Guidelines for a Transitional Mechanism' whereby developing countries could phase in their obligations under the Agreement, starting only with transparency requirements. The idea was that, to start with, developing countries would publish tender notices and post-award information in respect of central government, regional and local entities, and move on to the accession negotiations only after they had been able to evaluate the costs and benefits of the Agreement. The proposal was not pursued as it did not elicit much support from Uruguay Round participants. India also took an initiative to facilitate accession by developing countries by procedural improvements so that these countries were not frustrated in their efforts to accede by the burdensome demands of the developed country Parties. At Marrakesh in 1994 one of the instruments adopted by the Ministers was the 'Decision on Accession to the Agreement on Government Procurement', which invited the Committee on Government Procurement to lay down the

procedure for accession by WTO Members. However, the plurilateral agreement failed to attract any new developing country Member after the Round, the Ministerial Decision notwithstanding.

During the First Ministerial Session of the WTO at Singapore in December 1996 the United States proposed that negotiations should be undertaken to develop multilateral disciplines to bring about greater transparency in government procurement operations of WTO members. The issue was clubbed with other new areas, viz., trade and investment, trade and competition policy and trade facilitation proposed for negotiations by the EC and Japan, and the four are referred to as the Singapore issues.

Ever since the proposals were made in 1996 the Singapore issues have been ringed with controversy in the WTO. At Singapore there could be no agreement on commencing actual negotiations in any of the four areas, but the Ministers did agree on studies being undertaken in all of them. As on other issues, a working group was established on transparency in government procurement with the mandate of conducting “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” [WT/MIN (96)/DEC]. The language of the Ministerial Declaration in respect of transparency in government procurement was more advanced than in other areas as it already envisaged “an appropriate agreement” even though no negotiations had been agreed. In the case of investment and competition the ministerial document specially mentioned the understanding that “the work undertaken shall not prejudice whether negotiations will be initiated in the future”. In subsequent discussions in the WTO this difference in the mandate in respect of the four Singapore issues did not prove to be material, and until the Fifth Ministerial Session held at Cancun in 2003, all four were put in one bundle of issues and either opposed or supported by individual members as a whole.

Considerable work was done in the Working Group between 1996 and 2001. Members discussed proposals on the definition and scope of government procurement,

procurement methods, transparency, special and differential treatment and dispute settlement. On transparency detailed proposals were made on publication of information on national legislation and procedures, information on procurement opportunities, tendering and qualification procedures, transparency of decisions on qualification, transparency of decisions on contract awards, domestic review procedures, maintenance of record of proceedings and information to be provided to other governments. Some of the elements proposed for a possible transparency agreement clearly went beyond the requirements of transparency *per se* and there could be no agreement on the full implications of the term ‘transparency’. More importantly, members remained deeply divided on the need for negotiations in each of the four Singapore issues until the Ministers met for their Fourth Ministerial Session at Doha to consider the launching of a comprehensive round of multilateral trade negotiations. Even at that Session there was considerable debate and the meeting had to be extended by a day before agreement could be finally reached. And the decision was somewhat ambivalent. While Ministers agreed in principle to negotiations in these areas, they postponed the actual commencement of negotiations until a decision had been taken (by explicit consensus) on the “modalities of negotiations”.

On transparency in government procurement paragraph 26 of the ministerial document provided as follows:

“Recognising the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participants’ development priorities, especially those of least-developed country participants. 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.



We commit ourselves to ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion” [WT/MIN (01)/DEC//1].

During the discussions that followed in the Working Group members continued to be divided on the need and nature of an agreement in this area, as in other Singapore issues. It became clear that although at Doha there was agreement in principle on the need for a multilateral agreement in these areas, the reluctant members could block consensus on modalities and thereby obstruct commencement of negotiations. At Cancun, India, which was one of the strongest opponents of negotiations on Singapore issues, was reported to have been ready to move forward on transparency in government procurement (and trade facilitation). Some members, traditionally opposed to these issues, such as Malaysia, were willing to go along only in respect of trade facilitation, not transparency in government procurement. Towards the end of the Ministerial Session, the EC seemed willing to drop its insistence on negotiations to be undertaken within the ‘single undertaking’ on two of the areas that were subject to the greatest resistance viz., investment and competition policy and was asking for agreement only in respect of transparency in government procurement and trade facilitation. However, the African, Caribbean and Pacific (ACP) country members and the least-developed countries (LDCs) did not join the consensus. Consequently no decision could be taken at the Fifth Ministerial Session for commencing negotiations in any of the four Singapore issues.

The Chairman of the Conference, Minister Derbez of Mexico, had proposed a Revised Draft Ministerial Text [JOB(03)/150/Rev.2), which was neither adopted nor considered. This Draft had several annexes and Annex D was on Transparency in Government Procurement. In Annex D the Chairman had tried to reflect the state of play in the work carried out in the Working Group in very cautious terms, indicating only a few broad areas of convergence. A group of developing countries including India, Malaysia and Egypt had circulated another draft of an attachment to the Ministerial Declaration on Singapore issues in WTG/GC/W/514 dated 28 August 2003, which was reissued as WT/MIN/(03)/W/4, alleging that the Annexes to the draft Revised Ministerial

Text relating to these issues gave the views of the proponents only. Their text on government procurement listed almost every issue in the area as unsettled.

The assessment immediately after the collapse of the Cancun meeting was that the chances of substantive negotiations in the areas of investment and competition policy commencing in the near future had been pushed back indefinitely, if not dealt a mortal blow. Negotiations on transparency in government procurement and trade facilitation, however, could yet be revived. One of the major players, the EC, remains committed to negotiations in both these areas, but the US has indicated willingness to drop at least transparency in government procurement from the agenda of the Round.

This study has been undertaken with a view to investigating the implication for India of a possible agreement on transparency in government procurement in the WTO, having regard to the procurement laws, policies and practices in the country. We also examine from India's perspective the specific elements of a possible agreement taking into account the proposals that have been made in the course of more than six years of deliberations in the Working Group. As India's situation is little different from that of many other developing country Members the study would be of interest to them as well. By way of background information, we provide an analysis of government procurement in GATT 1994 and GATS. In order to help in the understanding of the issues involved we also provide an outline of the negotiation, evolution and operation of the plurilateral Agreement on Government Procurement.

Section II of the paper examines the provisions of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and those of GATS that have a bearing on government procurement. Section III deals with the origin, evolution and functioning of the Agreement on Government Procurement. Section IV describes the policies and practices on government procurement prevailing in India. Section V presents an analysis of the various issues that have arisen in the discussions on transparency in the Working Group. Section VI makes recommendations on the possible approaches that India could

adopt in any future negotiations on the subject. And finally Section VII contains a summary of the findings, conclusions, and recommendations.

## **II Government Procurement in GATT 1994 and GATS**

### ***II.1 GATT 1994***

Government procurement is mentioned at two places in GATT 1994, in Article III (National Treatment on Internal Taxation and Regulation) and Article XVII (State Trading Enterprises).

Paragraph 2 of Article III requires non-discriminatory treatment of imported and domestically produced products with respect to internal taxes and charges and the manner of application of such taxes and charges. With respect to laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use Paragraph 4 of Article III stipulates that imported products must be accorded treatment that is no less favourable than that accorded to like products of national origin. <sup>1</sup>Paragraph 8 (a) of Article III, however, exempts from the application of the Article “all laws, regulations or requirements governing the procurement by government agencies of products purchase for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial resale”. This exemption enables the WTO members to accord preferential treatment to domestic suppliers in purchases of goods for consumption in government, consistent with their obligations under GATT 1994.

On state trading enterprises, Article XVII.1 (a) lays down the general obligation that where a member establishes or maintains such an enterprise, or grants exclusive or special privileges to any enterprise, such enterprises must “act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this

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<sup>1</sup> In Korea Beef the Panel (WT/DS161/R) said that like products can be treated differently as long as the treatment of imported products is not less favourable. The Appellate Body also held in EC Asbestos (WT/DS135/AB/R) that a government can treat like products differently as long as it is not less favourable.

Agreement”. The Korea Beef panel held that the “general principle of non-discrimination includes at least the provisions of Articles I and III of GATT” (WT/DS161/R). In other words the state trading route cannot be used to circumvent the obligations on non-discrimination. Again, however, it is provided that the obligation does not apply to “imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale”<sup>2</sup>. With respect to such imports a lower level of obligation applies, that each member accord “fair and equitable treatment” to the trade of other members.

While the legal situation on government procurement is clear in respect of the general obligations of Articles III and XVII, it is less so as far as the MFN clause contained in Article I of GATT 1994 is concerned. Article I requires any advantage, favour, privilege or immunity granted by a member to any product of any other country to be accorded “immediately and unconditionally” to the like product of other members. This article expressly covers duties and charges, the method of levying such duties and charges and all formalities in connection with importation or exportation. By means of cross-reference to paragraphs 2 and 4 of Article III it also covers internal taxes and charges and laws, regulations and requirements affecting their internal sale, purchase, transportation, distribution, or use. Thus the language of Article I seems to cover government procurement.

The negotiating history of GATT (1947) shows that the representatives who participated in the Preparatory Works believed that they had excluded government procurement from the application of the provisions on national as well as most-favoured-nation treatment (Blank & Marceau 1996). The provision on national treatment explicitly referred to such exclusion. Their understanding was that government procurement had been excluded from the purview of the most-favoured-nation clause as well, by virtue of

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<sup>2</sup> An addendum to paragraph 2 of Article XVII, which contains this provision, clarifies that the term “goods” is limited to products and does not include the purchase and sale of services. The language of the addendum seems to imply that when the products are used for the production of services (as opposed to goods) that are for sale the exemption would still apply. But the negotiating history of the provision suggests that the objective of representatives at that time was to underscore that the whole agreement covered only goods and not services.

the fact that it was subject to the lower level obligation of “fair and equitable” treatment in the relevant provision on state trading enterprises. This understanding was legally flawed, as Article I of GATT 1994 does not explicitly exclude government procurement from the scope of most-favoured-nation treatment, as Article III does. Article XVII no doubt imposes a softer obligation in respect of “imports of products for immediate or ultimate consumption in government use and not otherwise for resale or use in the production of goods for sale”. But Article XVII applies only to the operations of state trading enterprises, and government purchases made otherwise than through such enterprises are not covered by it. The legally correct way of excluding government procurement from the scope of the most-favoured-nation clause would have been to incorporate in it a clause such as was added to the provision on national treatment.

In the Tokyo Round the Government Procurement Code was negotiated and in 1981 it entered into force for a small number of GATT contracting parties. In 1995 a new Government Procurement Agreement was drawn up as one of the four plurilateral agreements within the overall framework of the WTO Agreement. Thus successive plurilateral agreements on government procurement have been in existence for more than two decades among a subset of GATT contracting parties or WTO members. Despite the lacuna in the language of GATT 1994 in regard to the exclusion of government procurement from the application of the most-favoured-nation clause, there has never been a challenge from non-signatories on the consistency of these agreements with the most-favoured-nation clause. This has been so notwithstanding the fact that the signatories have indeed been applying the agreement on a conditional most-favoured-nation basis. The WTO members, like the GATT contracting parties before them, seem to have treated government procurement for a long period as being not covered by the most-favoured-nation clause. The shortcoming in the letter of the law in this regard, noted earlier has been ignored.

Government procurement has been excluded in clear legal terms from the scope only of the national treatment obligation, but in practice it has not been subject to the most-favoured-nation clause as well. But what is the extent to which other provisions of

GATT 1994 apply? We have seen that the obligation of “fair and equitable treatment” applies to the state trading enterprises in regard to the procurement operations undertaken by them, except when the goods are resold or used in the production of goods for sale. Article X (Publication and Administration of Trade Regulations) requires WTO members to publish promptly laws, regulations, judicial decisions and administrative rulings of general application, “pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or their use”. Government procurement regulations surely affect the sale of products and are clearly covered by the transparency obligation of Article X.

## ***II.2 GATS***

The General Agreement on Trade in Services (GATS) was one of the three substantive multilateral agreements that constituted the WTO Agreement. The architecture of the agreement provided for certain obligations (such as Article II on unconditional most-favoured-nation treatment and Article III on transparency) to be applied across the board to the entire universe of services. However, specific commitments on market access (Article XVI) and national treatment (Article XVII) apply only to the service sub-sectors that were scheduled i.e. listed by each member in the national schedule, which formed an integral part of the Agreement. Specific commitments have been made separately for the four modes of supply envisaged in the GATS, viz., cross- border supply, consumption abroad, commercial presence and movement of natural persons. They are subject to the qualifications and limitations that are described in the national schedules, and apply either horizontally to any mode of supply or specifically to any sub-sector within a mode of supply. The GATS also allowed time-limited derogation from the most-favoured-nation principle and the extent to which members have availed of this flexibility has been reflected in the national schedules.

As in the case of goods, at the time of initial negotiation of the GATT, there was a general disposition among the countries participating in the Uruguay Round to exclude government procurement from the commitments of GATS. Paragraph 1 of Article XIII therefore provided for exclusion (a virtual “carve out” in terms of the language normally employed in the Uruguay Round) of government procurement, not only from the applicability of Article II (unconditional most-favoured-nation treatment), but also from the coverage of specific commitments under Articles XVI (market access) and XVII (national treatment). Government procurement was defined in virtually the same way as in GATT 1994 viz. ‘the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale’. Exclusion from Article II rendered the conditional most-favoured-nation treatment implicit in the Government Procurement Agreement consistent with the GATS. Exclusion from Articles XVI and XVII implied that government procurement of services remained outside the scope of commitments made by members for liberalisation of services. It must be underscored, however, that the intention of the negotiators at that time seems to have been that the exclusion of government procurement from the basic commitments in the GATS would be temporary. Paragraph 2 of Article XIII provided that there must be negotiations on government procurement in services within two years from the date of entry of force of the WTO Agreement. The Working Party on GATS Rules has the mandate to carry out the negotiations according to this mandate, although these have not gone very far. (One of the reasons given by some Members for not moving forward in Article XIII:2 negotiations is the possible duplication with the work of the Working Group on Transparency in Government Procurement).

But does the temporary “carve-out” affect the applicability to government procurement of the transparency provision of GATS. Article III of GATS requires members to “publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement”. It has been argued that this provision could be interpreted to require governments to publish laws, regulations and all other measures

of general application, which concern procurement (Low et al. 1997). However, until such times as government procurement remains excluded from the application of key commitments under the GATS, and negotiations are not concluded under paragraph 2 of Article XIII, it would be equally arguable that the measures pertaining to government procurement cannot be said to affect the working of the GATS and are therefore not covered by its Article III.

### **III GATT and WTO Agreements on Government Procurement**

International efforts to develop disciplines to govern government procurement procedures have been undertaken by the United Nations, the World Bank and in the context of negotiations for regional trading arrangements. The UNCITRAL Model Law on Procurement of Goods, Construction and Services was developed by the United Nations Commission on International Trade Law (the UNCITRAL) to provide a model for the modernisation of their procurement laws and practices. The World Bank has also developed the Guidelines for Procurement under IBRD Loans and IDA Credits and the Guidelines for Selection and Employment of Consultants by the World Bank Borrowers, which is to be used for carrying out projects financed from a loan from the International Bank for Reconstruction and Development (IBRD) or a credit from the International Development Association (IDA). In the Asia Pacific Economic Community (APEC) the Government Procurement Experts Group has developed Non-Binding Principles on Government Procurement. Similar efforts are ongoing in the context of the negotiations on the Free Trade Area of the Americas (FTAA). However, the only international instrument that can be characterised as an enforceable agreement is the Government Procurement Agreement developed first under the auspices of GATT 1947 and renegotiated within the framework of the WTO. We take up these agreements in greater detail below.

#### ***III.1 Tokyo Round Agreement (GPA 1981)***

As we have noted earlier, government procurement activities of the contracting parties to GATT 1947 remained insulated from liberalisation efforts in the first six rounds



of multilateral trade negotiations. The Ministerial Declaration that launched the Tokyo Round envisaged that apart from the reduction or elimination of tariffs the negotiations would also aim to “reduce or eliminate non-tariff measures or, where this is not appropriate, to reduce or eliminate their trade restricting or distorting effects, and to bring such measures under effective international discipline” (GATT BISD, 20S). Under this mandate a Sub-Committee on Government Procurement was established in July 1976 to provide a forum for negotiations in the area. The next important step was the receipt in GATT in December 1976 of the result of expert level work that had been going on in the OECD for 15 years. The OECD draft formed the basis of the “Draft Integrated Text for Negotiations on Government Procurement” circulated in December 1977 by the GATT Secretariat to assist in the negotiations (Blank and Marceau 1996). The negotiations that followed resulted in an agreed text by the spring of 1979, and the Agreement on Government Procurement was one of the non-tariff measure agreements resulting from the Tokyo Round. None of these agreements was accepted by a large majority of developing countries that were contracting parties to GATT, but the Agreement on Government Procurement had the least number of signatories. Although India, Korea, Jamaica and Nigeria had participated actively in the negotiations they did not become Parties eventually. Of the developing countries only Hong Kong and Singapore joined. In India’s case the list of entities offered was not acceptable to the principal developed countries, which wanted India to add to the list of entities the Director General of Supplies and Disposal (DGS&D), which was the principal procurement agency of the Central Government in those times. In India the assessment at that time was that joining the Agreement would not secure much benefit by way of additional market access opportunities. Government was, therefore, not willing to consider going beyond such entities as the Oil and Natural Gas Commission (ONGC) and Doordarshan, which were included in the original offer.

After its entry into force on January 1, 1981, the Tokyo Round Agreement on Government Procurement (GPA 1981) went through the process of revision twice, during 1983-86 and again in 1988-96 before it was replaced by the Uruguay Round Agreement on Government Procurement. As we shall later analyse in detail the provisions of the

Uruguay Round Agreement, here we describe only the salient features of the Tokyo Round Agreement.

### *III.1.1 Scope and Coverage*

The GPA1981 did not contain a definition of government procurement but laid down three parameters, which defined its scope and coverage. First, its disciplines applied only to the entities listed by each Party and included in Annex I of the Agreement, and only central government agencies were included. The lists of entities had been drawn up in the course of negotiations in which each Party ensured that the trade opportunity that was created for its suppliers in the markets of other Parties matched the opportunity provided by it to suppliers in other Parties. In other words Parties ensured that they received reciprocity in the negotiations on the list of entities. Second, it covered purchase of products only and services incidental to the supply of products were included if the value of such services did not exceed that of the products themselves. Third, there was a value threshold of SDR 150,000, and the Agreement did not apply to procurement contracts below the threshold.

### *III.1.2 Substantive Obligations*

The most important substantive commitment in GPA1981 was that the Parties agreed to extend both national and most-favoured-nation treatment to other Parties in respect of government procurement on an immediate and unconditional basis. The explicit exclusion of government procurement from the national treatment obligation, and its de facto exclusion from the most-favoured-nation clause, were negotiated away among the Parties in respect of the entities annexed to the Agreement.

### *III.1.3 Transparency provisions*

The GPA1981 contained a number of provisions aimed at securing transparency of government procurement operations of Parties. In line with the transparency provision in Article X of GATT 1947, any law, regulation, judicial decision, administrative ruling

of general application regarding government procurement was required to be published in a publication listed by each Party in an Annex to the Agreement. Equally important were the provisions on *ex ante* publication of invitations to bid or for qualification of suppliers and *ex post* announcement of decisions. These provisions were intended to ensure that there was no de facto discrimination against any foreign supplier in the procedures for procurement. The transparency requirements are thus inextricably linked with the provisions on tendering procedures.

#### *III.1.4 Tendering Procedures*

The GPA 1981 allowed Parties to use open, selective as well as single tendering procedures, provided the conditions stipulated for each were complied with. Elaborate provisions were included in the agreement to ensure fair dealing and maximum transparency while inviting bids by suppliers and in the awarding of contracts. The GPA 1981 discouraged but did not rule out use of conditions relating to offset procurement opportunities and licensing of technology. Where such conditions were used Parties were required not to favour suppliers from one Party over suppliers from other Parties.

#### *III.1.5 Other important provisions of the GPA 1981*

- (i) The GPA 1981, like other Tokyo Round non-tariff measure agreements also provided a mechanism for the resolution of disputes on the pattern of the central dispute settlement machinery of GATT 1947.
- (ii) The Agreement also provided for further negotiations to take place at the end of three years from its entry into force with a view to broadening and improving it on the basis of mutual reciprocity. It was envisaged that during such negotiations the possibility of expanding the coverage to include service contracts would also be explored.
- (iii) Although few developing countries became parties to the Agreement, it contained elaborate provisions on special and differential treatment of developing countries.

First, developed countries, while preparing the list of entities to be covered by the Agreement, were expected to try to include entities purchasing products of export interest to developing countries. The developed country Parties were also required to establish information centres to respond to reasonable requests from developing country Parties for information relating to government procurement. Other provisions were aimed at lightening the burden on developing countries in including the entities to be covered by the Agreement. In the negotiations account had to be taken of the development, financial and trade needs of the developing countries, and in particular their balance-of-payments position, their need to promote the establishment of domestic industries and their need to support industrial units substantially dependent on government procurement. Developing countries were also allowed to negotiate exclusions from the rule on national treatment with respect to certain entities and products that were included in their list of entities. It would be noted that the provision on exclusions only provided for the possibility for the developing countries to seek exclusions during negotiations or thereafter: there was no assurance that such exclusions would in fact be permitted. Inherent in the provision was the discretion of the developed country Parties to refuse the request for exclusions or even the offer of entities if they felt that the offer of individual developing country concerned was not adequate. Were the seemingly extensive provisions on S&D treatment in GPA 1981 an empty shell?

### ***III.2 Negotiations under the GPA 1981***

As mentioned above, the GPA 1981 provided for negotiations for “broadening” and “improving” the Agreement and “expanding” its coverage. During the negotiations, which began in November 1983, these terms assumed specific connotation. “Broadening” meant enlargement of the country list of entities; “expansion” referred to the inclusion of service contracts; and “improvement” signified changes in the text (Blank and Marceau 1996). While the Parties attached equal importance to the three aspects, in the first phase ending in November 1986 agreement could be reached only on improvements in the text, which later took the form of a Protocol of Amendments (GPR/M/24 reproduced in

BISD/33S). None of the changes were of major significance, specially when assessed in the context of what was going to be agreed in subsequent negotiations leading up to the WTO Agreement on Government Procurement. Mention needs to be made only of the changes in coverage and redefinition of the basic obligations. The original GPA 1981 covered only procurement of products together with services essential to the supply of products. The amendment brought within the purview of the Agreement lease, rental or hire purchase as well. The value threshold was lowered from SDR 150,000 to SDR 130,000. The provision on non-discrimination was elaborated to provide that the entities did not discriminate against locally established suppliers on the basis of degree of foreign affiliation or ownership or on the basis of the origin of the good being supplied. The revised Agreement entered into force on 14 February 1988.

Simultaneously with the adoption of the agreed improvements Parties to the GPA 1981 decided to continue work on increasing the coverage of the Agreement, inclusion of service contracts and further improving the text. Negotiations proceeded in parallel with the Uruguay Round, and although unconnected with it, were affected by the vicissitudes of the Round. These negotiations resulted in a vastly increased coverage of the Agreement including entities at sub-Federal level and service contracts. The text of the Agreement was also thoroughly revised and the new Agreement on Government Procurement was approved on April 15, 1994 at Marrakesh as one of the four plurilateral agreements within the framework of the WTO Agreement. The Agreement entered into force on January 1, 1996, one year after the WTO Agreement. A feature of the Agreement was that a number of Parties took recourse to sectoral non-application against other Parties in cases where they felt that they had not received reciprocal benefits in the listing of entities. Originally the expectation was that these reservations would be temporary, pending further negotiations after April 15, 1994, when the Agreement was adopted and January 1, 1996, when it was to enter into force. However, a large number of them have been continued even after the entry into force of the new Agreement. They are listed in the General Notes and Derogations appended to the Annexes. We deal with these in greater detail below while examining the provisions of GPA 1996.

### ***III.3 WTO Agreement on Government Procurement 1996 (GPA 1996)***

The basic substantive obligations of the Agreement remained the same as in GPA1981 i.e. immediate and unconditional most favoured nation and national treatment of products and suppliers of the Parties. The architecture of the Agreement also was unchanged in as much as the obligations applied to only the entities listed in the Appendix. Any of the three tendering procedures (open, selective or limited) can be used provided the prescribed rules are followed. Special and differential treatment of developing countries has been retained in the form in which it existed in GPA 1981. However, the coverage has been expanded to services and the lists of entities enlarged manifold. Several improvements have been made in the text to ensure greater transparency and fair dealing, the most important of them being the requirement for introducing domestic procedures for challenging procurement decisions alleged to be in breach of the Agreement. We consider below some of the key aspects of the Agreement.

#### ***III.3.1 Scope and coverage***

As noted above the biggest change in the Agreement was inclusion of services and manifold enlargement of the lists of entities by the Parties. GPA 1981 covered only central government entities listed in its Annex I. Appendix I of GPA 1996 contains the lists of central government entities in Annex 1, of sub-federal entities in Annex 2 and of other entities such as government enterprises and utilities in Annex 3. In respect of goods generally all products are covered, unless restrictions have been imposed in respect of a certain class of goods e.g. implements of war in the case of the Ministry/Department of Defence. However, in respect of services only those categories are covered that are listed in Annexes 4 and 5. Annex 5 lists out the construction services and Annex 4 lists services other than construction.

The Annexes specify the thresholds agreed by the Parties. The threshold for goods and services other than construction services in respect of central government entities (Annex 1) has been retained at the pre-existing level of SDR 130,000. In respect of sub-central entities (Annex 2) the corresponding threshold is SDRs 200,000 for all Parties

except Canada and USA, which have put a higher figure of SDRs 355,000. In respect of other entities (Annex 3) this threshold is 400,000 for most Parties, 355,000 for Canada and Israel and 130,000 for Japan. USA has specified 250,000 SDRs for some entities and 400,000 for others.

For construction services the general threshold for central government, sub-central and other covered entities is 5 million SDRs, with variations by Israel, Japan and Korea. Israel has a common threshold of 8.5 million SDRs for all entities. Korea has a threshold of 5 million for central government entities and 15 million for others. Japan's threshold for construction services is 4.5 million for central government entities and 15 million for others. It has stipulated lower threshold for architectural services.

Article XXIV:6 of the Agreement provides for modifications and rectification to coverage and there is a significant level of activity under this provision. Article XXIV:7 provides inter alia for periodic negotiations to improve the Agreement and particularly to improve its coverage, the first one being undertaken not later than the end of the third year from the date of entry into force of the Agreement. Pursuant to this provision negotiations were promptly undertaken and were going on in 2004.

Some of the significant features of the Annex-wise commitments by different Parties (particularly the four major industrialised economies) are described below:

#### ***III.4 Annex I: Central or Federal Government Agencies***

Generally Parties have listed all the agencies of the Executive Branch of government including the Ministries and Departments. Japan has included even the two Houses of Legislature and the Supreme Court. The European Communities has listed not only the European Commission and the Council of the European Union but also the Ministries of the 15 member-states. Agencies, institutions, directorates, bureaus and other establishments functioning under the Ministries and Departments are also included. Canada, member states of the EC and the USA have generally listed these establishments while Japan has noted that the "internal subdivisions, independent organs, attached

organizations and other organizations and the local branch offices” are included. Korea states that the “subordinate linear organizations, special local administrative organs, and attached organs” of central government entities are also included.

While Parties have included the Ministry/Department of Defence, they have excluded hard core defence items such as arms, ammunition and implements of war, by means of a negative or positive list. Annex I entities are less affected than the entities in other Annexes by the general limitations and country specific derogations specified in the general and specific notes. However, there are a few product level exclusions. Of note is the exclusion by Canada, the EC and Korea of procurement of agricultural products for agricultural support programmes and human feeding programmes. Some Parties have made exclusions in favour of interest groups that they support as a matter of state policy, and these apply to Annex I entities as well. Canada and the USA have stated that the Agreement would not apply to set-asides for small and minority businesses. Japan has stipulated in Annex I that the Agreement does not apply to “contracts to be awarded to co-operatives or associations in accordance with laws and regulations existing at the time of entry into force of the Agreement for Japan”. Korea has a similar stipulation in Annex I in respect of set-asides for small and medium sized enterprises. The EC does not have a similar exclusion, but it has excluded the suppliers and service providers of Japan, Korea and the USA from the benefit of Challenge Procedures of Article XX of the Agreement for contesting the award of contracts to small or medium sized enterprises in the EC. The exclusion would remain valid “until such time as the EC accepts that they no longer operate discriminatory measures in favour of certain domestic small and minority businesses”. Examples of Party-specific derogations that impinge on the commitments made in Annex I are the exclusion by the EC from the benefits of the Agreement of Canada in respect of procurement of general purpose automatic data-processing, communication equipment and other items and of the USA in respect of air traffic control equipment.



### ***III.5 Annex 2: Sub-Central Government entities***

Among the major economies the EC has the most comprehensive list in Annex 2. All contracting authorities of the regional or local public authorities and bodies governed by public law are included. A body governed by public law means any body established for the specific purpose of meeting needs in general interest, not having an industrial or commercial character, which has legal personality and which is either financed substantially or controlled in other ways by the State or regional or local authorities. An indicative list of such bodies and categories of bodies is given in a published document of the EC. Examples of categories of bodies in the case of Germany are hospitals, public theatres, nursery schools, refuse and garbage disposal services and large-scale research institutes. Japan has also covered all 59 prefectural governments covered by local autonomy laws. Canada promised to give its Annex 2 list by 15 April 1994 but had not been able to do so until the date of writing (December 2003). The United States has listed selected entities in 37 of the 50 states. Korea has listed its cities but Hong Kong China and Singapore have stated that they do not have any sub-Central Governments.

Since Canada was unable to list its Annex 2 entities the EC made the commitments in Annex 2 inapplicable to that Party. As the list of the USA clearly did not cover all entities at the sub-Central Government level, the response of the EC was to extend the benefits of the Agreement to the USA only partially, covering suppliers but not service-providers. Japan has also excluded Canada from the benefit of the Agreement in respect of Annex 2 entities.

### ***III.6 Annex 3: Other Entities or Utilities***

Here too the EEC list is very comprehensive. Public authorities or public undertakings involved in the production, transport or distribution of drinking water or of electricity are included in the EEC's Annex 3. Also included are the contracting agencies connected with railways and airport and port facilities. Canada's list has a few entities but none are related to utilities, railways, airport and port facilities (apart from St. Lawrence Seaway Authority). The USA has listed a few power-related entities as well as some port

authorities with some exceptions. Tennessee Valley Authority is also included but entities concerned with airport facilities and drinking water are excluded. Japan has a fairly large list of entities in its Annex 3, including those that are related to water resources development, railways and highways and airport facilities, but excluding electricity and port facilities.

Sectoral non-application by Parties is prevalent in Annex 3 as much as in Annex 2. The EEC has excluded Canada from the benefits of the Agreement with respect to all the five categories of entities, Japan with respect to electricity and urban transport and the USA with respect to drinking water, airport facilities and urban transport. Japan too has excluded Canada from the benefit of the Agreement in respect of Annex 3 entities. Clearly the non-application is related to lack of reciprocity in the particular sector in most cases.

### ***III.7 Annexes 4 and 5: Services including Construction Services***

There is a commonality among the major economies with respect to Annex 5 in that they have included all the construction services covered by Division 51 of the Central Product Classification (CPC). However, Annex 4 lists of other services do not have a common pattern. Canada, the EC and the USA have drawn on the list prepared by GATT Secretariat in document MTN.GNS/W/120 while Japan has relied on the CPC. The US list is the most comprehensive, as it has a small negative list that includes all transportation services, dredging, public utilities services including telecommunications (except value-added services), research and development and printing services. The other major economies have all included value-added telecommunication services, computer-related services, architectural and engineering services, building cleaning services and sewage and refuse disposal services on the positive list. Accounting, auditing and book keeping services are included in the lists of Canada and the EC but not that of Japan. The EC has included some financial services (insurance services and banking and investment services) but the lists of Canada and Japan exclude these services.

### *III.7.1 Basic substantive obligations*

As mentioned earlier the basic substantive obligations of GPA 1996 are unconditional MFN Treatment and National Treatment. But the unconditional MFN treatment is implemented in a very different way from the practice in GATT 1994 or even in GATS. In GATT1994 the practice is that if during negotiations a member does not get adequate reciprocity from the principal supplier (or in some cases even substantial suppliers) then the concession is withdrawn from the Schedule of Concessions. The requirement in GATT 1994 that MFN treatment be unconditional bars the practice of requiring another member to grant a reciprocal concession as a condition for extension of MFN treatment in respect of a particular concession. Although GPA 1996 also has unconditional MFN treatment as a basic obligation, the practice is at variance with the principle as it has come to be understood in the context of GATT1994. Not only are there specific instances of sectoral non-application, but the extension of benefits is modulated in other ways also. We have seen that in some cases Article XX benefits relating to Challenge Procedures have been denied to other Parties. These practices are different from GATS as well, as when departures become necessary in that Agreement a particular sector was exempted from the MFN obligation altogether. There was no instance of sectoral non-application to other members being scheduled in specific commitments, as it has been done in GPA1996. *Thus the principle of unconditional MFN treatment in GPA1996 has a unique feature: it applies only where derogation has not been specifically stipulated. In GATT1994 derogations are barred altogether. In GATS derogations are possible only if MFN exemption has been scheduled.*

The other basic obligation of national treatment has been conceived of on traditional lines. Products, services and suppliers of other Parties offering products or services of the Parties have to be accorded no less favourable treatment than domestic products, services and suppliers. Furthermore discrimination of locally established suppliers is not permitted on the basis of degree of foreign affiliation or ownership or on the basis of the country of production of the good or service being supplied.

The national treatment obligation not only bars price preference but also rules out any practice or procedure placing foreign products, services and suppliers at a disadvantage. There is an over-riding requirement that the tendering procedures must be applied on a non-discriminatory manner and there are some specific rules that flow from this obligation. For instance, in the qualification of suppliers, the conditions for participation must be no less favourable to suppliers of other Parties than to domestic suppliers. The capacity of the supplier must be judged on the basis both of that supplier's global business activity, as well as of its activity in the territory of the procuring entity. In selective tendering there is the obligation that effective international competition must be ensured by including the maximum number of domestic suppliers as well as suppliers from other Parties. The prescribed time limits for submission of tenders must be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders. The delivery date must take into account the realistic time required inter alia for the transport of goods from the points of supply.

### *III.7.2 Technical Specifications*

Technical specifications laying down the characteristics of the product or services to be procured must not be such that they create unnecessary obstacles to international trade. In a provision that reproduces the language of the WTO Agreement on Technical Barriers to Trade, GPA1996 requires that technical specifications prescribed by the procuring entities must, where appropriate, be in terms of performance rather than design or descriptive characteristics and must be based on international standards where they exist. Where international standards do not exist they must be based on national technical regulations, recognised national standards or building codes. There must be no requirement or reference to a particular trademark, design or type or specific origin, producer or supplier. If such a requirement is absolutely necessary, the procurement entity must be ready to accept "equivalent" supplies also.

### *III.7.3 Tendering Procedures: Invitation to Participate*

The core of the GPA 1996 is devoted to procedures that must be followed in inviting and processing bids from suppliers of goods and services covered by it.

In all cases of intended procurement by open or selective procedures the invitation to participate must be published in an appropriate publication, which has been notified by Parties and is listed in Appendix II of the Agreement. Invitation to participate may be in the form of a notice of proposed procurement, a notice of planned procurement or a notice regarding a qualification system. In each case full information, as prescribed in the Agreement must be given in the notice. The tender document must include information on the address to which tenders or requests for supplementary information should be sent, the language of submission of the tender, the closing date and time for the receipt of tender, and the date and time of opening of the tender. It must also provide information on any economic and technical requirement, financial guarantees required as well as the technical specifications. Equally importantly it must contain the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders. Entities must also publish a summary notice in one of the official languages of the WTO. Parties have to inscribe in Appendix III the publication in which entities will publish annually full details of the permanent lists of qualified suppliers. If an amendment becomes necessary in the invitation to participate it must be given the same circulation as the original notice.

It would be relevant to mention here that although the GPA 1996 does not require the use of information technology, in actual practice a number of GPA Parties, such as the EC , the US, Canada, Singapore, Hong Kong, China, and Japan have taken advantage of the evolving technology for facilitating access to information on procurement opportunities, legislation, decisions etc.

Deadlines have been prescribed for submission of tenders to ensure that suppliers from other Parties get adequate time. The norm is not less than 40 days from the date of publication of the original notice to participate. An additional time of 25 days must be

allowed in the case of selective procedures not involving the use of a permanent list of qualified suppliers. The minimum time limits may be reduced to 25 and even 10 days in certain circumstances. Tender documentation provided to suppliers must contain all the information necessary to permit suppliers to submit responsive tenders. The Agreement lists these items of information.

In order to safeguard against possible discrimination the Agreement contains obligations on technical specifications to which we have already referred.

The Agreement permits recourse to limited tendering in certain situations e.g., in the absence of response to an open or selective tender, when the supplies can be made only by specific suppliers, for reasons of extreme urgency etc. In such cases the above procedures need not be followed.

#### *III.7.4 Tendering Procedures: Submission, Receipt and Opening of tenders and Awarding of Contracts*

Tenders must normally be submitted in writing directly or by mail. Opportunity must be given to tenderers to correct unintentional errors. Importantly, all tenders in response to open or selective procedures must be received and opened under procedures and conditions that guarantee the regularity of the openings. The award must be made to the tenderer who has been determined to be fully capable of undertaking the contract, and whose tender is either the lowest or the most advantageous in terms of the evaluation criteria. Negotiations are permitted if it has been indicated in the invitation to participate or if it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation. Undue advantage must not be given to any tenderer during negotiations, and when negotiations are concluded they must all be given a common deadline for submission of the final tenders.

### *III.7.5 Information and Review Provisions*

Entities are required to publish full information on the award of contract in a publication listed in Appendix II within 72 days of the award, including the name and address of winning tenderer, value of the winning award and type of procedure used. The suppliers of Parties have the right to seek an explanation of procurement practices and procedures and information concerning failure to qualify as a supplier or win a particular tender.

Parties are required to publish any law, regulation, judicial decision, administrative ruling of general application and any procedure regarding government procurement in an appropriate publication listed in Appendix IV of the Agreement. The governments have also to be ready to respond to requests from other Parties for information on the contract award that may be necessary to provide assurance that the decision on procurement was made fairly and impartially. In addition Parties are also required to submit on an annual basis detailed statistics on the award of contracts by the covered entities, broken down by entity and by categories of products and services.

### *III.7.6 Challenge Procedures and Dispute Settlement*

An innovation in GPA 1996 is the introduction of procedures enabling suppliers to challenge alleged breaches of the Agreement. Challenges must be heard by a court or by an impartial and independent review body “with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment”. A review body must either be a court or must follow quasi-judicial procedures. The procedures must provide for rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. There must be the possibility to suspend the procurement process or correct the breach or compensate for the loss or damages suffered.

The Agreement provides for recourse to the Dispute Settlement Understanding (DSU) of the WTO, with some additional rules and procedures contained in paragraphs 2 to 7 of Article XXII. As provided in Article 1.2 and Appendix 1 of the DSU the Committee on Government Procurement has adopted a decision on the application of the DSU with the additional and special rules contained in the afore-mentioned provisions. One important special rule is that there is no possibility of cross retaliation across other multilateral or plurilateral agreements in any dispute relating to GPA 1996.

### *III.7.7 Promoting transparency in countries not Parties to the Agreement*

GPA1996 contains a provision aimed at promoting transparency in countries that are not Parties to the Agreement. It envisages that if certain conditions are met by a country that is not a Party, they could not only be given observer status in the Committee on Government Procurement, but also access to procurement by entities of Parties on specified terms. Two of these conditions are that the country must comply with the requirements of the Agreement in respect of technical specifications and publish the procurement notices inviting participation as per the Agreement. In the summary notice it must indicate also the terms and conditions under which tenders would be entertained from suppliers situated in countries Parties to Agreement. In addition the country must be willing to ensure that the procurement regulations would not normally be changed during a procurement, and in case changes have to be made unavoidably the country must ensure the availability of a satisfactory means of redress.

## **IV Procurement Policies and Practices in India<sup>3</sup>**

India has a federal constitution, with the responsibility for governance divided between the central and state governments. The Union List, the State List, and the Concurrent List in the Indian Constitution govern the legislative functions of the central and state governments. The Parliament has exclusive powers to make laws on matters enumerated in the Central List, and the state legislatures on matters listed in the State List

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<sup>3</sup> The description of the procurement policies and practices given here is drawn largely from the Country Procurement Assessment Report (CPAR) of June 2001 drawn up by the World Bank.



with respect to its jurisdiction (Article 246). With regard to the Concurrent List also the state legislature may make laws provided that these laws do not conflict with the central act on the subject. Notwithstanding the distribution of legislative powers, the Constitution gives the Parliament wide authority to enact laws even with regard to matters falling under the State List. According to Article 249 the Parliament can make laws on matters enumerated in the State List if the Rajya Sabha declares by resolution by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest to do so. Article 253 also empowers the Parliament to make laws for implementing any international treaty, agreement or convention. According to Article 248 the parliament has exclusive powers to make any laws on any matter not enumerated in the Concurrent or the State List. Since government procurement does not figure in any of the lists, the Parliament would seem to have full powers to enact legislation on the subject. While state governments generally follow the same procurement procedures as the central government, the latter has not exercised its residual legislative authority in this regard to enforce uniform or improved procedures.

The Public Sector Undertakings (PSUs) of the Government of India can be divided broadly into three categories. These are: organisations, which are a part of the ministry or department, such as the Indian Railways and the Department of Telecommunications; statutory bodies such as the Life Insurance Corporation of India, Food Corporation of India etc.; and companies set up under the provisions of the Companies Act, 1956. The departmental undertakings falling in the first category follow the government procurement procedures fully. The statutory undertakings are not bound by the same rules but their functioning is subject to Parliamentary scrutiny and their accounts are audited by the Comptroller and Auditor General. The PSUs, which are incorporated as companies are more independent of government control. There are state level PSUs as well, which are controlled by the state governments. The most important of these are the State Electricity Boards.

We outline below the main features of the procurement policies at the levels of central government, state governments and central public sector enterprises.

## ***IV.1 Central Government and its Agencies***

### ***IV.1.1 General Rules and Evolution of Procurement Policy***

The general rules governing expenditure on government account laid down in the General Financial Rules, 1963 (GFR) and the Delegation of Financial Powers, 1978 (DFPR) govern expenditure on procurement as well. No expenditure may be incurred unless there is a provision for it in the Demand for Grants of the Ministry or Department approved by the Parliament for a particular year, and unless such expenditure has been sanctioned by the general or special orders of Government or by an authority to which power has been duly delegated. A Government of India Decision under Rule 6 of the GFR lays down rules that are more specific to government procurement. The relevant part of the Decision is quoted below:

‘(vi) The responsibility and accountability of every authority delegated with financial powers to procure any item on Government account is total and indivisible. Government expects that the authority concerned will have the public interest uppermost in its mind while making a procurement decision. This responsibility is not discharged merely by the selection of the cheapest offer but must conform to the following yardsticks of financial propriety: -

- (a) Whether the offers have been invited in accordance with governing rules and after following a fair and reasonable procedure in the prevailing circumstances.
- (b) Whether the authority is satisfied that the selected offer will adequately meet the requirement for which it is being procured.
- (c) Whether the price on offer is reasonable and consistent with the quality required.
- (d) Above all, whether the offer being accepted is the most appropriate one taking all relevant factors into account and in keeping with the standards of financial propriety?

(vii) Wherever called for, the concerned authority must place on record in precise terms, the considerations which weighed with it while taking the procurement decision.’

Chapter 8 of the GFR contains the general rules applicable to all departments regarding government procurement of goods (‘stores required for use in the public service’). The overall policy orientation relating to government procurement, which is a legacy of the pre-1991 economic reforms era, is contained in the Preamble to the Rules in Part I of Appendix 8 of GFR in the following terms:

‘The policy of Government is to make purchases of stores for the public service in such a way as to encourage development of indigenous production of stores to the utmost possible extent and to make the country self-sufficient in the matter of its own requirements.’

The Preamble goes on to elaborate the manner in which the above general principle must be implemented and lays down a hierarchy of preferences through which the policy of self-sufficiency must be implemented. The first preference must go to goods wholly produced in India, second to goods manufactured in India from imported materials, third to foreign manufactures held in stock in India and last to imported products offers for which have been received for supply through Indian Agents or India-based establishments. In addition, the purchasing entities have been given the discretion to accord price preference to domestically produced products over imported ones and to article produced by cottage and small-scale industry over those manufactured by larger ones.

Pursuant to the above policy government ministries and departments granted price and purchase preference to domestic over imported supplies. In addition, preference was granted to the PSUs over the private sector and to cottage and the small-scale industries over the large-scale ones. A purchase preference to supplies from the PSUs was already in vogue since the inception of the Industrial Policy Resolution in 1956. In addition, in 1980 the Bureau of Public Enterprises issued a circular mandating central government

ministries and departments as well as PSUs to grant a price preference to PSUs up to 10 per cent and even more in appropriate cases. A practice that actually prevailed was that if the price quoted by a PSU was within 10 per cent of the lowest quotation, negotiations were held with the PSU and the tender awarded to it at that quoted amount. The cottage and small-scale sector also received compulsory purchase and price preference. In 1996, out of the 836 products reserved for manufacture by the small-scale sector, as many as 412 were required to be procured exclusively from small-scale firms, four from the handicrafts sector and another 14 from the handloom sector. In addition the Director General of Supplies and Disposal was mandated to procure non-reserved products also from the small-scale sector to the extent their supplies were technically comparable to those from larger firms (Debroy and Pursell, 1997).

The policy prescriptions cited above are the product of the times when India's economic policy was inward looking. Things changed following the introduction of economic reforms in 1991-92. Now Rule 102 (3) of the GFR prohibits any purchase preference given to domestic suppliers over the duty paid price of imports. Price preference for PSUs was also discontinued and replaced by purchase preference. However, it is the declared intention of Government to eliminate purchase preference as well in due course. The purchase preference policy for the public sector enterprises is being extended from year to year (World Bank, 2001). The policies of preference to small-scale and cottage industries have, however, continued, albeit the list of products is somewhat smaller.

#### *IV.1.2 Organisation of Procurement in Central Government*

The Directorate General of Supplies & Disposals (DGS&D) under the Department of Supply was earlier the central organisation for procurement of supplies of the Government of India. Procurement operations were centralised and all ministries and departments, except those in which procurement operations were substantial (viz., Railways, Posts and Telegraphs and Defence), were directed to obtain their supplies through the DGS&D. The process of decentralisation had already begun earlier but a major reorganisation took place in 1992 following the introduction of economic reforms.

All Ministries are now authorised to procure goods for their use, and the DGS&D's role is limited to procurement of items of common use by more than one Ministry. DGS&D finalises the rate and running contracts for items of common use and individual ministries are compulsorily required to make use of these contracts. After 1992 small procurement units were created in some Ministries such as Home Affairs, Health and Family Planning and Information and Broadcasting.

The Central Public Works Department (CPWD), an attached office of the Ministry of Urban Development, is the central organisation for the construction and maintenance of central government buildings and other capital assets in India and abroad. The Ministries of Railways and Defence were always exempted from the requirement to go through the CPWD and there has been further decentralisation over time. A few Ministries such as the Post & Telegraph Department under the Ministry of Communications, the Ministry of Information and Broadcasting and the Ministry of Forest and Environment have their own organisations for the execution of works.

The Ministry of Railways has always functioned independently of the Department of Supply as it has large procurement operations. The Stores Department of that Ministry is responsible for procurement of all goods with the exception of rails and rail fittings, the procurement of which is handled by its Civil Engineering Department. The Civil Engineering Department also handles procurement of civil engineering works, while the responsibility for electrical works lies with the Electrical Engineering Department and for signalling and telecommunications works with the Signal and Telecommunications Department.

The Department of Telecommunications (DOT) and the Department of Telecommunication Services (DTS) were formerly big procuring entities but after their corporatisation in October 2000 the procurement function has passed on to the BSNL and other companies.

Another Ministry with sizeable procurement operations is the Ministry of Surface Transport (MOST). It has two Departments, the Department of Shipping and the Department of Road Transport and Highways. The latter is responsible for the development and maintenance of national highways. Until 1995, all works relating to national highways were executed by the State PWD in which it was situated. The MOST provided the budget and maintained technical and financial control. However, after the establishment of the National Highways Authority of India by an Act of Parliament in 1988, the responsibility for construction has been gradually shifting to the Authority.

#### *IV.1.3 Procurement Procedures and Transparency in Government of India*

Bidding systems: Rule 2 in Appendix 8 of the GFR contains the basic rule, which is quoted below:

“Tenders shall be invited in India and abroad also, when considered desirable for the supply of all article which are purchased under Rules 1 to 4 unless the value of the order to be placed is small or the Head of the Department is satisfied that sufficient reasons which shall be recorded in writing, exist that it is not in the public interest to call for tenders. No tender which fails to comply with the conditions as to delivery and payment prescribed in Rule 1 shall be accepted.”

Important agencies, such the DGS&D, CPWD and the Railways have their own manuals or comprehensive instructions, which are followed for procurement operations. The DGS&D and CPWD manuals serve as a model for other ministries and departments that have smaller scale procurement operations. The manuals and the basic financial rules on which they are based are in the nature of internal instructions and are devoid of legal force. They cannot be legally enforced in a court of law.

Four basic types of procedures are utilised by the procurement agencies. *Cash purchase* is made for petty purchase of goods or works. Even here, as a general rule, a minimum of three quotations is obtained from suppliers and the order given to the lowest. *Proprietary purchase* of such items as spares is made by inviting single tender from

manufacturer or supplier in cases in which no purpose would be served by inviting bids from other sources. The Railways have the practice of issuing open tender even for proprietary purchase in cases involving large purchases, with a view to exploring the market for acceptable alternatives. The proprietary item may still be purchased but a development order may be placed for promising substitutes. In *limited tender* the bids are sent to pre-selected firms on the list of approved suppliers/contractors in cases where the value of procurement is not very high. Limited tenders procedures are also resorted to for urgent requirement, particularly in the case of works. The Railways use a variety of limited tender known as bulletin tender, in which a weekly list of small value tenders is published in a bulletin and sent to registered suppliers of the item concerned. *Open tenders* in which the bid documents are sent to all firms that wish to participate are the norm in the Government of India for the procurement of goods. For the procurement of works, participation in the open tenders is restricted to approved contractors, including those registered in the appropriate classes by the procurement agency (CPWD, Railways, Military Engineering Services, etc.). Restricted open tenders are also used for procurement of specialised and safety items, including those in which type approval has been given earlier. In open tenders, bids may be invited nationally or globally. *Single tender* is employed to meet emergency situations, such as in works to meet natural disasters.

Registration of suppliers/contractors: Rule 4 in Appendix 8 of the GFR requires DGS&D to maintain a list of registered firms, but in practice all government procurement agencies maintain such lists. The credentials of registered suppliers, including their financial capability, are verified in advance. For this purpose they are required to submit detailed information including their organisational structure, manufacturing/stocking and trading capabilities, financial strength, past experience etc. The registration is valid for a fixed period, but if the performance is satisfactory it is renewed. A similar procedure is followed for works, in which the procurement agencies generally classify contractors according to their capability. To help in the classification, the contractors have to furnish details of contracts executed by them in the past. The criteria for registration that existed in the DOT (before corporatisation) included working capital, solvency certificate limit,

value of each of the latest three completed contracts in the previous five years, and work execution turnover. Distinct from the system of registered suppliers is the pre-qualification of bidders adopted for procurement of a particular work of large value. Bids for pre-qualification are invited through advertisement in the press and a short list drawn up on the basis of pre-specified criteria. Another tender system in vogue for high value complex projects is that of Two Envelope Bidding Procedures. The two envelopes contain the “Technical Bid” and the “Financial Bid” separately. This system enables the bidders to seek clarification if any on technical aspects and to submit any modification of the financial bid on that basis. The original bid as well as the modification is taken into consideration for the purpose of drawing up the comparative statement.

Procedural aspects of the invitation of bids: Standard documents drawn up by the DGS&D for supply of goods and those drawn up by the CPWD for works are used by other procurement agencies as well. For stores (goods) these contain inter alia instructions to bidders, schedule giving description of stores, quantity, delivery requirement, special conditions, if any, and conditions of contract. In the case of works, the standard document includes guidelines for use of standard forms, instructions to bidders, conditions of contract, bill of quantities and bid forms. In addition standard specifications for materials and works, schedule of rates, and general and detailed drawings are included in the bidding documents for works. Indian Standards Specifications are normally used, but where these are not appropriate or not available, international specifications or those prepared by the organisation itself are used. In the case of works standard CPWD specifications are used, and in their absence, the relevant Indian Standards codes or international specifications. Bid security by way of an earnest money deposit of 2% of the estimated value of the bid is the norm in India. It has been observed that the tender documents used in most cases do not clearly specify the criterion and methodology for selection of the bidder, leaving considerable room for arbitrariness.

Invitations of open bids (generally known as open tender) contain not only a brief description of the goods or works but also other essential information such as eligibility criteria, availability of tender documents, cost of the documents, date and place for



submission of tender etc. The notices are issued in the Indian Trade Journal, which is the main medium for publishing tender notices. In addition they are published in the national and regional dailies approved by the Directorate of Advertisement and Visual Publicity. For local bidding tender notices are also published in the local language of the region. Global tenders are also sent to the commercial attaches and foreign missions as well as Indian missions abroad. CPWD sends copies of its notices to registered associations of contractors.

For global tenders the minimum time given for submission of bids is eight weeks, for other open tenders six weeks, and for limited tender four weeks. Further a margin of 15 days is allowed for sending the tender notice in time for publication in the International Trade Journal. Sale of tender documents is unrestricted for goods, but for works it is generally restricted to the class of contractors specified in the notice. Pre-bid conferences are generally held for major works, and at these conferences bidders are entitled to ask for clarifications. A summary of the discussions at these conferences, including the points raised and the clarifications given, is furnished to all prospective bidders.

Submission and opening of bids: The tender notice invariably mentions the time and date by which the bids must be received and also indicates the person responsible for receiving them. Most purchasing organisations maintain a tender box in which all bids received against a particular notice are dropped. The officer responsible for purchases opens all tenders received in time at the specified place and time in the presence of the tenderers desirous of being present. At the time of opening a list is made of the representatives present and their signatures are obtained on the list. As the tenders are opened each of them is numbered serially and initialled. Essential information such as the price, delivery period etc. as quoted by the tenderer is circled and initialled by the designated officer at the time of opening. Any corrections, alterations, or overwriting in the offer are also circled and initialled. At the time of opening relevant particulars of each bid are also read out for the information of those present. A statement is also prepared indicating particulars of the tenders received. The bids are then scrutinised closely and a

comparative statement prepared, showing clearly the price, specification, description, quantity, delivery period, and other essential details. A technical scrutiny and evaluation of the bids is undertaken in the case of items like machinery and equipment. In some purchasing organisations the valuation is done by a committee constituted for the purpose. Negotiations are conducted if the bids are considered to be high as compared to the estimated rates or if bidders do not agree to terms and conditions of the contract. The rules provide that negotiations must be resorted to only as an exception and must not be held merely to bring down the rates. When negotiations are considered necessary, all responding bidders are invited. On completion of the evaluation the purchase officer prepares a comprehensive proposal and submits it to the competent authority. The proposal covers inter alia technical acceptability of the offer, technical and financial ability of the firms falling in the zone of consideration, delivery period vis-à-vis the requirement, reasonableness of the quoted price and any other relevant information. The last purchase price in a not too old procurement serves as benchmark for judging the reasonableness of the rates. Generally the bid adjudged to be the most economical is selected, but there are instances also of splitting of quantity among several bidders. Generally the recommendations of the tender evaluation committee or of the purchasing officer pass through intermediate hierarchical levels before being considered by the competent authority.

The designated authority competent to approve the purchase under the delegation of powers accepts tenders on the basis of the evaluation. Any purchase of a value of more than 50 million requires the concurrence of the Ministry of Finance. For lower amounts powers have been delegated to Heads of Department and officials lower down in the hierarchy. For instance, in the Directorate General of Supplies & Disposal, the Director General has powers for purchases of Rupees 40-50 million, the Additional Director General for Rupees 15-40 million and so on.

Award of contracts: In the area of goods there are two types of contracts, Ad Hoc contract and Rate Contract/ Running Contract. An Ad Hoc contract covers a one-time demand where the quantity is fixed. In a Rate Contract the contractor undertakes to

supply any quantity of materials on demand at fixed rates, during the currency of the contract. In a Running Contract the contractor agrees to supply and the purchasing agency agrees to receive a specified quantity of materials, as and when ordered, at fixed rates. In the area of works, there are four types of contract. In percentage rate contract, used for minor works, bidders are required to quote and contracts are awarded on the basis of a percentage below or above the standard schedule of rates maintained by the purchasing agency. In item rate contract, normally used in contracts for bridges and buildings, the rates and quantities are specified against each item of work. In piecework contract, small items of work are awarded on the basis of spot quotations. In lump sum contracts, bids are invited and contracts awarded for the entire project, which usually large and complex.

The procurement procedures do not provide for any remedies against perceived lack of fairness in the award of tenders. However, once a contract has been awarded, there is provision for arbitration for the settlement of disputes. Most contracts in the areas of goods as well as services contain a clause, which enables either party to take recourse to arbitration in accordance with the provisions of the provisions of law. The Arbitration and Conciliation Act 1996, provides for conciliation as a first step towards resolving disputes.

Central government procurement procedures and practices and the GPA 1996: How do the Central government procedures measure up to the requirements of GPA 1996? As far as transparency is concerned it would appear that on many aspects the prescribed procedures are broadly in line with the requirements of the plurilateral agreement. This is the case in respect of procedures relating to invitation to participate regarding intended procurement, selection procedures, time limits for tendering and delivery, submission, receipt and opening of tenders. With respect to these phases, the criticism is of deviations from the rules in practice rather than of the absence of rules. Some of these practices are selective/restrictive advertisement, selective sale of tender documents, substitution of documents, permitting and soliciting modification of bid after public opening, deliberate delay in processing of tenders, selective leaking of

information, and splitting awards for no good reason (World Bank, 2001). There are, however, some more significant shortcomings in the Indian practice and rules in respect of some other aspects of the procedures. As noted above, the tender documentation does not always clearly specify the criteria for awarding the contract as required in paragraph 2 (h) of Article XII of the GPA 1996. Further Article XIV requires that negotiations can be held in cases in which the intention to negotiate is notified in the invitation to suppliers, or when it appears that no one tender is obviously the most advantageous. In the Central government, negotiations are held in a routine manner with the lowest bidder. Furthermore there is no requirement for debriefing for the benefit of the unsuccessful bidders as required in paragraph 3 of Article XVIII, or for publication of contract awards, as required in paragraph 2 of that article. More importantly, formal appeal or challenge procedures, which are required by Article XX are not in existence. The CPAR (World Bank, 2001) contains recommendations to the Government of India for streamlining of government procurement procedures, which if implemented will make these procedures fully compatible with the requirements of GPA 1996.

On the more substantive aspects of non-discrimination in government procurement there is no departure in India from the MFN principle. Even with respect to national treatment there would be less difficulty now than was the case in the era before the 1991 economic reforms in meeting the requirement if India were to join GPA 1996. Explicit price preferences stipulated earlier in favour of public sector suppliers has already been given up. Purchase preference for other domestic suppliers has been phased out, and while it is being temporarily extended to public sector enterprises, it is the declared intention of government to eliminate this also. All that remains now is the preference for small-scale and cottage industries, but it is arguable that this preference is on par with the exemption that some of the major GPA 1996 signatories have obtained in respect of small enterprises.

#### *IV.1.4 Procurement of Consultancy Services*

The above analysis of the procurement policies and procedures in the central government relates only to purchases of goods and contracts for public works. In these

areas procurement operations have been going on from the pre-independence era, and the policies and practices have evolved over many decades. Manuals and other detailed instructions have been in existence for a long time. The position is not the same in respect of consultancy contracts. Traditionally the practice has been to rely on the expertise residing in various ministries and departments of governments. As government established its own consulting organisations (e.g. RITES under Ministry of Railways, EIL under Ministry of Petroleum, EDCIL under Ministry of Human Resources, TCIL under Ministry of Telecommunications, Hospital Consultancy Organisation under Ministry of Health and Family Welfare, and MECON under Ministry of Steel) government agencies developed a preference of awarding consultancy contracts to them by negotiation. The Ministry of Railways, the Ministry of Urban Development and the Ministry of Surface Transport are the main central government agencies that procure consultancy services.

Uniform procedures for procurement of consultancy services have not yet been developed in the central government and individual procurement operations are carried out on an ad hoc basis. The Ministry of Railways has issued guidelines but standardised documents have not been compiled. In 1994 the Ministry of Finance had approved and recommended a standard bidding document for consultancy contracts but the document has remained a dead letter.

In the Ministry of Railways selection of consultants is done after inviting proposals from 3-6 firms about whose qualification and experience information is available. In the Ministry of Urban Development (CPWD) advertisement is issued calling for expression of interest from qualified firms. The short-listed consultants are issued the terms of reference and asked to submit price bids and technical proposals in separate envelopes. A committee evaluates the technical proposals and the price bids of only those bidders are opened which qualify in respect of the technical proposals. Marks are assigned for both technical proposals and financial bids, and in the overall evaluation a ratio of 80-20 or 70-30 is adopted for the technical proposals and financial bids. The Ministry of Surface Transport has a continuous system of empanelment or pre-qualification of consultants. Sometimes selection of consultants is made after seeking

letters of interest through open advertisements. The applicants are short-listed on the basis of a marking system in which maximum marks are allocated for the qualification and experience of key personnel and for previous experience in similar assignments. Short-listed or pre-qualified consultants

are then issued the terms of reference and asked to submit their proposals. Two types of selection procedures are in use. The consultant may be selected on the basis of the technical proposal and then called for negotiation of fees. Or the decision may be taken on the basis of a combination of technical and financial proposal with the weightage of 80:20. Technical proposals are evaluated on the basis of numerical rating, the maximum marks being allocated to expertise of key personnel, adequacy of the proposed work plan, and prior experience in similar assignments.

Judged against the yardstick of the requirements of GPA 1996 the same deficiencies are seen as in the procurement of goods and in contracts for works. The evaluation criteria for bids are not well defined, there is no debriefing of unsuccessful bidders and absence of a challenge mechanism in which the appropriateness of the award can be contested.

#### ***IV.2 Procurement in state governments***

The CPAR (World Bank 2001) contains profiles of the procurement procedures and practices in three of the Indian states, viz., Karnataka, Tamilnadu, and Uttar Pradesh. The following paragraphs give an outline of these profiles.

In Karnataka, public procurement was governed by a host of rules, directives, codes, and manuals issued by various departments, until all these were replaced by the Karnataka Transparency in Public Procurement Act 1999 (KTPP Act), which entered into effect on October 24, 2000. The KTPP Act is equally applicable to government departments, local bodies, PSUs, Universities etc. The statute requires wide publicity and easy availability of tender documents, recourse to open tender except in specified circumstances, prior disclosure of criteria for eligibility, qualification and evaluation,

publication of award of contracts together with the reasons for the decision and the right to appeal for aggrieved tenderers. In some respects the new statute places Karnataka procurement procedures ahead of the procedures in the Central government and its agencies, as far as conformity with the practice in developed countries and with the requirements of the GPA 1996 are concerned. Nevertheless, a number of deficiencies have been noted even in the new statute (World Bank 2001). For instance, negotiations are held, not exceptionally but in a routine fashion to push down further the price quoted by the lowest tenderer. This militates against efficiency in the tendering system, as it leads to the practice of the bidders providing a cushion for negotiations in their quotations. Further the aggrieved bidder's right to appeal is not to an independent statutory tribunal, but to the Head of the Department or the Government.

The Tamilnadu Transparency in Tenders Act 1998 was enacted even before the corresponding legislation in Karnataka and it came into effect on October 1, 2000. It has broadly the same essential features and shortcomings as described in the case of Karnataka.

Unlike Karnataka and Tamilnadu, Uttar Pradesh has not introduced any law to govern public procurement in the state. As in the case of the Central government, the financial rules and orders, directives, and procedures issued by government departments from time to time provide the guidelines for procurement operations. The basic requirements are the same as in the central government, viz., public invitation of tenders (except for small value purchases) and selection of lowest tenderer, which is adjudged to be capable. Selective and single tenders are permitted in appropriate circumstances. The main deficiencies are the same as in the Central government. Unsuccessful tenderers do not have the right to know the reasons for the rejection of their bids. There is no system of statutory review of their grievance. The following shortcomings of tender documents have been listed by the World Bank (World Bank, 2001):

- ‘- Time for bid submission is unrealistic.
- Qualifications for eligible bidders are rarely stated.

- When stated they are often inappropriate for the works and discriminatory.
- Technical specifications (for equipment) are skewed.
- Criteria and methodology for evaluation and comparison are rarely disclosed.
- When disclosed they are often discriminatory.
- Bid and performance Securities are not always mandated.
- When mandated they are often ridiculously low for large contracts.
- The conditions of contract place most of the risks on the supplier/contractor.
- Payment terms are not in line with market practice.
- There is no sanction or interest for delay in payments.'

These examples of malpractice reflect the poor levels of governance of the state, which is one of the most backward in the country.

### ***IV.3 Procurement by Central Government Enterprises***

The economic policies followed in India immediately after independence entailed that government should assume direct responsibility for industries of basic and strategic importance. Government enterprises were consequently set up covering many areas, including heavy industry, iron and steel, non-ferrous metals, oil and gas, coal, telecommunication equipment. In the subsequent decades the public sector was expanded to cover most of the important services such as insurance and banking, railways, air transport, shipping and telecommunications, in most cases operating monopolistic enterprises. Two of the basic aims of government were to prevent concentration of economic power and to stabilise market forces. But government enterprises also served as important tools for advancing overall socio-economic objectives such as self-reliance, import substitution, employment generation, advancement of technology, development of backward regions and uplift of backward classes. While it was originally envisaged that the public sector enterprises would function as commercial enterprises the socio-economic objectives with which they were burdened implied that this was not to be the case. The Bureau of Public Enterprises issued guidelines to these undertakings on the policies and practices to be followed by them on many aspects of their functioning including procurement of goods and services. Some of the undertakings were statutory



corporations but most were incorporated as companies under the Indian Companies Act, 1956, but in all of them the central government had a majority share. Government could thus effectively control their functioning. Many of them ran into substantial losses and needed government grants and guarantee to keep them afloat. This gave to government even greater handle to control their policies.

With the introduction of economic reforms in 1991 the policy on public sector enterprises underwent radical transformation. Large areas that were hitherto reserved for enterprises in the public sector were opened up for investment by the private sector. It was decided that public sector investment in future would focus on strategic, high-tech and essential infrastructure. Among other things an ambitious policy of divestment in public sector enterprises was introduced. Sick units were to be investigated with a view to seeing if they could be revived or rehabilitated. As of March 2000 there were 240 public sector enterprises under the central government, of which 67 were sick and 32 were earmarked for divestment, leaving as many as 141, which are to be retained (World Bank, 2001).

The procurement policies and practices of seven major public sector undertakings (Bharat Heavy Electricals Ltd., Coal India Ltd., National Thermal Power Corporation Ltd., Indian Oil Corporation Ltd., Oil and Natural Gas Corporation Ltd., Steel Authority of India Ltd., and Mahanagar Telephone Nigam Ltd. have been analysed in the CPAR(World Bank 2001). The enterprises follow generally the same policies and procedures in procurement as in the central government viz. widely advertised open tenders for procurement of a large magnitude, limited tenders for purchases of small value, and single tenders for proprietary items or in certain situations. Transparency practices in respect of tender procedures, bidding documents, bid evaluation criteria etc. are also generally the same as in the central government, although there are differences among the enterprises on matters of detail. Their deficiencies are also the same as in the government viz. negotiations are held with the lowest bidder as a matter of routine, award of contract is split among tenderers on the basis of the lowest quotation, debriefing is not done for the benefit of unsuccessful tenderers, and there are no bid challenge procedures

in which an aggrieved bidder can appeal the decision to an independent body. As mentioned earlier, with respect to domestic preferences the earlier practice of 10 % price preference for government departments and other public enterprises has been withdrawn and replaced by a purchase preference. Under the current policy, if the price quoted by the supplying public sector enterprise is within 10 % of the lowest bid, other things such as quality and delivery schedule being equal, the contract has to be awarded to that enterprise at the lowest price. Government renews this purchase preference directive year to year, and the last government notification was valid until 31 March 2004.

## **V Issues that have arisen in the Working Group on Transparency in Government Procurement**

Between the First and the Fifth Ministerial Session at the meetings of the Working Group WTO members discussed the rationale of a multilateral framework in this area and the possible elements that should constitute such a framework. While some members supported an agreement in the area, others expressed doubts on the need for such an agreement and attempted to whittle down the proposed elements to the maximum extent possible. As alluded to already, the agreement at Doha on the need for a multilateral framework on transparency in government procurement did not result in a significant change in the trend of post-Doha discussions. A number of members, including India and Malaysia in particular, have remained unreceptive to the idea of negotiating an agreement on transparency in government procurement, as on other Singapore issues. And we have seen that at the Fifth Ministerial Session at Cancun a large number of members expressed unwillingness on going ahead with the negotiations on the totality of Singapore issues and for that reason an overall accord eluded the Session.

From the outset India and some other developing countries have been worried that an agreement on transparency would be only the first step and would be followed by an initiative on market access in government procurement. Their concern arose from the threat that they perceived to the preferences for domestic suppliers prevalent in many developing countries. Even though the Doha Ministerial Declaration seemed to settle the

issue, doubts remained in this regard. These doubts were translated into a negative stance of a number of members such as India, Malaysia and Egypt, which is reflected in the minutes of successive meetings of the Working Group.

Written submissions made in the Working Group are available in the WTO documents in the WT/WGTGP/W series, the minutes in the WT/WGTGP/M series and the annual reports in the WT/WGTGP/ series. In the minutes frequent reference is made to the Informal Note titled 'List of the Issues Raised and Points Made' drawn up by the Chairman in the unrestricted document JOB (99)/6782 of 12 November 1999. But the lack of availability of this document to the public is not a handicap, as the same list of issues figures in the concise notes on the discussions provided by the Secretariat in the unrestricted documents, WT/WGTGP/W/32 and 33.

We now analyse the key issues that have arisen in the Working Group on each of the 12 items listed in the Chairman's Informal Note. In this Section we lay out the issues and in the next Section we consider the best option for India for the resolution of these issues.

### ***V.1 Definition and Scope of Government Procurement***

There seems to be a measure of agreement that the virtually identical definition of government procurement contained in Article III: 8(a) of GATT 1994 and Article XIII.1 of the GATS could provide the basis for the definition for the purposes of a future agreement in the area. However, agreement has not been reached on four main issues with regard to coverage.

- Whether it should be limited to outright acquisition for government use as in GPA 1981 or should be expanded to other types of contractual arrangements or transactions such as lease, rental or hire purchase as in GPA 1996.
- Whether both goods and services should be included.
- Whether a certain threshold of value should apply as in the case of both GPA1981 and GPA 1996.

- Whether it should apply to entities at the central level only or extend also to sub-central entities and whether government enterprises should also fall within its ambit.

On the first of these issues there is disagreement in particular on whether concessions and build-operate-transfer (BOT) contracts should be brought within the purview of a future agreement. It might be mentioned here that these are not covered clearly in the GPA 1996 though the subject is being discussed in the current Article XXIV:7 negotiations, under which a definition has been proposed. The argument of the opponents of an extended coverage is that concessions 'generally have a different legal basis, purpose and philosophy from those underlying government procurement' (WT/WGTGP/W/32). On the coverage of services one of the problems raised is that separate work has been undertaken on government procurement in the context of the GATS. On the question of threshold some members believed that the principle of transparency must apply only to purchases above a certain threshold value in order to ensure that the obligations of an agreement are manageable particularly for developing countries. Others felt that transparency was an aspect that must apply to all government procurement equally, irrespective of value. However, as discussions progressed views appeared to be converging toward the transparency agreement being subject to a threshold value. In one of its early submissions (WT/WGTGP/W/26) the EC had proposed certain values as maximum thresholds. In their joint proposal Hungary, Korea, Singapore and the United States also envisaged one or more threshold/s of value (WT/WGTGP/W/27). An EC paper submitted in June 2003 stated as follows:

'The EC is in favour of minimising the impact of TGP rules on small entities in DCs by making these rules only applicable above a given threshold, which could even be higher for DCs. Good governance and efficient management in the public sector need a selection process that is proportionate to the value of the goods and services to be purchased' (WT/WGTGP/W/41).

With regard to the coverage of sub-central entities, the main problems raised are related to the balance of rights and obligations among members with different

constitutional structures, and the difficulty that could be experienced by the central government in ensuring compliance by sub-central entities. Some developing countries are strongly in favour of only central/federal entities being covered. On state enterprises one question that has been raised is with regard to the extent to which purchases made by them could be regarded as purchases for 'governmental purposes' as envisaged in the definition of government procurement in both GATT 1994 and the GATS. Some members have pointed out that governments do not have any control on the procurement decisions of public enterprises. The EC would like all government procurement to be covered, with option for limiting the application of some obligation. The US and others (Hungary, Korea and Singapore) are willing to consider an option to cover only central and federal government.

It would be relevant to mention here that in Annex D of the revised Cancun Ministerial Text [JOB (03)/150/Rev.2] the question of coverage was reflected as follows:

'We further agree that any coverage of the of the agreement beyond goods and central government entities is not prejudged. Only procurement above certain value thresholds, to be negotiated, will be covered.'

## ***V.2 Procurement methods***

In the proposals made in the Working Group and in the discussions there appears to be a meeting of minds that members must continue to have the ability to use any of the usual types of procurement methods. These are open procedures, where information on the procurement opportunity and the selection criteria used is made available publicly, selective tendering where such information is made available to pre-qualified suppliers, and limited or single tendering. The emphasis is rather on ensuring that the choice of procurement method is carried out on 'a transparent, predictable and non-arbitrary basis' (WT/WGTGP/M/14, paragraph 41). The EC paper of 1999 on the elements of an agreement (WT/WGTGP/W/26, Article 4:1) proposed that the procedures must be notified in advance and must be transparent. The only real issue has been how to limit

recourse to single tendering procedures. The US paper of 1998 (WT/WGTGP/W/16) seems to suggest the inclusion in the agreement of an illustrative list of circumstances (such as extreme urgency, absence of tenders, proprietary procurements etc.) under which governments may have recourse to this method plus some general criteria for circumstances that are not provided in the list. Other suggestions include the requirement to publish notices of invitation to tender and contract award notices and the requirement for the procurement entities to maintain records in each case and to furnish in the contract award notice the reasons for recourse to the method.

### ***V.3 Publication of information on national legislation and procedures***

There is a measure of agreement among members that publication of information on national legislation and procedures must be a core provision of a transparency agreement on government procurement. Differences remain on relatively minor issues such as the types of information that must be made available and the manner in which this should be done. The EC proposes that laws, regulations and administrative rulings of general application relating to government procurement must be readily and easily accessible to the public (WT/WGTGP/W/26, Article 3:1). During discussions it has been proposed that policy guidelines and judicial decisions must also be available in this manner. Some developing countries have expressed concern at the onerous nature of the obligation to make available the entirety of these instruments in their legal form and suggested the alternative of making the substance of all government instruments available. The second issue is whether the information requires to be published or simply made readily and easily accessible. A related issue is the establishment of a central enquiry point from which other members and their suppliers could obtain information on national legislation. Some members with a federal structure of government, both developing and developed, feel that the proposal would be difficult to implement (WT/WGTGP/M/14, paragraph 50).

#### ***V.4 Information on procurement opportunities: tendering and qualification requirements***

This is another area in which the views of members are not wide apart. In principle everyone agrees that ‘the information made available should be sufficient to enable suppliers to assess their interest in a particular procurement and, should they wish to participate in it, to submit responsive bids’ (WT/WGTGP/W/32, paragraph 41). Opinions vary only on whether a minimum list of items must be stipulated on which it must be obligatory to furnish information in the tender notice or documentation, or whether there should be an illustrative list. The EC has proposed a minimum list of standard information to include (a) name of procuring entity, (b) the goods or services to be procured, and their specifications, (c) the procurement procedure used, (d) any pre-qualification requirement, (e) any restrictions on market access and/or domestic preferences granted, (f) the contact details for obtaining tender documentation, (g) the award criteria), (h) the deadlines for the submission of tenders, and (i) the date and time for the opening of tenders (WT/WGTGP/W/26, Article 5.2). Some members, including India, feel that a list of minimum information would be unduly prescriptive and would constrain flexibility in small value procurements, for instance. There is no proposal to introduce any variation in the normal practice of advertising the tender notices in government gazette, official journal or national or local newspapers. However, references have regularly been made to the use of information technology, e.g. the Internet, to achieve transparency for advertisement of tender notices as well as for other purposes (WT/WGTGP/W/33, paragraphs 75-76). One important suggestion is to adopt the GPA 1996 transparency provision requiring additionally the publication of summary tender notices in a WTO language.

#### ***V.5 Time-periods***

It is recognised generally that an agreement on transparency must contain the requirement that sufficient time period should be available to enable suppliers to obtain the tender documentation and prepare and submit their bids in response. No suggestion has been made to fix minimum deadlines as in the GPA 1996, or to standardise or

harmonise the time limits. Rather, some guidelines are proposed, such as that the time limits must take into account the particular circumstances of each procurement operation including its complexity and that they should be the same for all suppliers.

#### ***V.6 Transparency of decisions on qualification***

Three basic proposals, which are largely uncontested, have been made with regard to decisions on qualification of suppliers. First, that the criteria for qualification must be limited to necessary requirements only, such as financial, commercial and technical capacities of suppliers and must be pre-disclosed to suppliers in advance. Secondly, where registration or pre-qualification systems are maintained these must be reopened at periodic intervals to enable new suppliers to apply for them. Thirdly, information on the basis of qualification decisions must be made available to all potential suppliers either generally or on specific request. However, there is disagreement on the related proposal that the procuring agencies must provide unsuccessful suppliers, upon request, with the reasons for the denial of their request and that these suppliers should have the right to challenge the conformity of the decision with the rules of the system. Doubts have been expressed on the feasibility of providing information to unsuccessful suppliers, particularly when their number is large, and on overturning decisions on qualification/registration. Some others, such as Brazil, have expressed the view that the provisions on qualification should be limited to setting out general principles and criteria and should not be overly prescriptive (WT/WGTGP/M/15, paragraph 32).

#### ***V.7 Transparency of decisions on contract awards***

For some members this would be one the most crucial elements of transparency. Three elements have been proposed in this regard:

- that the evaluation criteria, in objective terms, must be spelt out in advance in the tender notice or tender documentation, and the award must be based strictly on these criteria;



- that the tenders must be received and opened under conditions that guarantee regularity and impartiality and that rule out the possibility of manipulation; and
- information on contract awards must be made publicly available, and unsuccessful bidders must be notified or debriefed on the reasons for which their bids could not be accepted.

Both the EC and the US have stressed that ‘a future transparency agreement should have a provision requiring that unsuccessful bidders be informed of the rejection of their bid, and, on request, be given information as to the reasons why their bid had been rejected and the winning bid had been chosen’ (WT/WGTGP/M/15, paragraph 36). Some other members have expressed the concern that such a requirement would be onerous for the developing countries.

#### ***V.8 Domestic Review***

The proposal that as a part of the transparency agreement WTO members must be required to establish a process of domestic review of contract award decisions has proved to be one of the more contentious ones in the Working Group. The opponents of negotiations in this area, such as Egypt, India and Malaysia have generally used the argument of administrative burden on developing countries, in responding to the proposals on various elements of transparency. In the case of domestic review, however, their objection runs deeper: they consider that there is no place for provisions on domestic review in a transparency agreement. Malaysia has expressed particularly strong views on this aspect:

‘Any eventual agreement on transparency in government procurement should be limited in scope, should not be prescriptive, and should not have provisions on domestic procurement review that could be used to question the decisions of Members’ governments, administrations and procurement entities. The idea of domestic review procedures was fundamentally flawed in the context of a transparency agreement, the provisions of which would basically allow the provision of information on what Members did and how they did it, under what procedures, what time-periods, and what

requirements for potential bidders. Without a reassurance that domestic review procedures would not question the decision of domestic authorities, his delegation could not agree to including such procedures in a transparency agreement' (WT/WGTGP/M/17, paragraph 23)

Some developing countries are also worried that the introduction of review procedures could result in the proliferation of challenges and lead to additional costs for procurement agencies. On the other hand the proponents have stated that 'the availability of a bid challenge mechanism adds to the transparency of the decision-making process, increases confidence in the effective functioning of the overall system and enables the system to be seen to be transparent' (WT/WGTGP/W/33, paragraph 54).

Both the EC (WT/WGTGP/W/26, Article 8) and the US, jointly with Hungary, Korea and Singapore, (WT/WGTGP/W/27, Article X:2) have proposed that WTO members must be required to establish 'fair and transparent judicial, arbitral or administrative' bodies for the prompt review of practices and actions that are inconsistent with the transparency requirements. These proposals also set out two important requirements in this regard. The review body must be independent of the procurement entities and all interested parties, who participated in the procurement process, or are affected by the relevant practice or action, including foreign suppliers, must have access to it. During the discussions two connected matters have been raised. It has been suggested that in order to enable the review procedures to work effectively there should be a requirement for procurement entities to maintain full records of the procurement process for a designated period. The question of remedies has also been raised. Should the review body have the authority to suspend the procurement process or overturn procurement decisions and/or grant compensation to parties that have suffered economic loss as a result of procurement decisions that are held to be inconsistent with the rules? Developing countries that oppose the establishment of domestic review procedures have even greater reservation against such wide authority being given to the review body.

In the revised draft Cancun Ministerial Text, the following language was proposed on domestic review:

‘In regard to domestic review mechanisms, the agreement will address the transparency of such mechanisms, but not otherwise prescribe their characteristics.’

#### ***V.9 Other matters related to transparency***

There is wide recognition of the need for an explicit requirement for procuring entities to maintain records of the key stages of individual procurement operations. Some developing country members are of the opinion that matters like the period and the means of maintaining the records must appropriately be decided by domestic legislation, while other members, such as the US and Japan, have suggested that the details be left to the negotiations.

It is widely recognised that the use of information technology and of languages other than the national language would considerably enhance transparency in government procurement. But no one has envisaged anything more than a best-efforts rule in these areas. The EC has proposed that ‘Members are encouraged to ensure that all information referred to in this Agreement is provided in a WTO language’ (WT/WGTGP/W/26, Article 10). Brazil, the US and China have said that the national language should prevail in procurement-related matters while Japan, Korea, Morocco and the EC have suggested that for certain matters, e.g. lists of national laws and regulations and documents related to consultations and dispute settlement a WTO language could be used (WT/WGTGP/M/15, paragraphs 57-60). Likewise Hungary, Korea, Singapore and the United States have proposed that ‘Members and procuring entities are encouraged to use, to the extent possible, electronic communications at all stages of the procurement process, provided it complies with the requirements of this Agreement’ (WT/WGTGP/W/27, Article IX:2).

There has been discussion on the relationship between transparency in government procurement and the fight against bribery and corruption. It is not that

members have proposed a provision in this regard in a future agreement but that they have drawn attention to this aspect as the rationale for a transparency agreement in government procurement. Other members have felt that matters of bribery and corruption must be discussed in other fora and not brought up in the WTO.

#### ***V.10 Information to be provided to other governments (Notification)***

The centrality of the obligation to notify all laws and regulations relating to government procurement is widely recognised. The following provision proposed by the EC would also seem to command support of members:

‘Laws and regulations shall be promptly notified to the WTO Secretariat. Members shall further provide a list in one of the WTO languages of the relevant generally applicable instruments. The WTO Secretariat shall endeavour to make such lists available to the general public through an electronic medium’ (WT/WGTGP/W/26, Article 11).

There is less support, however, for the proposal that each member must establish central enquiry points that are capable of serving as a single access point for information on the laws and regulations. Some members feel that co-ordination among different government departments and central and sub-central levels may be difficult to accomplish. There is also wide opposition to the idea of statistical reporting of procurement activity on the grounds that it would be burdensome and would go beyond the requirement of transparency.

#### ***V.11 WTO Dispute Settlement Procedures***

This aspect has emerged as the single most controversial issue in the area of transparency in government procurement. The EC has proposed that the provisions of Articles XXII and XXIII of GATT 1994 or Articles XXII and XXIII of GATS respectively, as elaborated and applied by the Dispute Settlement Understanding, would apply to disputes among members on the decisions of the authority in charge of domestic

review on any procurement above the threshold value (WT/WGTGP/W/26, Article 13). The proposal of Hungary, Korea, Singapore and the United States (WT/WGTGP/W/27, Article XII) also contains a provision for the WTO dispute settlement procedures to be invoked by members only after interested parties have been encouraged to use the domestic review procedures. The latter proposal also stipulates that recommendations of the Dispute Settlement Body on measures found to be inconsistent with the provisions on transparency would not affect prior contract awards. In a later submission (WT/WGTGP/W/38) the US has proposed the agreement would specify that the use of domestic review procedures 'would be the only method through which a specific procurement could be challenged' and that 'the DSU would not be available to challenge a specific procurement, and thus could not be used to overturn a contract award.'

A number of members have opposed the applicability of WTO dispute settlement procedures to a possible future agreement on transparency in government procurement. The arguments given by Brazil in opposing the extension of the DSU to the area also seem to reflect the views of some other developing country members (China, Egypt, India, Malaysia and Pakistan):

'The WTO dispute settlement mechanism was based on the presumption that a violation of an obligation would have an effect on the trade of Members, whereas in the context of an agreement on transparency in government procurement, there could be no such presumption. Further, under the DSU, the way to correct non-compliance was through compensation or retaliation. It would be difficult to base any dispute settlement system on that premise because there would be no violation of trade rights in the case of a transparency agreement' (WT/WGTGP/M/17, paragraph 16).

Malaysia has proposed that the 'future provisions could be in the form of a declaration, an understanding among Members or an agreement with no linkage to the DSU' (WT/WGTGP/M/15, paragraph 83). Other suggestions include the soft law approach of setting up a peer-review mechanism rather than an enforceable agreement.

The EC has recognised that ‘the absence of market access obligation made it more difficult to conceive application of dispute settlement’ (WT/WGTGP/M/15, paragraph 73) but still feels that the application of the DSU was necessary in order to establish confidence in the agreement and ensure that it is adhered to. Without enforcement the agreement was not likely to be taken seriously by members. The US has conceded that the chances of disputes being raised on the issue of transparency were low. But it has argued that it was necessary for the DSU to be available ‘for systemic failures to comply with, or a high level of disregard to, the agreement, for instance if there were refusals to ever publish a notice, or refusals to ever make information available about procurement methods’ (WT/WGTGP/M/17 paragraph 66). The US proposal referred to above, that the individual procurement decisions would remain be subject only to domestic review and not to disputes under the DSU, has served to assuage some of the concerns of the developing countries.

In the revised draft Ministerial text, the following language was proposed on the issue of dispute settlement:

‘The issue of the applicability of the DSU is not prejudged, with the exception that individual contract awards shall not be subject to challenge or recommendations under the WTO dispute settlement system.’

#### ***V.12 Technical co-operation and special and differential treatment of developing countries***

Technical assistance is one of the least controversial areas in the discussions on transparency in government procurement. The texts proposed both by the EC and Hungary, Korea, Singapore and the US propose that technical assistance would be provided to developing and least developed country members on request and on mutually agreed terms and conditions. These texts do not make any proposals on special and differential (S&D) treatment, but the subject has figured in the discussions in the Working Group. Members have made proposals that S&D treatment could be given to developing and least developed members by providing them with transitional periods,

applying a higher level of threshold values, or exempting them from coverage in relation to entities at sub-central levels or services (WT/WGTGP/W/33, paragraphs 117). Others have expressed the view that the aspect could more appropriately be addressed once the substantive elements of the agreement had been finalised.

## **VI Approaching negotiations on Transparency in Government Procurement**

In the light of the foregoing analysis how should India approach the subject in the future negotiations in the Doha Round. We have pointed out above that at Doha it appeared that WTO members had already recognised the need for a multilateral framework in the area and agreed that negotiations would take place after the Fifth Session for realising such a framework. The only additional step that needed to be taken was to agree (by explicit consensus) on the modalities for such negotiations. However, the need to take a decision on the modalities by consensus opened the door to a *de novo* consideration of the basic issue whether transparency in government procurement (as also other Singapore subjects) needed to be on the agenda of the round at all. There is more than a modicum of legal basis in the argument that the Singapore subjects are already a part of the 'single undertaking' envisaged in the agenda of the negotiations set out in the Doha Ministerial Declaration adopted in September 2001. But the Ministerial Declaration cannot be the subject of a dispute under the DSU, and in interpreting it WTO members have to rely on the continuation of political consensus in its support. Any reinterpretation by a small minority of members can be dealt with by diplomatic persuasion and pressure but the disagreement by a large group of the membership to go ahead with the negotiations on any subject really implies that the issue is open once more.

At the resumption of the negotiations, therefore, India can start discussions on the basis that the proponents have to make out a case once again why it is necessary to have an agreement in the area of transparency in government procurement. And there are serious problems here with the position taken by the proponents of negotiations. In the area of government procurement many developing countries perceive a threat to preferences to domestic suppliers that they regard as an essential development tool. In order to allay their fears the proponents of a transparency agreement agreed to exclude

market access altogether from the purview of a possible future agreement. In the successive plurilateral agreements on government procurement (GPA 1981 and GPA 1996) one of the main objectives was to eliminate the exception in respect of government procurement from the national treatment obligation and to ensure that foreign and domestic suppliers were treated on an equal footing. *It is not so in the proposed agreement on transparency.* The agreement on excluding market access from the scope of a transparency agreement on government procurement might have served the purpose of meeting a major concern of some developing countries, but it also knocked out substantially its relationship with trade. According to GATT 1994 as interpreted over the years and even more explicitly the GATS the MFN obligation does not extend to government procurement. Both these agreements specifically exclude government procurement also from the purview of the national treatment obligation. A transparency agreement on government procurement would not affect the right of a WTO member to restrict the procurement opportunity to domestic suppliers and exclude altogether suppliers from other members. Even more egregious will be the possibility for WTO members to allow the suppliers of some other members selectively and deny the right to the suppliers of others. In light of this analysis it is questionable if a transparency agreement on government procurement without market access has a bearing on the multilateral trade relations of members and is appropriate for negotiating a multilateral agreement under Article III of the Agreement Establishing the World Trade Organisation. It is connected more with the socio-economic objective of improving governance and checking bribery and corruption particularly in the developing countries and less with the expansion of trade in goods and services. Some Members have acknowledged that suppression of corruption would be an incidental benefit but have been reluctant to pursue the negotiations from that standpoint because of difficulty in relating it to the WTO. Greater transparency in government procurement would also bring efficiency and value for money benefits and contribute to improvement in the management of the domestic economy. But again, it has been contested if this is a proper function of the WTO(Arrowsmith 2003).



The above having been said, it must also be acknowledged it has been demonstrated that corruption and bribery is a deep-seated canker, which is eating into the vitals of the Indian polity and seriously undermining the development efforts in the country. Quite independently of the WTO negotiations in the area both the State and Central governments should have an interest in improving transparency in government procurement at all levels. Indeed it is imperative that they do so in order to stem the rot that has been exposed in successive sting operations. If the target of eight per cent GDP growth is to be achieved massive leakage of government funds must be plugged. What better opportunity could be there than this in which we do what is in our national interest any way and claim credit for it in the multilateral trade negotiations.

Will India have to undertake a wholesale change in its procurement laws, regulations and practices, if it were to agree to the elements that have been proposed in the Working Group for an agreement in the area. Our examination has shown that in the Central Government as well as in the relatively advanced states of Karnataka and Tamilnadu, the procurement procedures conform broadly to the requirements of transparency envisaged in GPA 1996. The proposals on transparency in the Working Group are more general and less prescriptive than those in GPA 1996, and should therefore be less of a problem. The most important additional measure that would need to be taken in the Central government is to establish an independent challenge mechanism. Karnataka and Tamilnadu have provided for such a mechanism in their recently promulgated laws, but it is not independent, as required in GPA 1996 and in the proposals that have been made in the Working Group. The two major deficiencies found by the World Bank in its survey of government procurement in the Central Government and in the public enterprises of the Central Government are that the evaluation criteria are not drawn up clearly and there is no debriefing of unsuccessful tenderers. These are matters on which a transparency agreement would certainly contain specific provisions. The World Bank has noted also that negotiations are held in a routine fashion with the lowest tenderer, and orders are split up among more than one supplier. On these matters, no precise provision has been proposed in the Working Group but such practices would seem to be ruled out by the general requirement that decisions on award of contract must

be taken only on the basis of the terms set out in the notice inviting tender and tender documentation. Common sense dictates that the Government must bring about reforms to overcome these deficiencies, whether or not a transparency agreement materialises ultimately. And undertaking obligations to ensure that these shortcomings in the rules and practice are eliminated should not be considered onerous at all.

What is the implication of all this for India's overall approach to the negotiations in the area? Should it or should it not agree to negotiations in the area? The answer is that India should set a price for agreeing to negotiate in this area. The price can be in the modalities of negotiations in the areas of agriculture and non-agricultural market access, or in the substantive negotiations on market access in services. Further, the level of ambition of the transparency agreement can be calibrated in accordance with what India can secure in those negotiations. More on this later when we consider the position that India should take on some of the important elements of the proposed agreement.

Seeking a quid pro quo in other areas of negotiations is not the only option. Parties to the GPA 1996 could give other reciprocal benefits to India and other non-Parties to that plurilateral agreement. We have seen above that the GPA 1996 envisages that if non-Parties comply with key transparency provisions of that agreement, they can be given conditional access to competitive tendering procedures as well as challenge procedures. As a price for agreeing to the transparency agreement, India could ask for being given access to these procedures in respect of at least some of the entities or class of goods and services of its interest in the major industrialised countries. Of course it would not be legitimate for it to ask for the full benefits of the plurilateral agreement, until and unless it is agreeable to guarantee national treatment to foreign suppliers. The way the Indian economic policy is evolving, the day might come soon when it would be willing to commit itself to giving up all preferences to domestic suppliers, which is nearly the position on the ground already. In that eventuality, an agreement on transparency in government procurement will not be sufficient to respond to India's economic interest. India must then seek to become a Party to the GPA 1996.

Once India has decided to seriously engage in the negotiations, its positions would have to be developed on the proposed elements. In the discussions, in respect of many of the elements India has expressed the general difficulty that the requirement would be administratively burdensome. For the most part this objection emanates from the generally negative approach to envisaging an agreement in the area. Some of the more onerous proposals such as statistical reporting seem to have been talked out already in the past discussions and are unlikely to be pressed. We consider below three key aspects, on which the greatest amount of debate has taken place in the Working Group viz. scope of government procurement, domestic review and WTO dispute settlement procedures.

### ***VI.1 Scope of government procurement***

On the scope the really important issues are those relating to the threshold and the entities to be covered. There is some merit in the argument that the concept of threshold is more relevant to market access and less to an agreement encompassing only transparency aspects. The same transparency rules must necessarily apply to all government procurement, irrespective of the value of an individual transaction. As far as really small purchases are concerned they are in any case exempted from the normal procedures and are directly bought from the market. However, a threshold value will serve to increase the comfort level of WTO members with a transparency agreement. Moreover, if a domestic review mechanism is to be set up, and it is difficult to envisage an agreement without such a mechanism, a value threshold will provide one of the ways to keep the number of challenges to procurement decisions under control. India must press for a suitably high threshold value being fixed for the transparency agreement.

The issue of entities is more complex. First of all there can be no escape from all central government agencies being brought under the purview of a future agreement. But should India agree to state governments and government enterprises being covered. In the case of government enterprise, the answer is easy. We have seen that the development strategy adopted by India after independence involved the state in several industrial and commercial enterprises. Although after the economic reforms of 1991-92 the government

has embarked on a divestment programme, for a long time to come it may remain saddled with a large number of such enterprises. There is a problem with bringing central government enterprises within the purview of the agreement. Much of the procurement done by the industrial enterprises is meant to be used in the production of goods for commercial sale and is therefore not covered at all by the basic definition of government procurement in GATT 1994 or the GATS. In fact it is possible to argue that all the goods (and services) procured by these enterprises are meant to be used in the production of goods for commercial sale. Take, for instance, the case of the Steel Authority of India (SAIL) purchasing spare parts for the rolling mills, or air conditioners for its managerial staff. Clearly both the spare parts and air conditioners are used in the production of goods for commercial sale. Nevertheless, unless there is an explicit exclusion, given the government control and influence on these enterprises, an argument could be made on the basis of Article XXIV: 6b of the GPA 1996 that all procurement transactions of these enterprises are covered by the disciplines of the transparency agreement. Transparency disciplines might not be fully suited for commercial and industrial enterprises. India must therefore argue for the exclusion of government enterprises from the purview of the transparency agreement.

We have seen that the central government has the constitutional powers to enact laws on government procurement that could apply to all state governments. It is possible to foresee that the Government of India would act to improve governance in the states and impose the Tamilnadu or Karnataka type of transparency laws on other states. But such a major decision cannot be taken easily. To justify taking such action to comply with an agreement in the WTO India must get some major benefits in the current round of multilateral trade negotiations. If there is a major advance made by the industrialised country trading partners of India on reducing/eliminating agricultural subsidies, or by making concessions in the movement of natural persons (in the GATS negotiations), or in eliminating import duty on textiles and clothing, then India could consider undertaking the transparency obligation in respect of state government entities, as part of the bargain. In the eventuality of minimal advances in these areas, India must argue for limiting the coverage to the level of central government alone. This is the calibration to which we

have referred earlier. Instead of arguing for excluding some types of transactions such as hire purchase or leaving out an entire sector such as services, the best means for limiting the coverage is by restricting its scope to central government entities.

## ***VI.2 Domestic Review***

India, Malaysia and some other countries have argued against any provision being made requiring that provision be made for domestic review by establishing an independent challenge mechanism. If the WTO members are to accept provisions for ensuring transparency of the laws, regulations and guidelines of general application relating to government procurement in general and also of individual opportunities for procurement, then surely they must also agree on a mechanism for enforcement of the provisions. There are some valid points being made by India, Malaysia and others on extending the WTO DSU to a transparency agreement but the argument against an effective domestic review mechanism is weak. As in other areas covered by the WTO Agreement, the establishment of domestic review mechanism must be the primary means of enforcement, and the means must be efficient and effective. And for efficiency and effectiveness it is important that the mechanism is independent. In India some amount of surveillance is maintained by the Comptroller and Auditor General and the Vigilance Commissioner, but this surveillance is of a post facto nature and can result only in action against the officials concerned. An effective domestic review mechanism must, however, be able to provide relief to the aggrieved supplier, suspend the procurement, or overturn the procurement decision. For all this it is important that it is independent of the procurement entity. One fear expressed is that the challenge mechanism may become a tool for delaying procurement operations. Some amount of delay has to be tolerated in the interest of fair play and checking leakage of government funds. Since a threshold of value is likely to be agreed, the challenge mechanism would be available only for higher value contracts, where the stakes are large. Further to ensure that vexatious proceedings are not launched a requirement must be introduced that in order to take recourse to the challenge mechanism a security deposit would have to be made, which should be liable to be forfeited if the application is found to be without substance. If India agrees to a

transparency agreement in government procurement, it must also agree to an independent challenge mechanism to be a part of it.

### ***VI.3 WTO Dispute Settlement Procedures***

The argument against the proposal for the DSU being applied to a transparency agreement has some validity inasmuch as the market access element is excluded from its purview. The soft law approach is definitely an option and one could envisage two variants of this approach. The subject could either be covered in the Trade Policy Reviews periodically as a part of the larger exercise, or a special committee could be created in the WTO in which all aspects of government procurement activities could be subject to peer review, taking up each member at a time. But it cannot be stated that exclusion of market access would make a transparency agreement altogether incompatible with the DSU. Once in the agreement WTO members make a commitment to make their government procurement related rules accessible to other members and suppliers in other members and agree to publish individual procurement opportunities in a manner that allows wide participation, a complaint can certainly be made against them for nullification and impairment of the benefits under the agreement for failure to comply with its provisions. A complaint can also be made for failure to establish an independent domestic review mechanism, and a finding of non-compliance would certainly result in a recommendation to bring their laws and practice in conformity with the agreement. There would be difficulty only in determining the quantum of retaliatory action, if such an eventuality arises. But where there has been a failure to comply with an obligation, the quantum of retaliatory action has not always been determined by the trade effect. Once it is agreed that the DSU would apply to the transparency agreement there would be scope for fine-tuning of the dispute settlement aspect. It is apparent that the non-violation nullification or impairment of the benefits of the agreement would not apply for instance.

The concern that disputes in the WTO would result in disruption in the procurement processes in member countries has been met to a large extent by the proposal of the US that individual procurement decisions would be subject only to domestic review and not to disputes under the DSU. There is a large measure of

agreement also that disputes could be raised in the WTO only after the domestic review process has been exhausted.

In the light of the above analysis India could agree to the transparency agreement being subject to disputes under the DSU. However, once again a calibrated approach would be warranted. A transparency agreement on the basis of a peer review approach can make a great deal of sense, but if something stronger is required by the proponents then there should be some additional commitments by way of quid pro quo in other areas of negotiations.

## **VII Summary of findings, conclusions, and recommendations**

- Governments in developed and developing countries have used government procurement as a tool for promoting domestic industry and aiding particular types of enterprises. In order to ensure that the use of this instrument is not hindered the contracting parties to GATT 1947 excluded government procurement from the national treatment obligation of that agreement. Although the de jure situation in this regard is less clear, in the conduct of their trade relations the contracting parties to GATT 1947 and later the WTO members have treated government procurement as being not covered by the MFN obligation of GATT 1947 as well as GATT 1994. In the GATS government procurement was specifically excluded from the purview of obligations relating to MFN and national treatment as well as market access. Due to the exclusion of both goods and services from the key obligations of GATT 1994 and GATS it has been possible for a subset of contracting parties of GATT 1947 and of WTO members to restrict the benefits of the plurilateral agreement on government procurement to the parties to the agreement.
- In the Tokyo Round Agreement on Government Procurement (GPA 1981) the Parties (mainly a number of OECD countries and Hong Kong and Singapore) agreed to extend MFN and national treatment to each other in government procurement essentially in the area of goods. But the coverage of the agreement was restricted to

the entities (Ministries and other government agencies) listed by each party in an annex to the agreement, and was subject to a threshold of value for individual purchases. Besides the substantive obligations of non-discrimination there were obligations relating to transparency and tendering procedures. The GPA 1981 was revised in 1988 with some improvement in the text and lowering of the threshold of value.

- Thereafter another negotiation ensued in parallel with the Uruguay Round but unconnected with it. These negotiations resulted in the WTO Agreement on Government Procurement 1996 (GPA 1996) with vastly increased coverage of the agreement including entities at sub-Federal level and service contracts, particularly construction, and government enterprises as well. The text of the Agreement was also overhauled. Parties have generally excluded procurement from small enterprises. A feature of the Agreement was that a number of Parties took recourse to sectoral non-application against other Parties where they felt that they had not received reciprocal benefits in the listing of entities. This feature makes the substantive obligation of unconditional MFN treatment of GPA 1996 somewhat unique: it applies where the derogation has not been specifically stipulated. In GATT 1994 derogations are barred altogether. In the GATS derogations are possible only if MFN exemption has been scheduled. In GPA 1996 the provisions on transparency and tendering procedures were elaborated further and an important innovation was the introduction of procedures enabling suppliers to challenge alleged breaches of the Agreement.
  
- The government procurement practices in India have been recently surveyed and critically examined by the World Bank. The World Bank report brings out that as far as transparency is concerned on many aspects the prescribed procedures in the central government are broadly in line with the requirements of GPA 1996. This is the case in respect of procedures relating to invitation to participate in intended procurement, selection procedures, time limits for tendering and delivery, submission, receipt and opening of tenders. With respect to these phases, the criticism is of deviations from the rules in practice rather than of absence of rules. Some of these practices are



selective/restrictive advertisement, selective sale of tender documents, substitution of documents, permitting and soliciting modification of bid after public opening, deliberate delay in processing of tenders, selective leaking of information, and splitting awards without good reasons. There are, however, some more significant shortcomings in the Indian practice and rules in some other aspects of the procedures. Tender documentation does not always clearly specify the criteria of awarding contract. Negotiations are held in a routine manner with the lowest bidder. There is no requirement of debriefing of the unsuccessful bidder or for the publication of contract awards. Above all, formal appeal or challenge procedures are absent. The practices in the central government enterprises reflect broadly the practices and the shortcomings of the procedures in the central government. In the states there is wide variation in the standard of government procurement procedures. Some of the more advanced states (Karnataka and Tamilnadu) have introduced legislation on transparency, which puts them ahead of the central government. Others like Uttar Pradesh have procurement practices that reflect their generally lower quality of governance.

- On the more substantive aspects of non-discrimination in government procurement there is no departure in India from the MFN principle. On national treatment things have changed considerably following the introduction of economic reforms in 1991-92. Explicit price preferences stipulated earlier in favour of public sector suppliers has been given up. Purchase preference for other domestic suppliers has been phased out, and while it is being temporarily extended to public sector enterprises, it is the declared intention of government to eliminate this also. All that remains now is the preference for small-scale and cottage industries, but it is arguable that this preference is on par with the exemption that some major GPA 1996 signatories have obtained in respect of small enterprises.
- In the Working Group on transparency in government procurement the objective of the proponents is to obtain agreement on a level of transparency that is somewhat lower than what is envisaged in the GPA 1996. The proposed elements include: scope of the agreement; publication of information on national legislation and procurement

opportunities; time periods; transparency of decisions on qualification and on contract awards; domestic review; and WTO dispute settlement procedures. If the proposed elements were accepted in most respects not much change would be required in the Government of India practices. The only areas where an agreement would entail changes are with respect to the practice of not publishing the award criteria clearly, holding routine negotiations with the lowest bidder, and not debriefing unsuccessful suppliers. But making these changes would really be tantamount to bringing about much needed reform to this area of government activity. The principal issues that have emerged in the debate in the Working Group and on which India and other developing countries have expressed concern are scope of the agreement, domestic review, and WTO dispute settlement procedures.

- At Doha it appeared that the WTO members had already recognised the need for a multilateral agreement in the area and agreed that negotiations would take place after the Fifth Session for realising such a framework. The only additional step that was needed was to agree on the modalities for such negotiations. However, the need to take a decision on the modalities by consensus opened the door to a de novo consideration of the basic issue whether transparency in government procurement (as also other Singapore issues) needed to be on the agenda of the round at all. At the resumption of negotiations, therefore, India can start discussions on the basis that the proponents have to make out a case afresh why it is necessary to have a WTO agreement in the area. The specific points that remain outstanding could be addressed only after this preliminary point has been settled.
- There are serious problems on the relationship with trade of a purely transparency agreement on government procurement. In order to meet a major concern of the developing countries the proponents agreed to exclude market access from the purview of negotiations. But in doing so they also knocked out substantially its relationship with trade. A transparency agreement would not restrict the right of a member under GATT 1994 and the GATS to restrict the opportunity to domestic suppliers and exclude altogether suppliers from other members of the WTO. Even

more egregious would be the possibility for WTO members to allow the suppliers from some members and deny the right to the suppliers from others. In the light of this analysis a transparency agreement on government procurement sans market access would be connected more with the socio-economic objective of improving governance and less with the expansion of trade in goods and services. Transparency in government procurement could bring efficiency and value for money benefits, but these aspects have little to do with the WTO Agreement.

- It is not suggested that for the above reason India must oppose negotiations in the area. Since the agreement would serve to remove a major malaise in governance India might as well agree to the negotiations. But it should ask by way of quid pro quo for appropriate concessions in other major areas of negotiations in the Doha Round. Concessions can also be sought with respect to government procurement covered by GPA 1996. That agreement envisages that if non-Parties comply with key transparency provisions of that agreement, they can get conditional access to competitive tendering procedures as well as challenge procedures. As a price for agreeing to the transparency agreement India could ask for being given access to these procedures in respect of at least some of the entities or class of goods and services of its interest in the major industrialised countries.
- If India decides to seriously engage in the negotiations, it would have to develop a position on the proposed elements. For most of the elements India's has stated that the main difficulty is the administrative burden that is entailed. For the most part this objection emanates from the generally negative approach to envisaging an agreement in the area. Some of the more onerous proposals such as statistical reporting seem to have been talked out. There are three main areas where a decision has to be taken viz. scope of government procurement, domestic review and WTO dispute settlement procedures.
- On scope the really important issues are those relating to the threshold and entities to be covered. There is some merit in the argument that the concept of threshold is more

relevant to market access and less to an agreement encompassing only transparency aspects. However, it would be expedient to have a value threshold in order to increase generally the comfort level of governments with such an agreement. Moreover, a value threshold would serve to keep the number of challenges in the domestic review mechanism under control. As for the entities, government enterprises must be kept out for two reasons. First, because in most cases they are commercial and industrial enterprises, and even in the GPA 1996 the Parties have excluded such enterprises. Second, because much of the procurement done by these enterprises is used in the production of goods or services for commercial sale, and such goods do not come under the definition of government procurement in GATT 1994 or the GATS. As for state governments, the central government does have the constitutional powers to impose reformed government procurement procedures on them. But such a step would be a huge undertaking and should not be taken lightly. On the other hand if India's trading partners are willing to give valuable reciprocal concessions in other areas of negotiations India could consider bringing state government departments and agencies also under the purview of the transparency agreement.

- There is a strong case for agreeing to an effective challenge mechanism for domestic review as without it the transparency agreement would remain toothless. The mechanism would be effective only if it is independent and has the ability to provide relief to the aggrieved supplier, suspend the procurement, or overturn it. The threshold of value in the agreement would ensure that the mechanism is available only for high value contracts where the stakes are high. A system of security deposit could be introduced to safeguard against vexatious cases.
  
- The argument against making the DSU applicable has some validity inasmuch as the market access element is excluded from the purview of the transparency agreement. The soft law approach is definitely an option and one could envisage either bringing it within the purview of the Trade Policy Review or setting up peer review procedures independently for government procurement. But it cannot be stated that exclusion of market access would make a transparency agreement incompatible with the DSU. The

provisions of the DSU could be fine-tuned to the requirements of a transparency agreement. The concern that disputes in the WTO would result in disruption in the procurement processes in member countries has been met to a large extent by the US proposal that individual procurement decisions would be subject to domestic review and not to disputes under the DSU. India could therefore agree to the transparency agreement being subject to disputes under the DSU. However, once again a calibrated approach would be warranted. A transparency agreement on the basis of a peer review can serve the purpose, but if something stronger is required then additional concessions must be given by the proponents in other areas of negotiations.

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