

COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

concerning
negotiations regarding
access to third countries' markets
in the fields covered by
Directive 93/38/EEC
(the Utilities Directive)

INTRODUCTION

This report describes the progress made in multilateral or bilateral negotiations regarding access for Community undertakings to the third countries' markets in the fields covered by Directive 93/38/EEC of 14 June 1993, on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ("the Utilities Directive")¹. It is presented in accordance with Article 36 (6) of that Directive.

On 3 March 1993, the Commission presented a first progress report² on negotiations in the fields covered by Directive 90/531/EEC of 17 September 1990³. This Directive has in the meantime been replaced by Directive 93/38/EEC of 14 June 1993 covering supplies and works contracts as well as services contracts.

This report describes the progress achieved since then. It first gives and, where necessary, up-dates the information on the agreements which the Community has already signed with third countries and which cover procurement in the fields covered by the Directive.

It sets out the results of the GATT Government Procurement Agreement which was signed, subject to ratification, at Marrakech on 15 April 1994. It also provides information on other bilateral negotiations which the Commission is conducting with third countries in the same fields.

¹ O.J. L 199 of 9 August 1993, p. 84
² COM (93) 80 final of 3 March 1993
³ O.J. L 297 of 29 October 1990, p.1

I. NEGOTIATIONS ALREADY CONCLUDED

Agreements between the Community and the EFTA countries and some eastern European countries in the fields covered by the Directive have entered into force. An expanded GATT Government Procurement Agreement was signed in Marrakesh and is expected to enter into force on 1 January 1996. Formal procedures for Council approval have been launched.

1. EFTA countries

The Agreement on the European Economic Area ("the EEA Agreement") signed on 2 May 1992 by the Community, its Member States and the EFTA Countries provides in its Article 65 and Annex XVI that the provisions of the Utilities Directive be applied in the EFTA Countries. The EEA Agreement entered into force on 1 January 1994. Sweden, Finland, Iceland and Austria now provide access to contract award procedures to Community undertakings. As regards Norway, however, complete reciprocal opening will have been achieved by the end of the derogation period (31 December 1994) at the latest.

2. Eastern European Countries

The Europe Agreements signed on 16 December 1991 by the Community, its Member States and Hungary and Poland entered into force on 1 February 1994. Undertakings of the respective countries enjoy full access to the contract award procedures in the Community under conditions not less favourable than those applied to Community companies. National treatment has also been granted to Community undertakings established under specific forms in the countries concerned. By the end of the transition periods (ten years), national treatment will be granted to any Community undertakings and full access to procurement will be established on a reciprocal basis.

Relations between the Community and the Czech Republic, Bulgaria, Romania and Slovakia are still governed by the Interim Agreements with those countries, until such time as separate Europe Agreements containing identical provisions on government procurement are ratified and enter into force. Over the coming year, it is expected that negotiations will begin on Europe Agreements with Slovenia and the Baltic States.

3. GATT Government Procurement Agreement

Background

In pursuance of Article IX:6(b) of the GATT Government Procurement Agreement (the GPA) negotiations have been undertaken with a view to broadening its coverage to entities at sub-central level and entities operating in utility sectors and extending it to cover works and other services contracts. The negotiations have been conducted in parallel with the Uruguay Round and were concluded on 15 December 1993 in Geneva. The new GPA was signed subject to ratification on 15 April 1994 at the Marrakesh Ministerial Conference by the

Community and its Member States, the US, Japan, Canada, the EFTA countries, Korea and Israel.

Bilateral Agreement with the US of May 1993

A major impetus to the successful conclusion of the GATT GPA negotiations was given by the conclusion of a bilateral agreement in the form of a Memorandum of Understanding on government procurement between the EC and the US in May 1993. Under the bilateral agreement, barriers to EC companies to bid for contracts awarded by US central government agencies were removed. In the electricity sector, "Buy America" restrictions applying to federally operated electrical utilities were waived for EC companies. Similarly, the Community extended the benefits of the Utilities Directive in the electrical sector to US suppliers. The US also made a commitment to start an internal process to get coverage of sub-federal entities, including utilities, and the elimination of "Buy America" provisions in the GATT GPA. The bilateral MoU will expire with the entry into force of the new GPA which incorporates its results.

However, no agreement was reached in May 1993, nor at a later stage, concerning access to procurement in the telecommunications sector. This led the United States to impose sanctions on Community bidders participating in certain tenders, particularly those below-threshold, by the Federal Government, including sub-threshold contracts awarded by the 6 federally-owned electrical utilities. The Community responded in a measured and controlled way by imposing counter-sanctions against US bidders.

The expanded GATT Government Procurement Agreement

On 15 December 1993, Parties reached agreement on an expanded GPA which will enter into force on 1 January 1996. With regard to the United States, agreement on coverage of the sub-federal and public utilities was reached following extensive bilateral negotiations on 15 April at the Marrakesh Ministerial conference. Formal approval procedures (COM (94) 251) with regard to the agreement are under way. Details are set out below.

The new GPA Agreement strengthens and improves the existing code and significantly expands coverage. Korea has now also joined the existing parties as a signatory to the new GPA. However, Hong Kong and Singapore, Parties to the 1979 GPA, failed to sign the new GPA at Marrakesh. Hong Kong explained that its decision was related to objections of principle to the conditionality of the Agreement, whereby (because of important variations in coverage between parties) access to contracts is not granted on the basis of full MFN treatment. However, Hong Kong has stressed that it will continue to procure in an open and competitive way with regard to contracts in the fields covered by the Utilities Directive.

The Community's objective with respect to utilities in the negotiations was to obtain guarantees of comparable and effective access to public procurement markets in GPA signatory countries in a manner compatible with the approach of the Directives. This negotiating objective has to a large extent been achieved. From the entry into force of the Agreement in 1996, most public contracts awarded by the Parties will be subject to the rules and procedures of the Agreement and thus open on a non-discriminatory basis to Community suppliers, contractors and service providers. In terms of the contracts covered, the new GPA has extended the scope of the existing rules by bringing within its ambit not only contracts for the supply of goods but also contracts for construction and for the provision of services.

The GPA can be seen as consisting of two separate parts. The first part deals with procedural rules, while the second part is made up of annexes detailing coverage for each of the Parties.

The rules of the GPA

The procedural rules follow the pattern of the Community's procurement Directives very closely. They lay down requirements regarding publicity for entities' intended procurement, qualification schemes, calls for tender and contract awards; specification of goods, works and services in a manner intended to ensure that the market is open to a wide range of bidders; transparent procedures for the selection of candidates and the evaluation of bids; objective criteria for the award of contracts, announced in advance; and challenge procedures to ensure that bidders who find that their rights are not being respected can obtain timely redress.

The coverage of the GPA

The second part of the Agreement consists of the specific annexes which list the central and local government and other public bodies and utilities which must carry out their procurement in line with the rules of the Agreement. There are detailed annexes from the USA, Canada, Japan, Switzerland, Austria, Finland, Sweden and Norway, as well as from the Community. Coverage at central government level was agreed between all Parties on a Most Favoured Nation treatment basis. At sub-central government level, agreement was reached on a reciprocal basis.

Coverage in the utilities sectors was also agreed on a reciprocal basis, strictly in line with the provisions of Article 36. This means that third country bidders making bids containing a majority of non-Community origin products will only have guarantees of access to contracts awarded by entities in utilities sectors in the Community where their own country offers effective and comparable access to contracts in the same sector for EC suppliers. The Community's reciprocal approach is reflected in the derogations from the principle of Most Favoured Nation treatment which are contained in Annex III of its offer. A detailed analysis of the opportunities of access for EC suppliers to the markets of other Parties is given below.

The Community's offer

Apart from the EFTA Countries whose final offers corresponded to that of the EC, no other Party was able to meet the Community's requests for coverage in full. The Community therefore tailored its offer to match the degree of market opening offered by the other Parties.

In its final offer, the Community included its entities operating in the electrical, water, urban transport, port and airport sectors. The telecommunications sector was not included in the GPA, and the EC withdrew its offer on telecommunications in the closing stages of the negotiations in the absence of any credible counter offer from other major Parties. As other Parties were not willing to cover privately-owned utilities, even if they were regulated and operating under special or exclusive rights, the Community also only included its publicly owned utilities for coverage in its final offer. However, in practice, there is no difference in the way that utilities must operate and award contracts in the EU under the Utilities Directive.

The US offer

The United States and the European Community held intensive negotiations on expansion of coverage between conclusion of the GPA on 15 December 1993 and its signature on 15 April 1994 in Marrakesh. In finding a balanced agreement, the negotiators used the results of a jointly commissioned study conducted by an independent consultant on the procurement opportunities arising under their respective offers. The US offer in the fields covered by the Directive which resulted from these negotiations covers three areas:

1. The US will maintain open tendering in the electrical sector by the Tennessee Valley Authority and the five Power Marketing Administrations under the Department of Energy. Furthermore, New York Power Authority will be subject to GPA disciplines. The US also agreed to waive the application of "Buy America" provisions on contracts awarded by around 1,000 electrical co-operatives which are financed by loans or loan guarantees from the Rural Electrification Administration (REA). At present, all materials and equipment bought using REA funds must be supplied domestically, although exceptions are made for certain items which are not manufactured in high enough quantity or quality in the US. The threshold operated by the electrical utilities for supplies and services under the GPA is the SDR equivalent of \$ 250,000. The EU will operate a threshold of around ECU 400,000 for similar procurements, which is approximately \$ 580,000. The EC is committed to continue its disapplication of Article 36 of the Utilities Directive for the electrical sector towards the US.
2. The US also offered, partly in the GPA and partly bilaterally, to provide access to contracts relating to the procurement of supplies, works and services by its biggest ports. These include the New York/New Jersey Port Authority and the Baltimore and Massachusetts Port Authorities.

3. In the airport sector, the offer includes the three major airports in New York (La Guardia, Newark and JFK) and Boston Logan Airport. It should be noted that, because of the structure of sub-federal government in the US, the opening of procurement in utilities sectors is also made possible through the coverage of certain entities in States or Cities. EU suppliers, for example will enjoy access to procurement by Chicago O'Hare airport and by other entities which are owned and operated by covered sub-federal authorities. In fact, following a process of obtaining voluntary commitments from its sub-federal authorities to accept coverage, the US offered 39 States (among which the five biggest: New York, California, Illinois, Florida and Texas) and a number of its major cities (among which Chicago, Detroit, Boston, Dallas) either inside or outside the GPA. The EC has made no commitments with regard to procurement by its airports, as certain obstacles remain in this sector.

The Community also held bilateral negotiations on telecommunications procurement with the US with a view to obtaining appropriate guarantees of access for its suppliers. In these negotiations, it emphasised the importance of the application of certain disciplines with a view to ensuring transparent and open tendering, in particular, by privately-owned US telecommunications operators. The US was not able to make firm commitments in this regard. However, the US expressed its intent to try to reach an agreement with the EU in this area in the future. No substantive progress was made with regard to the elimination of discriminatory procurement requirements which are imposed along with the provision of federal funds to states and localities in sectors such as urban transport, airports (despite coverage of a number of major airports, see above) and water treatment. Consequently, the benefits of the Utilities Directive will not be extended to US suppliers in these sectors.

The Canadian offer

Canada has not yet made a concrete offer in the fields covered by the Directive. However, the Canadian side has made clear that the federal government is involved in a process of obtaining voluntary commitments for coverage from utilities which are either owned or influenced by provincial governments. This process should enable Canada to make a substantial offer within 18 months of signature of the GPA. The Community and several other Parties have requested the inclusion of electrical utilities, in particular Quebec and Ontario Hydro, urban transport, ports, airports and water facilities which are often operated at municipal level. However, Canada's position is strongly influenced by its assessment of the US opening in these sectors. Where Canada considers the US opening as insufficient, it remains to be seen whether or not Canada will extend the benefits of access to other Parties on a more selective basis.

The Japanese offer

The Japanese offer includes the water, port and airport sectors. Generally, the production, transport and distribution of drinking water is an activity which is carried out by major municipalities in Japan which have been offered. Ports and airports in Japan are administered by the Ministry of Transport or by prefectures. Their procurements are covered in accordance with the lower thresholds of the GPA applying to the central and sub-central government entities.

The Japanese offer also includes a number of entities in the area of public transport. These include the 7 railway companies which were previously part of the Japanese Railways (JR) company. It also covers a government-owned public transport entity (Teito Rapid Transit Authority) and a number of public transport entities which are owned by the major municipalities. However, a footnote in Japan's offer states that procurements relating to "operational safety" are not covered. Japanese officials have explained that this exclusion covers procurements of, for example, rolling stock, track and signalling equipment, rails and engines. The Community strongly rejects Japan's wide-ranging interpretation of this reservation and demands application of the GPA to any such procurements. It has stressed that safety of equipment can be ensured by setting adequate standards and testing methods. With regard to telecommunications, the Japanese offer does not include the procurement of telecommunications equipment by NTT. Its procurement is subject to a US/Japan bilateral agreement which, according to the Japanese authorities, is available on an MFN basis to other Parties. The rules and procedures of this agreement are not fully in line with GPA procedures. Moreover, the results of their application have been generally disappointing for foreign suppliers. Japan was also unwilling to cover its electrical utilities for reasons relating to their ownership structure (95% of the sector is privately owned). However, electrical utilities are heavily regulated by the Japanese government and their procurement practices are far from transparent and open to foreign suppliers. Consequently, the Community will continue to apply Article 36 to bids containing Japanese products in the public transport (including railways), telecommunications and electricity sectors.

The Korean offer

The Korean offer covers procurement by its water utilities, which are covered by the major municipalities. Furthermore, ports are covered through the Ministry of Transport, whose procurement is undertaken by the Central Procurement Office (OSROK). The Korean Electric Power Corporation (KEPCO) is the country's monopoly power generation company. The bulk of its procurement will be covered under the new GPA. However, there are a limited number of products which are exempted including electric transformers and insulated cables.

The opening up of procurement in the water, ports and electricity sectors to European suppliers is a major step forward. To date, European suppliers have regularly faced serious problems in gaining access to Korean procurement markets because of discriminatory practices. They have often been forced to accept uneconomic conditions in public contracts, such as compulsory technology transfer, domestic content requirements and other forms of offset.

The Korean offer contains gaps in the railway sector, the urban transport sector and the airport sector. With regard to railways, while the Korean National Railroad is covered, the offer makes no provision for the coverage of the entity which has been set up to manage the high-speed train system in Korea. Furthermore, while some urban transport and subway construction is covered, there are a number of entities in this field which have not been included. As regards the coverage of airports, those which fall under the Ministry of Transport are covered. However, the construction of new airports is procured by a separate body which is not covered. The Korean side has explained that the entities for which the Community is seeking coverage are not under the direct control of the government and can therefore not be offered. However, under the circumstances, the Community cannot accept that there is effective and comparable access for EC suppliers to markets in the public transport (including long-distance rail) and airport sectors in Korea, and will therefore maintain Article 36 towards Korea in those sectors, until such time as Korea is able to make satisfactory offers in those areas.

Regarding public telecommunications equipment procurement, non-Korean firms need to be implanted in Korea in order to be able to bid for domestically financed procurements (this is the major part of the market) unless a bilateral agreement with a third country on access exists. As a result of bilateral negotiations between the US and Korea, US firms are allowed to bid for part of the contracts. This privileged treatment which entered into force on 1 January 1993 de facto discriminates against non-US foreign competitors, including European firms. This matter is being pursued with Korea.

The Israeli offer

The Israeli offer includes procurement by its ports, airports and railways. Furthermore, the provision of water by the 3 main municipalities is offered. In the electrical sector, Israel has offered procurement by its monopoly provider, Israel Electricity Company, with the exception of cables, electro-mechanic meters, transformers, disconnectors and switchers and electric motors. The Community has mirrored the Israeli exemptions in its own schedule. As regards the telecommunications sector, Israel offered its national communications company, Bezek, on a reciprocal basis, with the exception of the procurement of cables. As the Community has not included its telecommunications sector in the GPA, Israel has not accorded rights of access to Bezek's procurement to EC suppliers. However, it is expected that bilateral negotiations will be held between the Community and Israel on this sector as well as on other outstanding areas in the near future. Israel made no offer on urban transport. The subject of telecommunication and urban transport procurement are among those to be covered in a new bilateral agreement with Israel currently under negotiation.

A table is attached setting out the situation regarding market access for procurements in the various utility sectors of the various Signatories to the GPA.

II. FURTHER NEGOTIATIONS ON THE EXPANSION OF COVERAGE

Inside the GPA

The GPA provides for the possibility to negotiate, bilaterally or plurilaterally, further expansion of coverage. This will in particular be done through the elimination of certain derogations or through the termination or non-application of parts of the Agreement between Parties. In this regard, it is recalled that the Community and the US reached agreement on an expansion of coverage between them at the Marrakesh Conference which they would, for the most part, incorporate in the new Agreement following its approval. It will also be recalled that the Canadian schedule envisages further negotiations prior to the entry into force of the Agreement, in particular concerning the coverage of entities operating in the fields covered by the Utilities Directive.

It should also be noted that several other Contracting Parties to the GATT have, at one time or another, expressed an interest in joining the Government Procurement Agreement. A concrete demand for accession has now been received from Aruba (including an offer covering all relevant utility sectors) while that of Liechtenstein has been announced. It is expected that others will follow. Furthermore, several candidates for accession to the GATT/WTO, for example mainland China and Taiwan have been requested to accede to the GPA subject to their GATT/WTO accession. In this respect, Taiwan has recently communicated to the GATT its interest in acceding to the GPA and its willingness to enter into coverage negotiations with other Parties.

Bilateral negotiations

As stated above, the Commission will continue to seek an expansion of coverage with a view to achieving effective and comparable access for EU suppliers to sectors not offered by other Parties, either within the GPA or, as regards sectors which have not been covered in the GPA, on a bilateral basis.

III. SUMMARY

The EEA Agreement has extended the benefits of the Utilities Directive from 1 January 1994 to the countries concerned, with extra deadlines for Norway and Liechtenstein.

The Europe Agreements with Poland and Hungary has also led the Community to provide access from 1 February 1994 to undertakings from these countries to tenders in the fields of the Directive. As regards the Czech Republic, Slovakia, Bulgaria, Romania, Slovenia and the Baltic States, the Community will make the Directive available to their undertakings as and when the Europe Agreements with these states have been ratified.

The Community has extended the benefits of the Directive to suppliers from the United States to the electrical sector from 25 May 1993 as a result of the bilateral Memorandum of Understanding on government procurement.

As a result of the GATT Government Procurement Agreement, the Community will extend on a reciprocal basis the benefits of the Directive for specific sectors to certain signatories. The benefits of the Directive concerning the water sector will be accorded to suppliers from Israel, Japan, Korea, and the EFTA countries; for the urban transport sector to suppliers from the EFTA countries; for the airport sector to suppliers from Israel, Japan and the EFTA countries; for the port sector to suppliers from Israel, Japan, Korea, the United States and the EFTA countries; for electrical utilities to suppliers from Israel, Korea, the United States and the EFTA countries. Access to contracts for EC suppliers in the same sectors is assured under the Agreement.

**Effective and comparable access for
Community undertakings to contracts in
utilities sectors covered by the GPA**

	Canada ¹	Israel	Japan	Korea	United States	Efta
Water	0	+	+	+	-	+
Electricity	0	+ ²	-	+ ²	+	+
Public transport	0	+	-	-	-	+
Airports	0	+	+	-	-	+
Ports	0	+	+	+	+	+

¹Canada will make an offer no later than June 1995

²Except for some specified products

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