



**International Chamber of Commerce**

*The world business organization*

## **ICC Policy Statement**

### **ICC recommendations for WTO negotiations on transparency in government procurement**

Prepared by the Commission on Trade and Investment Policy

#### **ICC position**

ICC reaffirms its call for WTO members to agree to formally launch the negotiation of a binding, multilateral agreement to increase transparency and due process in government procurement. ICC believes that WTO members should find a way to launch negotiations on transparency in government procurement within the Doha Development Agenda.

#### **The government procurement market**

With goods and services procured by governments comprising nearly 15 per cent of the world's Gross Domestic Product (GDP), the conduct of government procurement sets a model for commerce throughout each nation's markets. Accordingly, many governments have established defined rules to ensure fair and open competition, transparency, avoidance of bribery and corruption, and in some cases open trade with other nations. Most of these same nations subscribe to multinational agreements requiring common procurement practices.

Conversely, in other parts of the world, too many other nations maintain closed and opaque systems. The narrower government procurement market of those countries that neither apply the existing transparency procedures of the WTO plurilateral Agreement on Government Procurement nor maintain transparent procurement systems, is estimated to be about 5 percent of world GDP.

#### **Benefits of transparency**

Transparency produces increased competition and ensures the most efficient and proper use of government spending. As competition increases, quality improves and costs come down. For example, Brazil reports an estimated saving of 20 percent of expenditures, about 224 million US dollars a year, from its new electronic procurement system.

Transparency is a cornerstone for government procurement rules that bolsters integrity, applies the rule of law and builds the confidence of taxpayers, investors and traders. With knowledge that government practices are ethical and are getting the best value for taxpayer money, taxpayers become more confident and supportive of their governments. Transparent procedures and rule of law attract investors who otherwise are reluctant to invest in local production, service provision and joint ventures when procedures are opaque.

Improved integrity and investment can mitigate capital outflows. Transparency also encourages trade, as increased competition with a larger pool of bidders (both domestic and foreign) builds stronger companies. Stronger domestic companies, and even foreign companies employing domestic workforce, improve their capacity to bid on procurement opportunities within transparent procurement markets abroad, increasing exports and domestic employment.

#### **Current status**

The mandate in paragraph 26 of the Doha Ministerial Declaration states that negotiations on

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transparency in government procurement will take place "after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on the modalities of negotiations". These negotiations should build upon the progress made in the WTO Working Group on Transparency on Government Procurement, which was established at the 1996 Singapore Ministerial Conference with the charge of developing the elements of transparency to be included in a future agreement.

The mandate limits the negotiation to transparency aspects and "will not restrict the scope for countries to give preferences to domestic supplies and suppliers". It includes a commitment to provide "adequate technical assistance" and "support for capacity building" both during the negotiations and after their conclusion.

The ambition to launch formal negotiations in September 2003 failed as part of the collapse of the Cancún Ministerial Conference. However, in the follow-up to Cancún, there appears to be sufficient support among WTO members for negotiations on a multilateral agreement on transparency in government procurement. Significantly, WTO members now seem disposed to de-link the "Singapore issues", finding a way to move forward each of these on their own merit and at their own pace.

### **ICC recommendations**

ICC believes that formal negotiations on a multilateral agreement on transparency in government procurement should be launched at the earliest possible date and completed as part of the conclusion to the Doha round of negotiations. WTO members should consider a coordinated approach to capacity building to improve transparency in government procurement, while launching a formal and time limited negotiation. Capacity building and technical assistance should be granted once WTO members have made firm commitments to adopt binding transparent rules for government procurement.

At a minimum, the following elements of transparency should be included in WTO disciplines for transparency in government procurement:

- *Adequate notice*: Timely notice of opportunities to allow bidders to properly evaluate projects and prepare bids. Invitations should be available internationally, and should establish a minimum term of 60 days from publication for proposal submission. Information on opportunities should be provided ideally through a single website, to ensure that all economic operators have access to tenders.
- *Neutral standards*: The broadest possible scope should be applied to technical specifications to insure that all qualified bidders have an opportunity. Bid specifications should be stated in terms of internationally recognized standards when applicable, and performance standards should be used to ensure equivalent products are treated equally.
- *Specified criteria*: Bidding documents should specify the relevant factors in addition to price that are to be considered in the bid evaluation and the formula by which they will be applied.
- *Confidentiality*: The confidentiality of information put forward by bidders should be fully guaranteed by transparency rules. Nothing in this Agreement should require the public release of legitimate business proprietary information.
- *Public tenders and bid openings*: Tender or bidding documents should be made publicly available in the country of procurement, preferably in a language commonly used in international business. In accordance with existing international practice by the World Bank and other multilateral development

banks, the Agreement should require that bids be opened in public in the presence of all bidders. This is a fundamental element of the transparency requirements, as it allows bidders to understand one of the most important decision-making considerations. The World Bank Guidelines on public bid opening should form the basis for implementing this requirement.

- *Award of contracts:* Governments may make their procurement decisions either on the basis of lowest price among bidders that meet the pre-specified minimum standards or on the basis of "Best Value to the Government." The approach used must be specified in the initial tender documents. The availability of the two options allows for the differences in types of procurement. For instance, the procurement of pencils is likely to be on a pure price basis, whereas the procurement of computers may take into account differences in functionality as well as price.

- *Domestic recourse:* Contracting agencies should provide unsuccessful bidders access to an impartial and independent review of compliance with the bid process. Standard written procedures for lodging a complaint and adequate remedies for non-compliance should exist. These procedures should allow a rapid examination and allow suspension or re-opening of the procedure in cases of non-compliance with transparency rules.

- *Dispute settlement:* A swift mechanism for the settlement of disputes (via bilateral consultations) should be established for the non-application of a transparency agreement to ensure that economic operators, through their government, have recourse in the WTO. The WTO dispute settlement understanding should apply for substantive violations of a future agreement. WTO dispute settlement should be focussed on systemic problems with transparency or inadequate implementation of the Agreement and should not generally be used to rectify inequities in individual procurement situations.

- *Protection of intellectual property:* Bidders' rights to their technical data and patents must be protected in the procurement process. Technical submissions should be treated as proprietary and confidential. Inappropriate transfer of proprietary technical information should be subject to the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WTO dispute settlement understanding.

- *Scope and coverage:* A transparency agreement should cover the widest possible definition and scope of government procurement and should apply to procurement of all goods and services without any a priori exclusions, to ensure the widest possible gains from transparency rules.

- *Cooperation and technical assistance:* All countries will gain from improved transparency in government procurement. However, some WTO members (developing and especially least-developed countries) may require targeted financial and technical assistance to implement the agreement. Countries which have made firm and binding commitments could receive assistance for:
  - the development of a legal, regulatory and administrative system for the implementation of a future agreement;
  - the training of officials responsible for implementation of a future agreement; and
  - the development of internet resources to facilitate the publication of adequate information for potential bidders.

The WTO transparency disciplines should apply to the full range of financing and contracting arrangements that governments use to conduct their procurement, including "build-to-operate-transfer" and other such contractual arrangements. Thresholds for application to the transparency disciplines should be set at the levels specified in the WTO procurement agreement.

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