

GENERAL AGREEMENT ON

RESTRICTED

GPR/M/41

2 September 1991

TARIFFS AND TRADE

Special Distribution

Committee on Government Procurement

MINUTES OF THE MEETING HELD ON 12 JULY 1991

Chairman: Mr. David Hayes (United Kingdom)

1. The following agenda was adopted:

	<u>Page</u>
A. Conclusion of Article IX.6(b) negotiations	1
B. Trondheim Electronic Toll Collection System; recourse to Article VII:7 by the United States	2
C. Sonar Mapping System; recourse to Article VII:6 by the EEC	2
D. Implementation and Administration of the Agreement	5
E. Review of 1989 statistics	5
F. Other Business	5

A. Article IX:6(b) Negotiations

2. The Chairman gave the following report, on his own responsibility, on the meetings of the Informal Working Group on Negotiations which took place from 9 through 12 July 1991.

"I and the secretariat have consulted with all signatories individually during the last two days. These consultations have been useful in providing a better understanding of participants' positions and thoughts. Substantive differences on the main issues nevertheless remain. Several delegations referred to the need to make progress in parallel bilateral or plurilateral consultations, in particular on resolving procurement regarding telecommunications. The need for a balanced, reciprocal agreement was also emphasised by many. Various suggestions were made for future work. Some considered it useful to either:

- invite comments on the November 1990 Chairman's text. Others considered that that text could be improved, in particular as regards structure;

- clarify outstanding issues with more precision, and to provide a set of options to allow governments to see more clearly what needs to be decided, and what the choices are. This applies particularly to the text of the agreement;
- compile in a single document the various offers tabled so far, both for ease of reference and to assist clarification; or to
- discuss certain issues, e.g. dispute settlement, as a means of building consensus without prejudice to resolving the more difficult issues, to help create an improved negotiating climate. Others considered work on services would be useful.

As Chairman, I therefore intend to produce on my own responsibility:

- (a) a checklist of issues, which clarifies them and sets out options for agreement;
- (b) a comparison of offers made; and
- (c) a paper on services.

These will be circulated to signatories by the beginning of September.

I am also considering doing some work on the structure of the Agreement. Alternatively, it might be better to provide a document suggesting alternative structures. We will reflect. I will also consider areas where proposals might be made without prejudice to resolving more difficult issues. I would propose that we meet again informally in the autumn - either in September or October - and in November on dates to be agreed in consultation with you. I invite delegations to submit text proposals on all issues which they deem fit."

3. It was agreed that the Informal Working Group would meet again from 15-18 October and from 19-22 November 1991.

B. Trondheim Electronic Toll Collection System

4. The Chairman informed the Committee that bilateral talks between the parties concerned had taken place since 20 June 1991 and that both parties agreed to revert to this issue at a later stage.

C. Sonar Mapping System

5. The Chairman recalled that this item had been put on the agenda following a request by the European Community (ref. GPR/W/107).

6. The representative of the European Communities stated that, in his opinion, procurement of a multi-beam sonar mapping system on behalf of the National Science Foundation in the United States had infringed the Agreement on Government Procurement. He argued that by a tender notice published in the Commerce Business Daily of 27 February 1991, Antarctic Support Associates (ASA) announced its intention to procure a sonar mapping system. It was indicated that Buy America provisions would apply to the purchase. By letter of 30 May 1991, ASA informed potential suppliers that it was seeking "a company to manufacture in the United States" a sonar mapping system. This letter referred to a prime contract with the National Science Foundation (NSF). The EC spokesman stated that the National Science Foundation was a United States Government Agency whose responsibilities included ensuring the provision of facilities in connection with the United States Antarctic Program. This activity was financed by means of government appropriations, notably those contained in P.L. 101.302(3) which required the NSF to use 1990 funds to purchase a sonar mapping system that was manufactured in the United States. The NSF had contracted with ASA to provide certain facilities for the Antarctic Program on its behalf. In the EC's opinion the structure of responsibilities was, therefore, clear. Public appropriations were provided to the NSF which financed ASA to carry out the job. This arrangement had given rise to a number of contracts. These included, in particular, a contract for the leasing to ASA of a research ice-breaking vessel, for the duration of the survey. This vessel was to be built, owned and operated by Edison Chouest. The request for proposals which led to the ASA/Edison Chouest contract provided that the vessel should incorporate certain items of government furnished property, including a sonar mapping system whose value was estimated at US\$2.5 million. It was stated that government furnished property "... shall remain the Government's separate property, and shall not be considered as vessel's appurtenance, gear, fixture or equipment. Title to all Government furnished property shall remain in the Government." Although the operator of the vessel was required to incorporate, maintain and administer the property, it was to be used only for the performance of the contract. The tender notice of 27 February 1991 and the request for proposals of 30 May 1991 clearly related to the purchase of this item of "government furnished property". The EC representative argued that although the purchase was being carried out by ASA, it was clearly being done on behalf of NSF. The contract (referred to throughout by ASA as "the sub-contract") which incorporated clauses from the Federal Acquisition Regulations (FAR) provided for assignment of the contract "at any time ... to the Foundation (the NSF), or to any party selected by the Foundation". The EC spokesman added that the purchase was financed by public funds provided through the NSF; that the sonar mapping system would become the property of the NSF; that the NSF was a covered entity under the Government Procurement Agreement; that there was no exception under the Government Procurement Agreement for purchase of a sonar mapping system; and that the value of the sonar mapping system was clearly above the threshold of the Agreement (estimated value US\$2.4 million).

7. Furthermore, a detailed examination of the request for proposals showed that the supplier was required to furnish an "Analog hardcopy

recorder (EPC-3200s, Raytheon UGR)". This reference to a proprietary product was an infringement of Article IV:3 of the Government Procurement Agreement.

8. After twice requesting information from the United States delegation in the Committee on Government Procurement, the European Community had requested consultations with the United States under Article VII:3-5 of the Government Procurement Agreement. These took place in Washington on 26 June 1991. The EC considered the results of these consultations to be unsatisfactory and, by letter of July 1991, requested the Committee to meet under the terms of Article VII:6 of the Government Procurement Agreement.

9. The delegate of the European Communities concluded that the Buy American provision incorporated in the tender notice and the request for proposals for the sonar mapping system constituted an infringement of United States obligations under the Government Procurement Agreement. Furthermore, the reference in the specifications to a proprietary product also constituted an infringement of the Government Procurement Agreement.

10. The representative of the United States replied that the contract between the National Science Foundation and ASA was a sub-contract of a services contract and as such was not covered by the Government Procurement Agreement. She did not deny that the contract contained discriminatory provisions but this was not relevant in this case. She could not agree with the EC that the contract was Code-covered and therefore did not agree that the EC had any rights under the current Code.

11. The representative of the European Communities argued that services were not the point at issue. Article I of the Code applied, since the sonar mapping system was a product which was known and had a high value. This product was procured on behalf of a Code-covered entity of the United States Government, in a manner inconsistent with the Code. The European Community therefore requested the establishment of a panel. The closing date for the submission of offers in the tendering procedure at stake was 29 July 1991, which made the case even more urgent.

12. The representative of the United States, seeking a clarification from the EC, asked whether the EC considered that any products, procured under public work contracts, were covered by the current Code. The European Community's representative replied that he did not want to comment on that question since the case at hand was a specific one and generalities were not the issue.

13. The representative of the United States stated that she was looking forward to the legal reasoning of the Community in this matter, and went on to say that the United States had no objections to the establishment of a panel because the conciliation stage had been exhausted and all points had been covered in today's meeting, to no avail.

14. The Chairman concluded that the Committee had established a panel. He proposed for consideration the following terms of reference:

"To examine, in the light of the relevant provisions of this Agreement, the matter referred to the Committee by the European Community in GPR/W/107; to consult regularly with the parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution; and to make a statement concerning the facts of the matter as they relate to application of this Agreement and to make such findings as will assist the Committee in making recommendations or giving rulings on the matter."

15. Consistent with Article VII:8 of the Agreement, the Chairman would shortly propose the names of three panelists to the parties.

16. Commenting on the discussions concerning the sonar mapping panel case, the delegate of Japan reiterated his understanding that Japan's obligations under the Agreement covered for the time being only goods, whilst negotiations were under way to extend its coverage to services.

D. Implementation and Administration of the Agreement

17. The representative of the European Communities stated that an error had been found in the list of entities he had intended to present to the Committee today pursuant to Article IX:5. He would therefore transmit this list to the GATT secretariat as soon as possible. The Committee took note of the statement.

E. Review of 1989 Statistics

18. The Chairman thanked the delegations of Sweden, Switzerland and the EC for submitting their 1989 statistics subsequent to the Committee meeting in April of this year. The representative of the United States promised that her delegation's statistics would be ready later that day and would be transmitted to the secretariat. Since not all 1989 statistics were available yet, the Chairman proposed to postpone the review of the 1989 statistics until later this year. It was so decided.

F. Other business

19. No points were brought up under this agenda item.