COMMISSION OF THE EUROPEAN COMMUNITIES

COM(94) 251 final
Brussels, 16.06.1994

94/0150 (ACC)

Proposal for a

COUNCIL DECISION

concerning the conclusion of an Agreement in the form of an exchange of letters between the European Community and the United States of America on government procurement

(presented by the Commission)

EXPLANATORY MEMORANDUM

On 15 December 1993, the negotiations for a new Government Procurement Agreement (GPA) were successfully completed in parallel with the Uruguay Round negotiations. With minor modifications, the EC and US reconfirmed the coverage of central government procurement (Category A) in the GPA to which they had committed themselves last year in a Memorandum of Understanding (MoU)[1]. The MoU, central government procurement apart, also contained a provisional, albeit incomplete, opening of the electrical utilities sector. However, in the December negotiations neither side was prepared to commit itself to open its state, regional (Category B) and utilities' (Category C) procurement to each other. Therefore, as had been agreed in the MoU, negotiations were to continue beyond the 15 December deadline on the basis of the outcome of a study. The study, financed by both sides, was to evaluate the value of the respective offers for a government procurement deal. It was completed in March 1994 and bilateral negotiations recommenced with a view to expanding coverage in the GPA.

* * *

On 13 April 1994, agreement was reached on the following elements:

- at Category "A", reconfirmation of coverage agreed in the GPA negotiations of 15 December 1993. The annual value of procurement opportunities is estimated in the study at $50-55 Bio for each side;

- at Category "B", the US is to bind the major part of its procurement for 37 States for goods, works and services (details in the annex to the agreement) in the GPA and offer National Treatment to the EC for two more States and 7 of the 24 largest cities. For its part the EC is to bind procurement of goods only at sub-central government in the GPA with respect to the US. The annual value of procurement opportunities is estimated at $21-24 Bio for each side;

- for the Electrical sector, to the goods and construction covered under the May 1993 MoU, to expand mutual coverage, services are added. Moreover the US is adding for coverage under the GPA, the New York Power Authority and the waiving of "Buy America" restrictions when financing power generation projects under the Rural Electrification Administration. The US is also to reduce its threshold for supplies and services to $250.000 . These additional guarantees, beyond the MoU of May 1993, give greater security to EC suppliers to the US electrical market. The EC would continue to disapply Art 36 of the consolidated Utilities Directive (93/38/EEC) for the electrical sector to the US and amend its offer in the GPA accordingly. The annual value of procurement/ purchasing in this sector is estimated at $ 25-30 Bio for each side;

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[1] OJ No L 125, 20.5.1993, p.1.

- for Category "C", other than the electrical and telecommunications sectors, the US is to bind into the GPA procurement of goods, works and services for the Port Authorities of New York and New Jersey (which includes three major airports) and Baltimore (which also includes its airport) and on a bilateral basis to grant National Treatment to the EC with respect to the procurement of goods, works and services for the Massachusetts Port Authority (which includes Boston's Logan airport). It should be noted that, because of the structure of sub-federal government in the US, the opening of procurement of Utilities sectors is also made possible through the coverage of certain entities in States or Cities, see above (eg, the National Treatment coverage of Chicago gives EC supplier access to O'Hare airport procurement). To match the value of US coverage dollar for dollar, the EC is to bind its goods, works and services procurement of ports in the GPA with respect to the US. However, the EC would exclude dredging services and procurement related to shipbuilding from the list of covered services as the US was unwilling to open these areas of procurement to the EC. The annual value of procurement opportunities in this mixed category is estimated at around $ 0.5-1 Bio, for each side;

- both side agreed to co-operate to improve transparency. This was a request from the EC with a view to making clear in relevant tender notices that the procurement opportunities are open to international bidding (currently, this is a particular problem in the US system).

The agreement neither deals with telecommunications procurement nor "Buy America" restrictions beyond the Rural Electrification Agreement (see above). For these, both sides agreed to continue the dialogue. However, this is not specified in the agreement, no particular arrangements were made and no dates for meeting were fixed.

The agreement, itself, made in the form of an exchange of letters, places commitments, as follows:

- for both sides, to amend, in accordance with the points made above, their respective Appendix I of the GPA as signed at Marrakesh on 15 April 1994. The GPA is to enter into force 1 January 1996. The US is to waive "Buy America" on the Rural Electrification Administration financing before that date;

- for the US, to grant National Treatment to the EC for procurement in two States, 7 cities and one Port Authority;

- for both sides, to extend the MoU (see above) to cover the period from May 1995 to the date of entry into force of the GPA (1 January 1996);

- for both sides, to co-operate on transparency.

The Council is invited to approve the agreement and adopt the proposal for a Decision concerning the conclusion of an Agreement in the form of an exchange of letters between the EC and the US.

Proposal for a Council Decision

concerning the conclusion of an Agreement in the form of an exchange of letters between the European Community and the United States of America on government procurement

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 228(3) first sentence, and Article 113 thereof;

Having regard to the recommendation from the Commission,

Whereas the Agreement in the form of an exchange of letters negotiated between the European Community and the United States of America on government procurement should be approved,

HAS DECIDED AS FOLLOWS:

Article 1

The Agreement in the form of an exchange of letters between the European Community and the United States of America on government procurement is hereby approved on behalf of the Community.

The text of the Agreement is attached to this Decision,

Article 2

The President of the Council is hereby authorized to designate the person empowered to sign the Agreement in order to bind the Community.

Done at Brussels,

For the Council

The President

AGREEMENT IN THE FORM OF AN EXCHANGE OF LETTERS ON GOVERNMENT PROCUREMENT

His Excellency Sir Leon Brittan
Commissioner
Commission of the European Communities
200 Rue de la Loi
1049 Brussels, Belgium

Dear Mr. Commissioner,

With reference to the discussions held between representatives of the Government of the United States of America (hereinafter the US) and the European Community (hereinafter the EC) regarding government procurement, I have the honour to confirm the following.

1) The US and the EC agree to amend their respective Appendix I of the Government Procurement Agreement signed at Marrakesh on April 15, 1994 as set out in the attachments to this letter.

2) The US shall grant to EC suppliers of goods and services, including construction services, treatment no less favourable than for out-of-state suppliers for the Massachusetts Port Authority and for the states of West Virginia, North Dakota, and as regards Illinois for procurement not covered by the Government Procurement Agreement, and for out-of-city suppliers for the cities of Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville and San Antonio.

3) The US and the EC agree to co-operate and take all necessary steps to improve substantially the transparency of the notices of intended procurement in order to ensure that contracts covered under the Government Procurement Agreement can be clearly identified as such.

4) The US and the EC agree that the Memorandum of Understanding between the US and the EC on Government Procurement of 25 May 1993 will be extended until the date of entry into force of the Government Procurement Agreement signed at Marrakesh on 15 April 1994.

5) The US agrees that it will implement its obligations with respect to the Rural Electrification Administration contained in Annex 3 of its Appendix I attached hereto as soon as possible after entry into force of this Agreement, but no later than entry into force of the Agreement establishing the World Trade Organization.

I shall be grateful, Mr. Commissioner, if you could kindly confirm that this letter and its attachments correctly set out the understanding reached between us.

I propose that, if the EC so agrees, this letter and its attachments and your reply to that effect constitute an agreement between the EC and the Government of the US, which will enter into force on the date hereof, with the exception of point 2 above, which will be effective upon entry into force of the Government Procurement Agreement signed at Marrakesh on 15 April 1994.

Please accept, Mr. Commissioner, the assurance of my highest consideration.

Sincerely,

Michael Kantor

Attachments: Amended Annexes 2 and 3 and General Notes of Appendix I of the United States.
Amended general notes and derogations from the provisions of Article III of Appendix I of the EC.

Ambassador Michael Kantor
United States Trade Representative
Executive Office of the President
Washington DC 20506
United States

Dear Mr. Ambassador,

I have the honour to acknowledge receipt of your letter of today's date, which reads as follows.

"Dear Mr. Commissioner,

With reference to the discussions held between representatives of the Government of the United States of America (hereinafter the US) and the European Community (hereinafter the EC) regarding government procurement, I have the honour to confirm the following.

1) The US and the EC agree to amend their respective Appendix I of of the Government Procurement Agreement signed at Marrakesh on April 15, 1994 as set out in the attachments to this letter.

2) The US shall grant to EC suppliers of goods and services, including construction services, treatment no less favourable than for out-of-state suppliers for the Massachusetts Port Authority and for the states of West Virginia, North Dakota, and as regards Illinois for procurement not covered by the Government Procurement Agreement, and for out-of-city suppliers for the cities of Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville and San Antonio.

3) The US and the EC agree to co-operate and take all necessary steps to improve substantially the transparency of the notices of intended procurement in order to ensure that contracts covered under the Government Procurement Agreement can be clearly identified as such.

4) The US and the EC agree that the Memorandum of Understanding between the US and the EC on Government Procurement of 25 May 1993 will be extended until the date of entry into force of the Government Procurement Agreement signed at Marrakesh on 15 April 1994.

5) The US agrees that it will implement its obligations with respect to the Rural Electrification Administration contained in Annex 3 of its Appendix I attached hereto as soon as possible after entry into force of this Agreement, but no later than entry into force of the Agreement establishing the World Trade Organization.

I shall be grateful, Mr. Commissioner, if you could kindly confirm that this letter and its attachments correctly set out the understanding reached between us.

I propose that, if the EC so agrees, this letter and its attachments and your reply to that effect constitute an agreement between the EC and the Government of the US, which will enter into force on the date hereof, with the exception of point 2 above, which will be effective upon entry into force of the Government Procurement Agreement signed at Marrakesh on 15 April 1994.

Please accept, Mr. Commissioner, the assurance of my highest consideration.

Sincerely,

M. Kantor

Attachments: Amended Annexes 2 and 3 and General Notes of Appendix I of the United States.
Amended general notes and derogations from the provisions of Article III of Appendix I of the EC."

I have the honour to confirm that the EC agrees to the common understanding set out in your letter and its attachments and that your letter, this reply and the attachments shall constitute an agreement between the EC and the Government of the US.

Please accept, Mr. Ambassador, the assurance of my highest consideration.

Sincerely

Leon Brittan

ANNEX 2

Sub-Central Government Entities which Procure in Accordance With the Provisions of this Agreement

Thresholds 355,000 SDRs for supplies and services
5 million SDRs for construction

List of Entities

Arizona

Executive branch agencies

Arkansas

Executive branch agencies, including universities but excluding the Office of Fish and Game and construction services

California

Executive branch agencies

Colorado

Executive branch agencies

Connecticut

Department of Administrative Services
Connecticut Department of Transportation
Connecticut Department of Public Works
Constituent Units of Higher Education

Delaware*

Administrative Services (Central Procurement Agency)
State Universities
State Colleges

Florida*

Executive branch agencies

Hawaii

Department of Accounting and General Services (with the exception of procurements of software developed in the state and construction)

Idaho

Central Procurement Agency (including all colleges and universities subject to central purchasing oversight)

Illinois*

Department of Central Management Services

Iowa*

Department of General Services
Department of Transportation
Board of Regents' Institutions (universities)

Kansas

Executive branch agencies, excluding construction services, automobiles and aircraft

Kentucky

Division of Purchases, Finance and Administration Cabinet, excluding construction projects

Louisiana

Executive branch agencies

Maine*

Department of Administrative and Financial Services
Bureau of General Services (covering state government agencies and school construction)
Maine Department of Transportation

Maryland*

Office of the Treasury
Department of the Environment
Department of General Services
Department of Housing and Community Development
Department of Human Resources
Department of Licensing and Regulation
Department of Natural Resources
Department of Public Safety and Correctional Services
Department of Personnel
Department of Transportation

Massachusetts

Executive Office for Administration and Finance
Executive Office of Communities and Development
Executive Office of Consumer Affairs
Executive Office of Economic Affairs
Executive Office of Education
Executive Office of Elder Affairs
Executive Office of Environmental Affairs
Executive Office of Health and Human Service
Executive Office of Labor
Executive Office of Public Safety
Executive Office of Transportation and Construction

Michigan*

Department of Management and Budget

Minnesota

Executive branch agencies

Mississippi

Department of Finance and Administration (does not include services)

Missouri

Office of Administration
Division of Purchasing and Materials Management

Montana

Executive branch agencies (only for services and construction)

New York*

State agencies
State university system
Public authorities and public benefit corporations, with the exception of those entities with multi-state mandates

In addition to the exceptions noted at the end of this annex, transit cars, buses and related equipment are not covered.

Nebraska

Central Procurement Agency

New Hampshire*

Central Procurement Agency

Oklahoma*

Office of Public Affairs and all state agencies and departments subject to the Oklahoma Central Purchasing Act, excluding construction services.

Oregon

Department of Administrative Services

Pennsylvania*

Executive branch agencies, including:

Governor's Office
Department of the Auditor General
Treasury Department
Department of Agriculture
Department of Banking
Pennsylvania Securities Commission
Department of Health
Department of Transportation
Insurance Department
Department of Aging

Department of Correction
Department of Labor and Industry
Department of Military Affairs
Office of Attorney General
Department of General Services
Department of Education
Public Utility Commission
Department of Revenue
Department of State
Pennsylvania State Police
Department of Public Welfare
Fish Commission
Game Commission
Department of Commerce
Board of Probation and Parole
Liquor Control Board
Milk Marketing Board
Lieutenant Governor's Office
Department of Community Affairs
Pennsylvania Historical and Museum Commission
Pennsylvania Emergency Management Agency
State Civil Service Commission
Pennsylvania Public Television Network
Department of Environmental Resources
State Tax Equalization Board
Department of Public Welfare
State Employees' Retirement System
Pennsylvania Municipal Retirement Board
Public School Employees' Retirement System
Pennsylvania Crime Commission
Executive Offices

Rhode Island

Executive branch agencies, excluding boats, automobiles, buses and related equipment

South Dakota

Central Procuring Agency (including universities and penal institutions)

In addition to the exceptions noted at the end of this annex, procurements of beef are not covered.

Tennessee

Executive branch agencies (excluding services and construction)

Texas

General Services Commission

Utah

Executive branch agencies

Vermont

Executive branch agencies

Washington

Washington State executive branch agencies, including:

General Administration
Department of Transportation
State Universities

In addition to the exceptions noted at the end of this annex, procurements of fuel, paper products, boats, ships and vessels are not covered.

Wisconsin

Executive branch agencies, including:

Department of Administration
State Correctional Institutions
Department of Development
Educational Communications Board
Department of Employment Relations
State Historical Society
Department of Health and Social Services
Insurance Commissioner
Department of Justice
Lottery Board
Department of Natural Resources
Adminstration for Public Instruction
Racing Board
Department of Revenue
State Fair Park Board
Department of Transportation
State University System

Wyoming*

Procurement Services Division
Wyoming Department of Transportation
University of Wyoming

Notes to Annex 2

In addition to the conditions specified in the General Notes, the following conditions apply:

1. For those states marked by an asterisk with pre-existing restrictions, the Agreement does not apply to procurement of construction-grade steel (including requirements on subcontracts), motor vehicles and coal.

2. The Agreement shall not apply to preferences or restrictions associated with programs promoting the development of distressed areas and businesses owned by minorities, disabled veterans and women are reserved from coverage.

3. Nothing in this annex shall be construed to prevent any state entity from applying restrictions that promote the general environmental quality in that state, as long as such restrictions are not disguised barriers to international trade.

4. The Agreement shall not apply to any procurement made by a covered entity on behalf of non-covered entities at a different level of government.

5. The Agreement shall not apply to restrictions attached to Federal funds for mass transit and highway projects.

ANNEX 3

All Other Entities which Procure in Accordance With the Provisions of this Agreement

Threshold: 400,000 SDRs for supplies and services (except as specified below)
5 million SDRs for construction

List of Entities

The following entities at the SDR equivalent of $250,000 for supplies and services:

Tennessee Valley Authority
Power Marketing Administrations of the Department of Energy
--Bonneville Power Administration
--Western Area Power Administration
--Southeastern Power Administration
--Southwestern Power Administration
--Alaska Power Administration
St. Lawrence Seaway Development Corporation

The following entities at 400,000 SDRs for supplies and services:

The Port Authority of New York and New Jersey with the following exceptions:

--Maintenance, repair and operating materials and supplies (e.g., hardware, tools, lamps/lighting, plumbing).

--In exceptional cases, individual procurements may require certain regional production of goods if authorized by the Board of Directors.

--Procurements pursuant to multi-jurisdictional agreement (i.e., for contracts which have initially been awarded by other jurisdictions).

The Port of Baltimore (subject to the conditions specified for the state of Maryland in Annex 2)

The New York Power Authority (subject to the conditions specified for the state of New York in Annex 2)

Rural Electrification Administration Financing:

(1) waiver of Buy American restrictions on financing for all power generation projects (restrictions on

financing for telecommunication projects are excluded from the Agreement);

(2) application of Code-equivalent procurement procedures and national treatment to funded projects exceeding the thresholds specified above.

Notes to Annex 3

1. With respect to these entities, the Agreement shall not apply to restrictions attached to Federal funds for airport projects.

2. The conditions specified in the General Notes apply to this Annex.

General Notes

1. Notwithstanding the above, this Agreement will not apply to set asides on behalf of small and minority businesses.

2. Except as specified otherwise in this Appendix, procurement in terms of U.S. coverage does not include non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and governmental provision of goods and services to persons or governmental authorities not specifically covered under U.S. annexes to this agreement.

3. Procurement does not include the acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt.

4. Where a contract to be awarded by an entity is not covered by this Agreement, this Agreement shall not be construed to cover any good or service component of that contract.

5. For goods and services (including construction) of the following countries and suppliers of such goods and services, this Agreement does not apply to procurement by the entities listed in Annexes 2 and 3 or the waiver described in Annex 3:

   Canada
   Austria
   Switzerland
   Norway
   Sweden
   Finland
   Japan

   The United States is prepared to amend this note at such time as coverage with respect to these annexes can be resolved with a Party listed above.

6. For construction services of the Republic of Korea and suppliers of such services, this Agreement applies only to procurement of the entities listed in Annexes 2 and 3 above a threshold of 15 million SDRs.

7. For goods and services (including construction) of Japan and suppliers of such goods and services, this Agreement does not apply to procurement by the National Aeronautics and Space Administration.

8. A service listed in Annex 4 is covered with respect to a particular Party only to the extent that such Party has included that service in its Annex 4.

AMENDED GENERAL NOTES AND DEROGATIONS FROM THE PROVISIONS OF ARTICLE III OF APPENDIX I OF THE EC

General notes and derogations from the provisions of Article III

1. The EC will not extend the benefits of this Agreement:

   - as regards the award of contracts by entities listed in Annex 2 to the suppliers and service providers of Canada;
   - as regards the award of contracts, other than for supplies, listed in Annex 2 to the suppliers and service providers of the USA;
   - as regards the award of contracts by entities listed in Annex 3 paragraph

     (a) (water), to the suppliers and service providers of Canada and the USA;

     (b) (electricity), to the suppliers and service providers of Canada, Hong Kong, and Japan;

     (c) (airports), to the suppliers and service providers of Canada, Korea and the USA;

     (d) (ports), to the suppliers and service providers of Canada;

     (e) (urban transport), to the suppliers and service providers of Canada, Israel, Japan, Korea and the USA

     until such time as the EC has accepted that the Parties concerned give comparable and effective access for EC undertakings to the relevant markets;
   - to service providers of Parties which do not include service contracts for the relevant entities in Annexes 1 to 3 and the relevant service category under Annexes 4 and 5 in their own coverage .

2. The provisions of Article XX shall not apply to suppliers and service providers of:

   -Israel, Japan, Korea and Switzerland in contesting the award of contracts by entities listed under Annex 2 paragraph 2, until such time as the EC accepts that they have completed coverage of sub-central entities;

   -Japan, Korea and the USA in contesting the award of contracts to a supplier or service provider of Parties other than those mentioned, which are small or medium sized enterprises under the relevant provisions of EC law, until such time as the EC accepts that they no longer operate discriminatory measures in favour of certain domestic small and minority businesses;

   -Israel, Japan, and Korea in contesting the award of contracts by EC entities, whose value is less than the threshold applied for the same category of contracts awarded by these Parties.

3. Until such time as the EC has accepted that the Parties concerned provide access for EC suppliers and service providers to their own markets, the EC will not extend the benefits of this Agreement to suppliers and service providers of:

   - Canada, as regards procurement of FSC 36, 70 and 74 (special industry machinery; general purpose automatic data processing equipment, software, supplies and support equipment (except 7010 ADPE configurations); office machines, visible record equipment and ADP equipment);

- Canada, as regards procurement of FSG 58 (communications, protection and coherent radiation equipment) and the USA as regards air traffic control equipment;
- Korea and Israel as regards procurement by entities listed in Annex 3 paragraph (b), as regards procurement of HS Nos 8504, 8535, 8537 and 8544 (electrical transformers, plugs, switches and insulated cables); and for Israel, HS Nos 8501, 8536 and 902830;
- the USA, as regards procurement by entities listed in Annex 3 paragraph (d), as regards procurement of dredging services and procurement related to shipbuilding;
- Canada and the USA as regards contracts for good or service components of contracts which, although awarded by an entity covered by this Agreement, are not themselves subject to this Agreement.

4. The Agreement shall not apply to contracts awarded under:
   - an international agreement and intended for the joint implementation or exploitation of a project by the signatory States;
   - an international agreement relating to the stationing of troops;
   - the particular procedure of an international organisation.
5. The Agreement shall not apply to procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes.
6. Contracts awarded by entities in Annexes 1 and 2 in connection with activities in the fields of drinking water, energy, transport or telecommunications, are not included.
7. This Agreement shall not apply to contracts awarded by entities in Annex 3:
   - for the purchase of water and for the supply of energy or of fuels for the production of energy;
   - for purposes other than the pursuit of their activities as described in this Annex or for the pursuit of such activities in a non-member country.
   - for purposes of re-sale or hire to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity.
8. This Agreement shall not be applicable to contracts:
   - for the acquisition or rental of land, existing buildings, or other immovable property or concerning rights thereon;
   - for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time.
9. This Agreement shall not be applicable to the award of service contracts by Spanish entities listed in Annex 3 before 1 January 1997 or to the award of contracts by Greek or Portuguese entities listed in Annex 3 before 1 January 1998.

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18