

**ESF SECOND POSITION PAPER ON
PUBLIC PROCUREMENT IN SERVICES**

25th November 2002

The European Services Forum (ESF) adopted in April 1999 a first position paper on this issue. The substance of that paper remains valid and the most important arguments are, for ease of reference, repeated in this current paper. The paper analyses first the importance of the public procurement for many of the services sectors (I) and then explained the reason why the European service industries feel the need for a multilateral framework of rules on public procurement in services (II).

I. The importance of public procurement for services sectors

The ESF would like to draw attention to the importance of public procurement of services (including construction). Public procurement for their own purposes by government and other public authorities and agencies at national and local level represents a very important share of total public expenditure and thus has a significant role in domestic economies.

A. The economic size of the Public procurement

Procurement of services by government agencies for their own purposes represents an important share of total government expenditure and thus has a significant role in domestic economies. Services represent est. 60% of total procurement for all levels of government with an amount of US\$ 5550.6 billion in 1998, roughly equivalent to 82.3% of world exports¹. The world value of government procurement of goods and services, excluding defence-related expenditure and compensation of employees, was estimated at US\$ 2083 billion, equivalent to 7.1% of world GDP or 30.1% of world exports.

B. Efficient public procurement: a tool of development

More efficient public procurement is certainly a way to help developing economies lift their services economy, to assist the public administration in providing better public services to citizens at a lower cost to taxpayers. This issue therefore can also play a role in the development dimension of the current Doha agenda.

Allowing fair competition between local and foreign service suppliers to provide services to governmental and local authorities in the developing countries, in addition of the financial advantages, will also allow transfer of know-how and technologies in the public administration and therefore contribute to further sustainable development.

C. Specific quality requirement for public procurement on services

The major objective in public procurement of services must be to allow public clients to choose the most suitable service provider from the widest possible range of adequately qualified service suppliers in order to receive the highest quality of service. Ensuring best value for money will only be secured through an open and non-discriminatory procurement regime containing all central government entities and sub-central government entities as laid down in Appendix I Annex 2 GPA.

¹ *The Size of Government Procurement Markets*, Offprint from OECD Journal on Budgeting Vol.1, No.4, March 2002, ISBN 9264196307

This is especially important in the services sector, because quality of service is in general more difficult to evaluate than the quality of goods. Whereas quality control of goods is already possible at the time of delivery of the goods in question, quality of service can often not be verified before the completion of the work and sometimes even not before a certain amount of time when the results of the service will become apparent. This applies in particular to intellectual services. Service providers will obviously be even more motivated to provide always-higher quality standards when they know that they participate in a real fair competition to offer their services. This will improve quality of services in general.

II. The Need for multilateral rules on Public procurement in Services

A. Enlarged access to private markets not sufficient

ESF is pleased to note that, in the framework of the current GATS negotiations, access to foreign markets will likely increase for the services sectors through the countries schedules of commitments. However, it is clear that for these sectors only a part of foreign markets will be open if nothing is done to allow them to compete with domestic companies on public procurement.

B. Scope of the negotiations

ESF takes note that the GATS mandate (included in Article XIII of the GATS treaty adopted at the end of the Uruguay Round) targets the "government procurement in services". A clarification of the scope of this mandate is needed. The European service industries would like to emphasise that all kinds of public procurement should be subject to the same rules. Failing to extend the scope of the negotiations would considerably diminish the interest of a possible agreement. National/Federal, regional and local governments and any other body governed by public law should be obliged to follow public procurement regulations². This not only includes any association formed by one or more of such authorities or bodies governed by public law, but also:

- any body financed, already for the most part, by the State, or regional or local authorities, or bodies in the exercise of governmental authorities or
- subject to management supervision by those bodies or
- having an administrative, managerial, or supervisory board, more than half of whose members are appointed by the State, by regional or local authorities or by other bodies governed by public law (e.g. NGOs).

However, purchasing entities, such as telecommunications operators, which operate in competitive markets, should be exempted from public procurement rules, provided that there is objective proof of genuine competition on such markets.

A common obstacle to international fair competition is that public authorities try to get around public procurement regulations by using so-called "in-house services" and therefore feel that by this they are not required to follow public procurement laws. This problem should also be tackled in the negotiations.

C. A valid Negotiating Mandate

As stated in Article XIII of the GATS, "there shall be multilateral negotiations on government procurement in services under this Agreement". To our understanding the Doha Development Agenda has not modified this mandate.

The mandate on Transparency in Government Procurement (§ 26 of the Doha Ministerial Declaration) will not ensure more market access to public procurement on services. The European Services Forum is of the view that transparency is a necessary first step, but if applied only to domestic companies does not bring much added value to international trade.

² See Appendix I Annex 2 of the Government Procurement Agreement (GPA).

ESF recommends that WTO should conduct three parallel sets of negotiations. One should be aimed at the creation of general rules applying to all countries, in the form of a uniform multilateral agreement on services. One should be aimed at an agreement for the countries that are ready to proceed further, i.e. through further development of the GPA, but with fewer exceptions and more signatories. Finally, one set of negotiations should have the purpose of devising a multilateral agreement on transparency.

ESF would favour a strong transparency commitment from all WTO members that would be applicable across the board, i.e. to public procurement related to goods, works, and services. To fulfil transparency obligations through the whole procurement process should be considered as a normal part of the procedure so as to attract the most efficient bidders. Implementing a transparent process at national level would allow participation of foreign services suppliers set up in the country as joint ventures and as a subsidiary (e.g. local company). ESF would therefore welcome such a first move. To this end, ESF urges all WTO members to adopt the appropriate modalities at the next WTO Ministerial in Cancun in September 2003 as to launch effective negotiations on this issue.

However, progress in the negotiations on public procurement in services should not be linked to progress in the negotiations on transparency in general government procurement (& 26 DDA).

In addition to this, the Government Procurement Agreement (GPA) is a plurilateral agreement and therefore its on-going review will not reach all WTO members. The Agreement on Government Procurement has only been signed by a number of industrialised countries. ESF supports any extension of the GPA obligations to a greater number of countries. It must be clear however that this is not connected to the GATS or even DDA negotiations.

The GATS is therefore the right tool to use to, at least, establish a first step of opening public procurement to foreign service providers under national treatment conditions.

D. A multilateral framework of rules on public procurement in services

The European Services Forum urges all WTO members to take part in negotiations aimed at establishing a jointly agreed multilateral framework of rules on public procurement in services. The absence of multilateral rules for procurement in services is probably the most important non-tariff barrier affecting many services sectors, in particular Construction services. Indeed, for some services sectors like Construction services, more than 50% of their activity is related to public procurement. Public procurement is also crucial to Architectural services, Engineering services, Environmental services, IT and Computer related services, Financial services, Catering and Textile services, etc.

In this context, ESF welcomes the **Communication to the WTO Working Party on GATS Rules from the European Communities and their Member States on Government Procurement on Services from 12 July 2002 and strongly supports the suggested recommendations therein.**

All WTO members, within the WTO Working Party on GATS Rules, should discuss the following topics, so as to ensure that public procurement in services will benefit a quality based selection:

- Transparency is indeed a must, so as to give access to all interested companies to the relevant information related to the call of tender. Minimum transparency requirements should include: publication of the calls of tender in appropriate media and format, including if possible on internet; sufficient tender period; mention of the officials in charge with the relevant contact details, explanation of refusals to bid, etc.
- Preparation of submission of tenders is costly for the participating companies, which is why procurement rules must prescribe that invitations to tender be sufficiently precise in order to attract only the best-qualified service providers and at the same time achieve effective

competition. This includes a restriction on the amount of work required by the tenderer, so as to allow the client an objective and well founded pre-selection or selection of the bidder. The principle must be to require as little information but as much necessary work from the bidder as possible in order to ensure fair competition.

- The selection procedure must be transparent and open to scrutiny. Any selection criteria - direct or indirect - referring to nationality, citizenship or domicile must be avoided, unless reciprocity principles apply.
- Competition rules must include objective criteria on registration, pre-qualification, selection and award and consider the specificity of the different kinds of services in order to achieve effective competition between the service providers in the interest of the contracting authority and at the same time be effective to avoid costly procurement procedures and selection of non suitable providers.

A possible complementary strategy

ESF is aware of the political difficulties that the negotiations on government procurement are raising in the WTO framework.

That is the reason why ESF would like to invite WTO members to **consider the possibility of using the flexibility of the GATS** to go further on this issue in the field of services. **WTO members who are ready to open up part of their public procurement to competition but do not feel comfortable with the obligations of the GPA, or who are not ready to open up all services sectors but only in some of them, should get a chance to do so.**

One of the ways to do so might be to i) adopt a set of multilateral rules, ii) undertake in the country schedule to submit some specific sectors only to the set of rules. Experience and actual practice is the best way to demonstrate that possible concerns might not be justified. Possible agreed transitional periods should be envisaged in the same spirit.

To get the support of the whole WTO membership ESF is conscious that a multilateral framework of rules would likely need to be rather general and set only a set of minimum rules. Although clearly favouring a more far-reaching Agreement, ESF might go along this rather soft route, as a first step in the process. A revision of the set of rules should be opened at the next round of Services negotiations.

Contact: - **Rapporteurs:**
Mr. Alain Sagne, Secretary General, Architects Council of Europe
M. Tillman Prinz, Senior Policy Advisor Architects Council of Europe
Tel: +322 543 11 40 – Fax: +322 543 11 43 – Email: alain.sagne@ace-cae.org

- *Pascal KERNEIS, Managing Director, European Services Forum (ESF)*
Tel: +322 230.75.14 - Fax: +322 230.61.68 - Email: esf@esf.be

List of ESF Members Supporting the
Second Position Paper on Public Procurement in Services – 25th November 2002

- Accenture
- Architects' Council of Europe –ACE
- Association of Commercial Televisions - ACT
- Association of European Airlines – AEA
- Allianz AG
- Arup Group Ltd
- AVIVA (ex. CGNU)
- AXA
- Barclays PLC
- Bertelsmann
- British Telecommunications plc
- Bundesverband des Freien Berufe – BFB
- Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
- Comité Européen des Assurances - C.E.A.
- European Council of the Liberal Professions – CEPLIS
- Clifford Chance
- Comité de Liaison des Géomètres Européens – CLGE
- Commerzbank AG
- Deutsche Post AG
- Deutsche Telekom AG
- DHL Worldwide Network SA
- EDS Europe, Middle East & Africa
- EMI Europe
- Espacio y Entorno (Architect)
- EuroCinéma
- EuroCommerce
- European Association of Cooperative Banks – EACB
- European Banking Federation – FBE
- European Community Shipowners' Association – ESCA
- European Express Association – EEA
- European Federation of Engineering and Consultancy Association – EFCA
- European Film GATS Steering Group
- European International Contractors - EIC
- European Publishers Council – EPC
- European Public Telecom Network – ETNO
- European Retail Round Table – ERRT
- European Savings Banks Group – ESBG
- European Textile Services Association – ETSA
- Federation of European Consultancies Associations - FEACO
- Fédération des Experts Comptables Européens – FEE
- Federation Européenne des Fonds et Sociétés d'Investissement - FEFSI
- Fédération de l'Industrie Européenne de la Construction – FIEC
- Federation of Professional Industry and Services Organisations in Italy - FITA
- France Telecom
- Free and Fair Post Initiative
- Herbert Smith
- International Air Carrier Association - IACA/ACE
- IBM Europe, Middle East & Africa
- International Federation of the Phonographic Industry – IFPI
- International Financial Services, London - IFSL
- KPMG
- La Poste
- Marks & Spencer plc
- Metro AG
- Microsoft Europe, Middle East & Africa
- National Bank of Greece
- H-J Pohl . Dr J. Bauer – Rechanwälte
- Posten AB
- PostEurop
- Poste Italiane S.p.A.
- PricewaterhouseCoopers
- PT - Palvelutyöntajat ry - Employers' Confederation of Service Industries, Finland
- Royal Ahold NV
- Société des Auteurs et Compositeurs Dramatiques – SACD
- Suez
- Svenskt Näringsliv (Confederation of Swedish Enterprise)
- Telefónica SA
- TPG
- TUI
- UNICE
- UNICE WTO Working Group
- UNIQA Versicherungen AG
- Vivendi Universal
- Züblin