

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(95) 18 final
Brussels, 07.02.1995

94/0150 (AVC)

Amended 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 pursuant to Article 189 A (2)
of the EC-Treaty)

EXPLANATORY MEMORANDUM

On 16 June 1994, the Commission published a 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 (COM (94) 251 final/2 of 7.7.94, OJ C 291 p4 of 19.10.94).

The enlargement of the European Union to include three new member states on 1.1.95 brings about a change in the coverage of the agreement. Where explicit reference is made to a list of countries in the text itself, amendment is required. Only the amended general notes of Appendix I of the United States attached to the agreement falls into this category. Here it is necessary to delete reference to Austria, Finland and Sweden, listed among those countries not benefiting from the US concessions to the European Union. The Commission and United States Trade Representative have amended the text accordingly.

The legal basis to the agreement should be modified particularly in the light of the opinion of the Court of Justice (No 1/94 of 15.11.94) issued on questions of competence over the conclusion of multilateral agreements concerning trade in goods, GATS and TRIPS. The Commission proposes as a new legal basis Articles 57(2) last sentence, 66 100a and 113 of the Treaty. It is proposed, moreover, that the consultation of Parliament, under a field concerning co-decision (Art 189b), is carried out on the basis of Article 228 (3) second indent, ie after the assent of Parliament.

The Commission therefore hereby submits to the Council and the European Parliament an amendment to its initial proposal set out in its communication COM (94) 251 final and invites them to approve the agreement and to adopt this amended 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.

Amended 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
Articles 57(2) last sentence, 66, 100a, 113 and 228(3), second indent, thereof,

Having regard to the proposal from the Commission,

Having regard to the assent of the European Parliament,

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 authorised to designate the person empowered to
sign the Agreement in order to bind the Community.

Done at Brussels

For the Council

The President

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**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 1 of the EC.

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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 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

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
- Administration 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

Switzerland

Norway

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.

ISSN 0254-1475

COM(95) 18 final

DOCUMENTS

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Catalog number : CB-CO-95-023-EN-C

ISBN 92-77-85144-9

Office for Official Publications of the European Communities

L-2985 Luxembourg