

NOTIFICATION OF NATIONAL IMPLEMENTING LEGISLATION

Communication from Iceland

The following communication has been received from the Permanent Mission of Iceland in accordance with the Committee Decision of 4 June 1996, relating to the procedures for the notification of national implementing legislation (GPA/1/Add.1).

**SUBMISSION OF LEGISLATIVE TEXTS AND DESCRIPTION OF
GPA IMPLEMENTATION**

The Ministry of Finance hereby respectfully submits a notification to the WTO Committee on Government Procurement, on the implementation of the Agreement on Government Procurement (GPA) into Icelandic national legislation. The Ministry of Finance regrets the delay incurred in submitting the notification.

This notification refers to the checklist of issues provided in GPA/1/Add.1 (Procedures for the Notification of National Implementing Legislation).

I. GENERAL ELEMENTS

1. Has the Agreement been transposed into national law and/or does it apply directly?

On 31 May 2001, a new Act on Public Procurement was passed by the Icelandic Parliament, Act No. 94/2001. This Act had been under preparation for some time. The purpose of the Act is, *inter alia*, to ensure equal treatment of bidders on public procurement and to encourage active competition and efficiency in public operations. With this new and comprehensive Act on Public Procurement, No. 94/2001, the EU/EEA directives on public procurement were fully implemented into the national legislation. Before that they were published as special regulations based on the general laws on the acceptance of the EEA agreement. Furthermore, in Act No. 94/2001 the WTO Agreement on Government Procurement (GPA) was transposed into the national legislation.¹

Below is the following list of national legal instruments in force today in the field of public procurement:

1. Act No. 94/2001, on Public Procurement. *Lög um opinber innkaup nr. 94/2001.*

¹ The complete texts of the basic legislation (laws and regulations) on government procurement, including an English translation of Act No. 94/2001 can be consulted in the WTO Secretariat (Office 3062).

2. Regulation No. 513/2001, on threshold figures regarding public procurement in the EEA and in accordance with the WTO Government Procurement Agreement. *Reglugerð nr. 513 um viðmiðunarfjárhæðir vegna opinberra innkaupa á Evrópska efnahagssvæðinu og samkvæmt samningi Alþjóðaviðskiptastofnunarinnar (WTO) um opinber innkaup.*
3. Regulation No. 705/2001, on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. *Reglugerð nr. 705/2001 um innkaup stofnana sem annast vatnsveitu, orkuveitu, flutninga og fjarskipti.*
4. The Public Projects Procedures Act, No. 84/2001. *Lög um skipan opinberra framkvæmda nr. 84/2001.*
5. Regulation on Public Projects Procedures, No. 715/2001. *Reglugerð um skipulag opinberra framkvæmda nr. 715/2001.*
6. Act No. 65/1993, on the execution of tenders. *Lög um framkvæmd útboda nr. 65/1993.*
7. Parliamentary resolution on membership to the WTO Government Procurement Agreement. *Pingsályktun um aðild að samningi um opinber innkaup (Þskj. 871- 565.mál).*

2. *In the case that entities below the federal or central state level are covered: are these categories of entities autonomous from federal or central state level government in the implementation of the Agreement?*

The entities covered by Annex 1 and Annex 2 in Iceland's offer, that is central and municipality level, are covered by Act No. 94/2001. By definition all central entities that are covered by Act No. 94/2001 are also covered by the GPA.

3. *In the case that Annex 3 entities are covered: are these categories of entities autonomous in the implementation of the Agreement or do they apply the legislation provided by the federal/central or sub-central level?*

The rules on public procurement for entities covered by Annex 3 are stipulated in Regulation No. 705/2001, on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, that is based on Act No. 94/2001. The Agreement has been implemented in this regulation.

4. *Which main differences (if any) exist between the implementing laws at the federal or central level, the sub-central level and for Annex 3 entities?*

In regard to implementing the Agreement into laws at the municipality and the central level there are no differences. As stated above, Annex 3 is implemented with Regulation No. 705/2001, with reference to Article 6(2) of Act No. 94/2001.

5. *To what extent is information technology used in the process of government procurement?*

According to Article 48 of Act No. 94/2001, a contracting authority may decide that tenders may be submitted in other than written form, if it can be ensured that unauthorised parties do not learn of the contents of the tender and if its reception and reception time can be verified. A purchaser may receive and respond to queries by tenderers as referred to in Article 41 by means other than written, for example, by fax, e-mail, telegram or other equally secure manner. Reference can also be made to Article 18 of Regulation No. 705/2001.

I. SPECIFIC ELEMENTS

6. *Identify the specific provisions in your legislation which reflect the national treatment and non-discrimination commitments of Article III of the Agreement.*

According to Article 8 in Act No. 94/2001, holders of rights according to the Act are all individuals and legal entities domiciled in any of the Member States in the EEA. The same applies to other individuals and legal entities that have such rights on the basis of international treaties to which the Icelandic Government is a party. Titles 2 and 3 of the Act reflect the national treatment and non-discrimination commitments of Article III of the Agreement. It should also be mentioned that Article 11 of the Act stipulates the fundamental rule that in the case of public procurement, contracting authorities shall ensure equal treatment of bidders.

7. *Article IX:2 of the Agreement foresees that the invitation to participate may take the form of a notice of proposed procurement. If your implementing legislation provides for this opportunity, give details.*

Act No. 94/2001 does not provide for this opportunity. Article 59 of the Act (notification of total procurement) states that contracting authorities shall publish, as early as possible during each financial year, an estimate of total procurement of supplies, services or work, as listed in Annex A, for the ensuing 12 months, if the total amount of procurement reaches the threshold amounts for total procurement published by the Minister in a regulation as provided for in the first Paragraph of Article 56. Further reference is made to Articles 64 and 65 of the Act regarding time-limits. However, Regulation No. 705/2001 provides for this opportunity. Reference is made to Article 12 of Regulation No. 705/2001 which deals with the notification of total procurement.

8. *Article IX:3 of the Agreement foresees that entities at the sub-central level as well as Annex 3 entities may use a notice of planned procurement or a notice regarding a qualification system as an invitation to participate. If your implementing legislation provides for this opportunity, give details.*

This opportunity is provided for in Regulation No. 705/2001. However, Act No. 94/2001 does not provide for this opportunity.

9. *In the case of selective tendering procedures: to what extent are entities allowed to use permanent lists of suppliers or is there a requirement for lists of suppliers to be selected on a contract-by-contract basis?*

According to Act No. 94/2001, entities are not allowed to use permanent lists of suppliers. According to Article 18 of Act No. 94/2001, in all other instances than those provided for by Articles 19 (negotiated procedure with prior publication of a contract notice) and 20 (negotiated procedure without prior publication of a contract notice), the open procedure or the restricted procedure shall be applied. A pre-qualification process shall always be applied prior to the restricted procedure. A pre-qualification process is subject to the rules on open procedure as applicable. According to Article 34 of the Act in restricted and negotiated procedures, pre-qualification shall be applied to select those parties invited to submit tenders. In the case of restricted procedures, or negotiated procedures as provided for in Article 19, pre-qualification shall be advertised in a conspicuous manner with the intention of providing all parties who can provide the supply, service or work in question, the opportunity of participating in the pre-qualification. In the case of restricted procedures, the number of participants selected to be invited to tender may be limited. As a rule, participants shall not be fewer than five or more than 20 in number. The number of participants selected must, in all cases, be sufficient to ensure genuine competition in the procedure. If the number of participants to be selected in pre-qualification is to be limited, mention must be made of such in the tender documents. In the case of negotiated procedures as provided for in Article 19, the

number of participants to be selected in pre-qualification to submit tenders shall not be fewer than three, as long as the number of participants is sufficient. In restricted or negotiated procedures, the parties selected for participation by a pre-qualification shall be invited to submit a tender in a notification sent to all of them concurrently. The notification shall be accompanied by tender documents and accompanying documentation, where applicable.

10. *Article XIV of the Agreement allows for negotiation under certain conditions. Are entities allowed to proceed to negotiations? If so, which categories and what are the conditions imposed?*

Article 19 of the Act deals with negotiated procedure with prior publication of a contract notice. Article 20 of the Act deals with negotiated procedure without prior publication of a contract notice. Article 21 of the Act deals with negotiated procedure in a design contest. Article 22 of the Act deals with framework agreements. Further reference is made to these articles.

11. *Article XI contains the time-limits for tendering and delivery. Time-limits shall normally be "not less than X days". Does the domestic legislation reflect the various minimum time-limits as set out in the Agreement? If not, give information on any longer time limits which have been established.*

Articles 64 and 65 of the Act contain the time-limits for tendering and delivery. These provisions reflect the various minimum time-limits established in the relevant EU/EEA Public Procurement Directives, as well as the time-limits set out in the Agreement (GPA). Further reference is made to Articles 64 and 65 of the enclosed Act.

12. *To what extent does the implementing legislation allow entities, in pursuance of Article XII:1, to permit tenders to be submitted in several languages (one of which has to be a language of the WTO)? To what extent do entities use this flexibility?*

According to Article 23 of the Act, the following shall be included in tender documents, as applicable: 1. Language or languages in which the tenders shall be submitted. Usually the tenders are submitted in Icelandic but in English when dealing with larger procurements, e.g. within the EEA.

II. CHALLENGE PROCEDURES - ARTICLE XX

13. *Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.*

Articles 75-82 of the Act concern the Tender Complaints Committee. The role of the Tender Complaints Committee is to resolve promptly and impartially complaints by individuals and legal entities concerning claimed violations of this Act and rules adopted pursuant to it. The Committee shall work independently. Its rulings and decisions as provided for in this Act may not be referred to other public authorities, cf. Article 75. The challenge procedure is laid down in Articles 76-81 of the Act. Finally, Article 82 of the Act states that the Tender Complaints Committee may adopt detailed rules, which must be approved by the Minister of Finance, on the submission of documents, procedures before the Committee and publication of its rulings.²

² A copy of these rules can also be consulted in the WTO Secretariat (Office 3062).

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less than 10 days". What are the limits in domestic legislation?

Article 78 of the Act deals with time-limit for lodging a complaint. According to Article 78(1), a complaint must be lodged in writing with the Tender Complaints Committee within four weeks of the complainant having learned, or having been able to learn, of the decision, action or failure to act which he considers a violation of his rights.

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"? If the latter:

- How are its members selected?
- Are its decisions subject to judicial review?
- If not, how are the requirements of paragraph 6 of Article XX taken into account?

The Tender Complaints Committee is responsible for the challenge procedure. As stipulated in Article 75(1) of the Act, the Tender Complaints Committee shall be comprised of three persons appointed by the Minister of Finance for a four-year term. Alternates shall be appointed in the same manner. The chairman of the Committee and alternate must fulfil the legal requirements made of district court judges. Other members of the Committee must have comprehensive commercial knowledge and experience. Committee members must be independent of interests of the state or other public authorities. As stated previously, the Committee shall work independently. Its rulings and decisions as provided for in this Act may not be referred to other public authorities. However, the Committees decisions are subject to judicial review in front of the national district courts (Héraðsdómur) and the Supreme court (Hæstiréttur).

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

The Tender Complaints Committee works in accordance with Act No. 94/2001 and examines complaints with reference to Act No. 94/2001 and subsequent secondary legislation on public procurement. Reference is made to the list of national legal instruments in force today in the field of public procurement. It should also be mentioned that it is stated in Article 79(5) of the Act that handling of questions (before the Committee) shall in other respects comply with the Public Administration Act, No. 37/1993.

- (iv) *Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities?*
- *Do these measures include the possibility to suspend the procurement process? On what conditions?*

Article 80 of the Act authorises a temporary suspension of contract procedures. This is regarded as a rapid interim measure to preserve commercial opportunities. The Article stipulates that if the Committee is of the opinion that there is considerable likelihood of a violation against the Act, or rules adopted pursuant to it, in a certain procurement it may, at the demand of a complainant, suspend the tender or awarding of the contract until a final decision has been reached on the complaint. The party against whom the complaint is directed shall as a rule be given a brief time-limit for expressing an opinion concerning possible temporary suspension of the tender or awarding of a contract. Derogation may be made from this provision in the case of a clear and obvious violation of this Act or rules adopted pursuant to it. A party involved may demand that the Committee give written grounds for a decision as provided for in this Article if such grounds did not accompany the decision when notice of it was given.

- (v) *How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?*

Article 81 of the Act deals with the remedies available to the Tender Complaints Committee. The Article states that the Committee may with a ruling invalidate or alter a decision by the contracting authority for public procurement, cf. however Article 83. The Committee may instruct the contracting authority to tender certain procurement, advertise a tender once again or alter a tender notice, description of tender or other aspect of tender documents. The Committee may express its opinion on the liability of the contracting authority for damages towards the complainant, but shall not express itself concerning the amount of damages. The Committee may decide that the party against whom a complaint is directed shall pay the complainant the cost of lodging the complaint. If a complaint is clearly unjustified or lodged for the purpose of delaying the implementation of public procurement the Committee may rule that the complainant pay legal costs of the case, which shall accrue to the national treasury. If a ruling of the Committee as provided for in the first paragraph is not complied with, it may levy per diem fines on the party at which the ruling is directed. Fines may amount to up to ISK 500,000 for each day which elapses without compliance with the Committee's ruling. If a ruling is referred to a court the per diem fines shall not commence until final judgement is pronounced. Per diem fines as provided for in the fourth paragraph shall accrue to the national treasury. Per diem fines and a ruling on legal costs, as provided for in the third paragraph, are enforceable by execution without prior court judgement. Article 84 of the Act furthermore stipulates liability for damages.

- (vi) *Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.*

The time-periods for the stages of the challenge procedure are laid down in Articles 78-81 of the Act. As stated previously, Article 78(1) stipulates that a complaint must be lodged in writing with the Tender Complaints Committee within four weeks of the complainant having learned, or having been able to learn, of the decision, action or failure to act which he considers a violation of his rights. Article 79(1) states that the complainant shall as a rule be given a brief time-limit in which to express himself on the comments from the respondent. Article 79(4) states that the Complaints Committee must deliver its ruling on a complaint as rapidly as possible, and no later than one month after it receives the documents referred to in Articles 78 and 79.

(vii) *What are the usual costs to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?*

It is free of charge to conduct a challenge procedure. However, it is stated in Article 81 of the Act that the Committee may decide that the party against whom a complaint is directed shall pay the complainant the cost of lodging the complaint. If a complaint is clearly unjustified or lodged for the purpose of delaying the implementation of public procurement the Committee may rule that the complainant pay legal costs of the case, which shall accrue to the national treasury.
