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Joan Claybrook, President

November 1, 2004

Jean Heilman Grier
Senior Procurement Negotiator
Office of the United States Trade Representative
1725 F Street, NW
Washington, DC 20508

69 FR 60219

Dear Ms. Grier,

Public Citizen submits these comments in response to the Office of the United States Trade Representative's (USTR) notice and request for public comment on the proposed expansion of market access opportunities in government procurement under the World Trade Organization Agreement on Government Procurement (AGP).

The Interests of Public Citizen

Public Citizen is a not-for-profit lobbying and advocacy group with approximately 160,000 supporters nationwide. Public Citizen works in Congress, in courts, and in federal agencies for government reforms that serve the public interest. Since its founding, Public Citizen has worked to strengthen the ability of citizens to participate in the domestic policy-making process and to protect public health and safety. For the past thirteen years, Public Citizen has worked to educate the American public about the impact of international trade and economic globalization on our nation's health, safety, and environmental standards, democratic accountability, and policy-making procedures. Public Citizen submits these comments to urge USTR to refrain from making additional market access offers under the AGP and instead to reconsider current commitments in light of recent developments on the State, national, and international levels. Under AGP Article XXIV-10, the United States may withdraw entirely from its obligations on 60 days written notice to the WTO. If they had the information necessary to render an informed decision about the AGP, U.S. taxpayers might urge the Executive Branch to exercise this option. To date, no thorough, objective study has been done to measure the economic implications for U.S. taxpayers of the amount of taxpayer money being granted under the AGP terms to foreign companies that do not employ U.S. workers versus the amount of funds U.S. companies that employ U.S. workers obtained from contracts with other nations who have signed the AGP and how this balance compares with before the 1995 establishment of the AGP.

Background

The AGP is a plurilateral agreement that currently applies to 38 Members of the WTO.[1] The AGP was negotiated as part of the Uruguay Round, and implementing legislation was passed by the U.S. Congress as part of the Uruguay Round Agreements Act in 1994.[2] The AGP entered into force for the United States on January 1, 1996.[3] Federal agencies, 37 U.S. States, and various port authorities currently are listed as entities covered by the disciplines of the AGP. The agreement requires that covered entities treat foreign goods, services and suppliers from the other 37 signatory countries "immediately and unconditionally"[4] the same as domestic suppliers when purchasing goods and services with taxpayer dollars. The AGP "applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement…" and "applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services."[5] The only caveat to this broad scope is that the agreement's rules do not apply if a procurement opportunity involves only a relatively small amount of money.

The AGP also prohibits non-performance-related conditions in product or service technical specifications and supplier qualifications. Thus, with limited exceptions, covered entities are not allowed to adopt or maintain procurement policies that award contracts by considering factors beyond price and the ability to perform the contract.

AGP rules require that "Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities contained in its lists annexed hereto, with the provisions of this Agreement."[6]

In addition to the AGP, the United States has bilateral trade agreements with Chile, Morocco, Australia, and Bahrain that include procurement provisions modelled after the AGP. The Central American Free Trade Agreement (CAFTA), which awaits a vote in Congress, contains similar rules, as well. Indeed, if the full list of countries with which the United States seeks new bilateral and regional trade agreements were to be realized, the procurement activities would be constrained in relation to companies from some 37 additional countries in addition to the U.S. obligations owed the companies operating from the 38 signatories of the WTO AGP.[7]

Should International "Trade" Rules Cover Government Procurement at all?

Government procurement has little to nothing to do with traditional trade matters of tariffs and quotas and is an unacceptable area for negotiations at the WTO or in bilateral or regional trade agreements. Subjecting government procurement at the national or sub-central level to global, one-size-fits-all rules on how taxpayers' funds may be spent chokes off citizens' reasonable expectation to retain a level of democratic accountability over how their money is spent.

The expenditure of taxpayer money for the procurement of goods and services needed to fulfill the functions of the government on which citizens rely is an intrinsic function of any sovereign government. In democratic nations, citizens who pay taxes to local, State, and national governments traditionally have had the opportunity to influence procurement policies and

decisions via democratic processes so that the use of their tax dollars is done in a manner that fulfills their needs and values. In short, taxpayer dollars are not the same as private consumers' dollars. Because taxpayer dollars are aggregated, no individual consumer or citizen maintains control over how they are spent but rather must operate through the democratic process to ensure his or her dollars are spent in an agreeable manner. Thus, citizens have organized on the city, county, state and federal level time and again to promote environmental considerations in procurement policy, to cut off expenditures with companies that were doing business in apartheid South Africa, to disqualify companies with bad labor or environmental records from being able to bid for government work, and to ensure that procurement funds were set aside to insist that living wages or for construction projects prevailing wages are paid workers employed by those obtaining government contracts.

The procurement agreement rules in trade agreements generally and the WTO Agreement on Government Procurement specifically unnecessarily constrain citizens' rights and lawmakers' policy options by requiring that covered entities bring existing procurement policies into compliance and prohibiting them from adopting conflicting policies in the future. Effectively, when the United States subjects its procurement activities to the constraints of a global pact such as the AGP, the Executive Branch of government is substituting its judgment about how best our tax dollars should be used. The specific terms of the AGP impose one set of values over all citizens' likely varying opinions: citizens' tax dollars may only be spent according to a set of rules that is aimed at facilitating the ability of large companies, from the countries who are signatories to this deal, to get a chance to profit from their tax payments. This one goal is imposed by these agreements over other values or priorities – such as seeking to promote local or domestic businesses by recycling tax dollars into local jobs and investment or seeking to create a market for environmentally-friendly goods or services or rewarding companies that pay a decent wage or provide health benefits. All of these other legitimate goals might be the priority tax payers would set for themselves unless the federal government's Executive Branch takes away these freedoms by forcing one-size-fits-all global rules over these choices.

Government procurement and policies related to it have very important economic, social and even political roles. Controlling the level of expenditure, and directing the expenditures to locally produced materials, is a major macroeconomic instrument, especially during recessionary periods to cover economic downturn. National policies that give preference to local firms, suppliers and contractors boost the domestic economy. Specification that certain groups or communities, especially those that are underrepresented in economic standing, be given preference is an important policy tool to address discrimination or injustice. Finally, for procurement or concessions where foreign firms are invited to bid, being able to give preference to firms from particular countries is – for better or for worse – a commercially powerful international-relations policy tool (i.e. awarding of Iraq reconstruction contracts).

National, State, and local governments in the United States and elsewhere should be free to adopt policies intended to ensure that government spending policies reflects taxpayers' values and interests, including the use of preferences for domestic goods, services or workers to ensure that tax dollars are recycled back into the local economy. The American people are increasingly concerned about the impact of offshoring on the U.S. economy and middle class. Job loss caused by technological developments or by offshoring in the private sector is a hard problem to

solve. However, governments *can* and indeed are expected to make decisions about how to spend taxpayer dollars to promote domestic economic development and growth. Regrettably, the AGP restricts policy-makers from doing so effectively, therefore taking away one of the few available policy tools to address the exporting of jobs and livelihoods.

AGP Ties the Hands of Lawmakers and Unacceptably Limits Policy Options

The AGP contains constraints with regard to the development of procurement policy and the awarding of procurement contracts that conflict with an array of common U.S. procurement policies. If a federal, State, or local entity agrees to comply with the AGP, the following policies could be challenged in the closed-door dispute resolution system of the WTO:

- Anti-offshoring policies. The AGP requires "national treatment" for all goods and services of government purchases, meaning signatory governments cannot give preference to local firms or firms employing local workers, much less forbid the spending of tax dollars on companies offshoring work.[8] This means that the "anti-offshoring" legislation proposed in more than 30 States in 2004, and an array of other local development policies aimed at keeping tax dollars employing local workers and giving preference to locally-produced goods and services (so-called "Buy America" policies) are forbidden under AGP rules.

- "Green" procurement policies. The AGP requires that "technical specifications laying down the characteristics of the precuts or services to be procured…shall not be prepared, adopted, or applied with a view to, or with the *effect* of, creating unnecessary obstacles to international trade."[9] Translated from the trade jargon, this provisions means that specifications based on *how* a good is made (for instance, requiring recycled content in paper or other goods to be procured) or *how* a service is provided (for instance, requiring a portion of energy be purchased from renewable sources) are prohibited. As well, under these tight constraints of what factors can be considered in awarding a procurement contract, any qualification that might have the unintended *effect* of creating an obstacle to trade – such as environmental or consumer safety labels or certain packaging requirements – could be subject to challenge before a trade tribunal.

- Policies targeting companies' human rights, environmental, labor conduct. The AGP also limits what sorts of qualifications may be required of companies seeking to supply a good or service. Conditions for participation in bidding are limited to "those which are essential to ensure the firm's capability to fulfil [*sic*] the contract in question."[10] This means that suppliers cannot be disqualified because of the companies' labor, human rights or environmental records or practices. Yet, many entities condition contracts upon such track records or practices in a number of ways. Under the same provision, "sweat-free" procurement rules that ban purchase of goods from companies using sweatshop labor or child labor are prohibited, as is the exclusion of companies based on their international human rights and environmental records.

- Prevailing and living wages and project-labor agreements. The AGP's limits on the requirements that can be imposed on contractors also bar conditions such as prevailing wage and living wage requirements. For entities bound to the AGP, project labor agreements that

require fair treatment of workers and their unions in order to avoid labor disputes in public works projects also cannot be required for a bidder to qualify for business.

- Pro-union or pro-public bidding assistance. AGP rules also forbid policies that provide aid to employees and unions in bidding for public contracts, and laws that require favorable consideration of such in-house bids. Also in conflict with AGP rules are costing requirements that require private bidders to provide substantial savings over public providers in order to get a public contract, but do not allow savings due to lower wages or benefits to be factored in.

- Policies targeting countries' human rights, labor rights, other conduct. The AGP also requires "most favored nation" treatment in procurement,[11] meaning that governments cannot treat foreign companies differently based on the human rights, labor rights or environmental records of the countries in which they are based or in which they operate. This removes tools used by governments in the past to demand corporate responsibility in the face of human rights abuses – such as the policies disqualifying procurement from companies doing business in apartheid South Africa and those now in place in several States regarding procurement with companies doing business in Burma.

Other nations that are party to the AGP are empowered to challenge a nonconforming policy (no matter when it was established unless a specific limit is set in the U.S. schedule) maintained or newly established by entities listed in the U.S. schedule of commitments as a violation of the agreement in the binding dispute resolution system established in the text. The tribunals are staffed by trade officials who are empowered to judge if a policy has resulted in an AGP violation. None of the basic rules of due process apply. The tribunals are closed to the public and press. There are no conflict of interest rules for the tribunalists, many of whom work as trade lawyers with private sector clients. There are not outside appeals, only a WTO Appellate Body. State and local government officials may only participate if their law is challenged at the invitation of federal government representatives.

Policies judged to violate the rules must be changed, or trade sanctions can be imposed. Sub-central government officials have no standing before these tribunals and thus must rely on the federal government to defend a challenged policy. In addition, the federal government is obliged to use all constitutionally-available powers – for instance preemptive legislation, lawsuits and suspension of funding – to force sub-central government compliance with WTO rulings.

U.S. Lawmakers Increasingly Opposed to AGP Model

An increasing number of officials in the United States at the national, State and local levels are disturbed about the implications of these rules and have moved to limit their application to procurement under their jurisdiction. In the U.S. Congress, several Members have introduced legislation that would directly restrict overseas outsourcing by the federal government despite the United States' AGP commitments. In the spring of 2004, Governors from seven States (Iowa, Kansas, Maine, Minnesota, Missouri, Oregon, and Pennsylvania) that were previously listed to be bound by CAFTA's procurement rules each acted to withdraw their States after learning about the policy constraints posed by the agreement.[12] This was a historic shift. To our knowledge,

there never has been such a number of public actions by a bipartisan group of State officials with actual policy implications (versus political statements) with regard to any trade issue in the United States. Indeed, only 21 States remain listed in the CAFTA text, in contrast to the 37 that are currently listed under the AGP, as other States explicitly declined to be bound in the first place.

State legislators across the United States have raised concerns about the past AGP commitments made by their past Governors as well as the process used to decide if a State will offer market access in procurement agreements. That States were 'signed onto' the AGP by merit of letters from Governors raises separation of powers issues. By signing onto the AGP, Governors effectively agreed to alter state procurement policy. Yet, setting state procurement policy is the constitutional realm of the Legislative, not the Executive Branches.

Majority of WTO Member Nations Rejected Adding Procurement Rules to Core WTO Undertaking

If the domestic rejection of government procurement in recent trade pacts has been significant, rejection of *new* negotiations on transparency in government procurement has been even more emphatic. The very notion of setting one-size-fits-all global rules on procurement was so strongly opposed by a majority of the nations involved in the GATT Uruguay Round negotiations which established the WTO, that the AGP is one of few 'plurilateral' agreements of the WTO. That means that only the countries that have opted into the AGP are covered which is why only 38 of the WTO's 148 signatory nations are party to the AGP.

Starting with the first Ministerial after the establishment of the WTO, a small group of nations has tried to reopen this discussion and has pushed for procurement rules that all WTO signatory countries would be bound to follow. The 1996 Singapore Ministerial Declaration included a clause committing WTO member countries only to set up a working group to study procurement transparency and, based on this study, to discuss what elements might be considered in an appropriate agreement. But, as with all of the so-called Singapore Issues, there was no commitment to start negotiations on any new agreement. After the push for negotiations on an AGP-style agreement had been rejected time and again, the countries favoring this approach then called for an agreement in 'transparency' in government procurement. This strategy was clearly understood as a slippery slope towards obtaining the initial all encompassing WTO procurement agreement.

After almost a decade of developing country and civil society opposition to a proposed broad expansion of WTO scope and powers, the contentious issue of transparency in government procurement finally was taken off the WTO negotiating agenda in July 2004.
At the 2003 WTO Ministerial Conference in Cancún, Mexico, the talks collapsed after more than 70 developing countries, led by Kenya, Malaysia, Brazil, and India, refused to begin negotiations on the Singapore Issues, including transparency in government procurement. Despite the spectacular failure to reach any agreement at Cancún, the European Union and Japan continued to press for negotiations on some or all of the Singapore Issues later that year.

However, informal consultations went nowhere, and in mid-December 2003, 45 developing countries tabled a formal paper in the WTO calling for investment, transparency in government procurement, investment, and competition policy to be dropped completely from on-going WTO negotiations. This was the final position taken at the July 2004 General Council meeting during which the scope of the so-called Doha Round of WTO talks was significantly narrowed.[13] Effectively, it had become clear that to avoid a total standstill of all WTO talks, negotiations on issues about which there was broad, unmovable opposition had to be dropped.

In light of the emerging global consensus that government procurement is beyond the reasonable reach of WTO, AGP signatories such as the United States should reconsider the acceptability of current market access commitments that go far beyond the more limited negotiations on transparency that have been rejected vehemently by the majority of WTO members.

Primary Avenues for Increasing Access to U.S. Procurement Market are Objectionable

The Federal Register notice to which we are responding gives notice of talks to expand the AGP's coverage, but does not specify what mechanisms for such expansion are being considered. The United States could expand its current market access commitments under the AGP in one of three ways, all of which, from our perspective, are not in the public interest:

1) **Do not recruit the remaining thirteen States currently not covered by the AGP to agree to be bound by the pact in their procurement activities. (This would target Alabama, Alaska, Georgia, Indiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Virginia, West Virginia)**

Over the almost ten years of WTO's existence, 37 U.S. States have been recruited to commit to the provisions of the AGP. However, the process that has been used to determine States' commitments is highly questionable under U.S. law. To date, to determine whether or not a State will offer access to its procurement market, the USTR has sent a letter of request to the Governor. Governors have responded affirmatively, negatively, or not at all. The USTR then lists States that it considers to have "consented" based on this process in the annex of the agreement and implementing legislation.

Putting aside the dearth of information given to State officials regarding the implications of a decision to bind a State to procurement rules, there are two main problems with the current process. First, Governors do not single-handedly make State procurement policy. State legislatures are typically responsible for establishing the parameters under which the Executive Branch procures goods and services. In many States, procurement policy is clearly the purview of the Legislative Branch. It is unclear whether a representative of the Executive Branch has the authority to unilaterally commit current and future legislatures to abide by the AGP or other procurement agreements by merit of a simple letter to the USTR, as such a commitment could require significant changes to a State's procurement code, and certainly limits future legislatures' policy options. State legislators in several States have requested that their attorneys general and/or legislative counsel look into this issue as a result of their concern over the impropriety of such a move. The National Conference of State Legislatures addressed this question as well, in comments to the USTR:

> *In light of recent experience with the World Trade Organization's Government Procurement Agreement, it is critical to stress that decisions affecting State procurement practices must be made in consultation with State legislators. While the executive branch is an important partner in State procurement decisions, State legislators are equally vital. It is clear that Governors' commitments alone cannot legally bind a State. Indeed, State laws and constitutions require action by the legislature for a State to bind itself voluntarily to any new procurement regime.*[14]

Secondly, even if Governors *were* determined to have the authority to bind States without consulting the legislature, the Office of the United States Trade Representative has not taken proper care in addressing States' concerns and reservations. For example, documents obtained through a Freedom of Information request show that Montana was added to the AGP after its Governor sent a letter in 1993 noting that the State's laws did *not* conform to the WTO rules.[15]

In 2003, it appears that the USTR simply copied the list of States from the AGP and pasted them into the annex to the procurement chapter of the U.S.-Chile Free Trade Agreement without any consultation with States whatsoever. As of November 1, 2004, Oregon still remains listed on the U.S.-Morocco Free Trade Agreement and the pending CAFTA, despite multiple letters from the Governor stating that the State did not wish to be bound by any new procurement agreements.[16]

Finally, while the USTR has touted the ability of States to join agreements on their own terms,[17] Ambassador Robert Zoellick refused to take reservations for sensitive policies requested by Governor Gary Locke of Washington in June 2004 as a condition for signing on to CAFTA.[18] While the examples listed above are far from comprehensive, it is evident that the USTR is not making a good faith effort to solicit the prior informed consent of States before binding them to the AGP or other procurement agreements and has bound States to various agreements in a slipshod manner.

<u>The U.S. should not offer market access in additional States until these serious procedural problems are remedied and state legislatures have the opportunity for prior informed consent – voting whether or not their states should be bound. In fact, this exchange of requests and offers, provides States with the desire some seek to modify or rescind commitments made under the past flawed process. Indeed, we urge the Office of the U.S. Trade Representative to give notice to the 37 U.S. States now committed to the AGP of this opportunity. We request that such notice be given to the senior Democrat and Republican of both State legislative bodies, the Attorney General and the Governor of each State now listed as committed to the AGP that this is an appropriate moment to negotiate changes with our trading partners.</u>

2) Do not add municipal and county governments to the U.S. schedule of commitments

Municipal and county procurement to date remain untapped in the current U.S. market access commitments under the AGP. The U.S. federal government actively recruited U.S. cities to sign up to the AGP, but ultimately none were added. Public Citizen has dozens of letters sent by then-USTR Mickey Kantor to cities that extol the virtues of the AGP, but fail to explain the constraints the agreement would place on cities' procurement options.[19] Offering market access

for municipalities is not unprecedented, however. Following the AGP negotiations, the United States developed a side agreement on government procurement with the European Union (EU) under which seven major U.S. cities are covered.[20]

The procedural problems raised in the context of States apply to the situation of local governments, as well. However, there are additional concerns to be raised regarding the capacity of local governments to consider the ramifications of such a commitment given limited resources. The National League of Cities "discourages the expansion of the AGP to include coverage of local governments."[21] The U.S. should not offer market access for local government procurement.

3) Do not eliminate current exceptions, reservations and carve-outs to AGP rules

The final way the United States could offer increased market access would be to eliminate some of the reservations and carve outs taken in prior AGP negotiations. The United States has exceptions, reservations and/or carve outs in the following areas, among others: national security;[22] set-asides on behalf of small and minority businesses;[23] federal funds for mass transit and highway projects;[24] steel, motor vehicles, and coal;[25] select service sectors such as transportation, dredging, all services purchased in support of military forces located overseas, management and operation contracts of federally-funded research and development centers, and public utilities services, including telecommunications;[26] and State-specific carve outs for automobiles, software, construction services, beef, and more.[27] Current exceptions, reservations and carve-outs negotiated to safeguard legitimate national security and economic development interests, should not be compromised or eliminated in future U.S. offers.

Conclusion

U.S. negotiators should reconsider the broad lack of acceptability of government procurement as a topic to be covered by the WTO and should withdraw from the AGP instead of submitting an additional offer for increased market access. At a minimum, the U.S. should refuse to make additional offers covering State and local governments and safeguard existing exceptions, carve-outs and reservations. In addition, an overhaul of the process used in the United States to bind sub-central entities to procurement agreements is sorely needed.

Respectfully submitted,

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[1] In addition to the United States, they are: Canada, European Communities (including its 25 member States), Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, and Switzerland.
[2] 19 U.S. Code §§ 3501 et seq.
[3] WTO Document AGP/23 (98-2803), July 15, 1998.
[4] WTO AGP Article III-1.
[5] WTO AGP Article I-1,2.
[6] WTO AGP Article XXIV-5.
[7] Australia, Bahrain, Botswana, Lesotho, Morocco, Namibia, South Africa, Swaziland and 29 Latin American and Caribbean nations.
[8] WTO AGP Article III.
[9] WTO AGP Article VI (1): "Technical specifications laying down the characteristics of the precuts or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade."
[10] WTO AGP Article VII (b).
[11] WTO AGP Article III.
[12] Michael Schroeder, "Governors Rescind Agreement to Comply with Trade Pacts," *The Wall Street Journal*, May 14, 2004, and John Nichols, "Global Fights Go Local," *The Nation*, Aug. 30, 2004.
[13] Martin Khor, "Singapore Issues Downgraded at WTO?" *Star*, Feb. 16, 2004.
[14] National Conference of State Legislatures, Comments to USTR re: Free Trade Area of the Americas Draft Text Release, Aug. 22, 2001.
[15] Governor Mark Racicot to Ambassador Michael Kantor, November 23, 1993. "I support open trade and a reduction in the barriers to free trade. At the same time, however, I must advise that Montana has statutory procurement preferences designed to benefit instate vendors. I am attaching copies of these statutes. As a result, I am unable to make any commitment which could be interpreted as contrary to these statutes."
[16] Governor Ted Kulongoski to Ambassador Robert Zoellick, May 7, 2004 and May 27, 2004, on file at Public Citizen.
[17] United States Trade Representative, "State Government Procurement and Trade Agreements: The Facts," March 2004.
[18] See Governor Gary Locke to Ambassador Robert Zoellick, Jun. 17, 2004 and Ambassador Robert Zoellick to Governor Gary Locke, Aug. 13, 2004, on file at Public Citizen.
[19] Memorandum to Ambassador Kantor from Debbie Leilani Shon, Re: GATT – Subcentral Procurement Letters to Targeted 24 Mayors, Jul. 27, 1993, on file at Public Citizen.
[20] WTO Document WT/TPR/S/56 (99-2176), June 1, 1999.
[21] National League of Cities, 2004 National Municipal Policy: Community and Economic Development.
[22] WTO AGP Article XXIII (1).
[23] WTO AGP General Notes, Notes to Annex 2.
[24] WTO AGP Appendix 1, Notes to Annex 2.
[25] WTO AGP Appendix 1, Notes to Annex 2.
[26] WTO AGP Appendix 1, Annex 4
[27] WTO AGP Appendix 1, Annex 2.