

UNITED STATES - PROCUREMENT OF A SONAR MAPPING SYSTEM

*Report of the Panel
(GPR.DS1/R)*

I. INTRODUCTION

1.1 Consultations pursuant to Article VII:3-5 of the Agreement on Government Procurement between the European Community and the United States concerning the procurement by the United States National Science Foundation of a sonar mapping system took place in Washington D.C. on 26 June 1991. On 12 July 1991, the European Community requested the Committee on Government Procurement to meet under Article VII:6 of the Agreement and requested the establishment of a panel under Article VII:7 (document GPR/M/41, part C). At that meeting, the Committee agreed to establish a Panel to examine the complaint of the European Community concerning the procurement by the United States National Science Foundation of a sonar mapping system.

1.2 On 9 September 1991, the Committee was informed in document GPR/61 that the Panel would have the following composition:

Chairman: H.E. Mr. William Rossier
Members: Mr. John Clarke
Mr. François Nadeau

The Panel has the following terms of reference:

"To examine, in the light of the relevant provisions of this Agreement, the matter referred to the Committee by the European Communities on 12 July 1991; to consult regularly with the parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution; and to make a statement concerning the facts of the matter as they relate to the application of this Agreement and to make such findings as will assist the Committee in making recommendations or giving rulings on the matter."

1.3 Subsequent to the Committee's decision to establish the Panel, the European Community submitted an aide mémoire dated 31 July 1991 which set out the case which had been described orally at the Committee meeting of 12 July. This aide mémoire is reproduced in Annex 1. It should be noted that one of the matters referred to in the aide mémoire - the alleged infringement of the Government Procurement Agreement through a requirement to acquire a proprietary product - was not pursued by the Community and has not been considered by the Panel.

1.4 The Panel held meetings with the parties to the dispute on 30 October 1991 and 27 January 1992. The Panel submitted its conclusions to the parties on 9 April 1992.

II. FACTUAL ASPECTS

2.1 The National Science Foundation (NSF) is an agency of the United States Government with responsibility for conducting scientific research. It has the authority to contract goods and services to do so. The NSF is listed among the United States entities to which the Agreement on Government Procurement applies, and is thus a "covered entity". Since 1959 the NSF has carried out a programme of Antarctic research. Currently, the NSF is responsible for the management, administration and funding of Antarctic research under the United States Antarctic Research Program. Under this Program, since 1968, the NSF has competitively tendered successive multi-year contracts with private contractors to provide Antarctic research services. The current contract, dated 1 October 1989 and submitted to the Panel at its request, is with Antarctic Support Associates (ASA), a private company. It requires ASA to provide a wide range of logistical and other supporting services for the research programme and to procure products necessary for its fulfilment.

2.2 The contract between the NSF and ASA, referred to as DPP89-22832, is a multi-year contract for an amount of US\$251 million. It covers a wide range of activities, including the construction, maintenance and operation of research, housing, logistical and transport facilities and the provision of all manner of logistical support. Its budgeted amount for the period 1 April 1990 to 30 September 1991 was \$70,084,019, of which \$38,953,244 or 56 per cent was allocated to the acquisition of services, and which included the appropriation for the sonar mapping system. In the contract the NSF states that its long-range planning encompasses a wide range of scientific goals as well as maintaining an effective presence on the Antarctic continent. Under the contract, ASA is, inter alia, responsible for procurement of project computer systems and equipment and communication facilities and for the maintenance of project vehicles and vessels. As part of the contract between the NSF and ASA, ASA is also required to procure, equip, and operate a research vessel with ice-breaking capability and equipped with the advanced oceanographic equipment needed to perform its research functions. ASA will lease the completed vessel and is responsible for purchasing from subcontractors items for installation on the vessel. ASA is also required to furnish instrumentation support to research projects using the vessel. The contract states that a modern suite of oceanographic equipment, including swath mapping and multi-channel seismic systems, will be provided on the ship.

2.3 As an Executive Agency under the President of the United States, the NSF is required to follow the Federal Acquisition Regulations (FARs). The FARs (large portions of which are codified by statute) establish the general contractual procedures for obtaining goods and services for the United States Government. In the contract between the NSF and ASA a large number of Federal Acquisition Regulation clauses are incorporated by reference with the same force and effect as if they were given in full. They cover a wide spectrum, such as technical standards, a prohibition against kickbacks, protection of minorities, award of contracts to United States companies, the so-called "Buy American Act" (Supplies) (52.225-3) and FAR 52.203-10, entitled "Remedies for Illegal and Improper Activity" (see paragraph 2.7). The contract also contains a number of Special Contract Requirements, such as the Requirement that contracts may only be awarded to United States firms and citizens (H.6).

2.4 By a tender notice published in the Commerce Business Daily of 27 February 1991, Antarctic Support Associates announced its intention to procure a "multibeam sonar, deep ocean, swath mapping system". According to the notice, the system, whose purpose is to map the ocean floor with a wide beam swath, was to be mounted in the hull of a new research vessel with ice-breaking capability. The final and complete technical specifications for the system were to be announced in the "Request for Proposal" (RFP). It was also stated: "The Buy American Act applies to this procurement which means that the system cannot be foreign manufactured." In response to a question by the Panel, the United States confirmed that the system that was being advertised for in the Commerce Business Daily by ASA was the sonar mapping system.

2.5 In the subsequent Request for Proposal of 30 May 1991, ASA informed potential suppliers that it was seeking a company to manufacture a bathymetric sonar mapping system. The offerer was required to complete a considerable number of Certifications and Representations, including a Certification of United States Manufacture (No. 22), which enjoined an officer of the company manufacturing the multibeam sonar mapping system to certify that over 50 per cent of the total cost for components comprising the system would be of domestic origin. The notice referred to a prime contract with the National Science Foundation.

2.6 The National Science Foundation will hold title to the sonar mapping system once the vendor has delivered the system. In response to a question by the Panel, the NSF has supplied the following information: in the case before the Panel, a multibeam sonar mapping system is being purchased by Antarctic Support Associates, a prime contractor of the National Science Foundation. The specifications for this subcontract were developed jointly by the prime contractor and the Universities

National Oceanographic Laboratory Systems (UNOLS), an association of the oceanographic institutes which will be the primary beneficiaries of the mapping system. Furthermore, according to the contract between the NSF and ASA, UNOLS is charged with co-ordinating the use of major shared-use research vessels and identifying future requirements for the oceanographic institutes, which operate these vessels. The Foundation's role in this process will be to ensure that procurement rules are followed and that there are sufficient funds for the procurement.

Public Law 101-302

2.7 The initial 1990 appropriation of funds for the Antarctic Research Program provided funds amounting to \$74,000,000 for the United States Antarctic Program (Public Law 101-144, dated 9 November 1989). The United States informed the Panel that part of this sum was to be allocated to the acquisition of a multibeam sonar mapping system. Subsequently, the 1990 Emergency Appropriations Act (Public Law 101-302, dated 26 May 1990) in its Section 307, placed a limit of \$2.4 million on the total cost of procurement of a multibeam sonar mapping system, and further directed that no appropriated funds could be used for procurement of a multibeam sonar mapping system manufactured outside the United States. It was further provided that this Section would not be applicable to any procurement covered by the Agreement on Government Procurement.

Section 307 of Public Law 101-302 reads as follows:

"Section 307. None of the funds appropriated by this or any other Act with respect to any fiscal year for contractual services support of the United States Antarctic Program may be obligated for procurement of a multibeam bathymetric sonar mapping system manufactured outside of the United States: Provided, that not to exceed 2,400,000 shall be available for the total cost of such procurement, including software: Provided Further, that this section shall not be applicable to any procurement covered by the GATT Agreement on Government Procurement."

According to FAR 52.203-10, entitled "Remedies for Illegal and Improper Activity", the text of which is quoted in full in the contract between the NSF and ASA, the NSF would disallow funds if ASA purchased a sonar mapping system of non-United States origin, since the purchase would be in violation of this section of Public Law 101-302 and therefore not an allowable cost.

Draft Contract for the Acquisition of the Sonar Mapping System

2.8 The draft of a subcontract between the ASA, as the buyer, and the eventual winning bidder for the supply of the sonar mapping system, specifically refers to the prime contract DPP89-22832 between the NSF and ASA and states that, in the performance of such a prime contract, ASA requires the manufacture of a bathymetric sonar mapping system. It repeats most of the FAR clauses incorporated in the NSF-ASA contract, by reference - with the same force and effect as if they were given in full text - including 52.225-3, "Buy American Act" (Supplies), which specifies that in case of conflicts the United States Manufacture Certification has precedence over FARs. According to information submitted by the NSF in response to a question from the Panel, clauses such as this one, or FAR 52.225-7 ("Balance of Payments") are imposed routinely on procurements which are not covered by the Agreement, both on prime and subcontracts. Additional clauses include 52.249-2, entitled "Termination for Convenience of the Government" which allows the NSF to terminate the subcontract if it were in the interest of the Government to do so. The draft subcontract also includes a Certificate of United States Manufacture, which needs to be signed by the company manufacturing the required item(s) for the procurement of a bathymetric sonar mapping system. The subcontract furthermore contains an assignment clause which allows the Buyer (ASA) to assign this subcontract to any joint venture member and/or its subsidiaries, to the NSF, or to any party selected by the NSF.

III. MAIN ARGUMENTS

(i) Summary

3.1 The European Community argued that the procurement of the sonar mapping system fell under the Agreement on Government Procurement because it was a direct product procurement, above the threshold, by an entity covered by the Agreement, notwithstanding the fact that the system was to be procured through an upstream product procurement contract between a private company (ASA) and the supplier of the system and that the prime contract was a service contract. Accordingly, the application to the procurement of a "Buy American" requirement, resulting in the exclusion of potential foreign suppliers, was contrary to Article II:1 of the Agreement on Government Procurement.

3.2 In normal circumstances such an upstream contract between two private companies would not be regarded as government procurement and would fall outside the scope of the Agreement on Government Procurement. In such a case the application of the "Buy American" requirement might be held to be inconsistent with Article III of the GATT. In the present case, however, there were strong indications that the control of the United States Government (both the Congress and the executive, i.e. the NSF) over every stage of the procurement was so pervasive that it was clearly a direct procurement by the NSF, through ASA, of a product distinct from the services which ASA was contracted to provide to the NSF.

3.3 The European Community therefore requested the Panel to find: (1) that the application of a "Buy American" requirement to the procurement of a sonar mapping system for the United States National Science Foundation was contrary to Article II:1 of the Agreement on Government Procurement, or in the alternative (2) that the Agreement on Government Procurement was not applicable to such requirement, because the acquisition of the sonar mapping system was a private procurement, and not because the acquisition was a "services contract per se" within the meaning of Article I:1(a) of the Agreement on Government Procurement.

3.4 The United States stated that the procurement of the sonar mapping system was part of a government procurement - a small part of the services to be performed by Antarctic Support Associates under its contract with the National Science Foundation. It was not disputed that the contract between the NSF and ASA, an extensive, multi-faceted contract covering all aspects of Antarctic research support services, was a service contract: the sonar mapping system would be acquired through a subcontract of that service contract. Its purchase was therefore excluded from coverage of the Agreement on Government Procurement, Article I:1(a) of which specified that the Agreement did not apply to "service contracts per se". This could only mean that service contracts in their entirety were excluded from the coverage of the Agreement.

3.5 The United States argued further that there was no direct NSF procurement of a product. Rather, the NSF was procuring a service that, to be carried out, required the provision by a subcontractor of a sonar mapping system to the contractor, ASA. The United States Government had no interest in the sonar mapping system separate and distinct from its interest in the research services which were the purpose of its contract with ASA. The United States therefore requested the Panel to determine that the procurement of the sonar mapping system was not inconsistent with the requirements of the Agreement.

(ii) Detailed Arguments

3.6 Article I:1(a), whose interpretation is dealt with in the arguments of the two parties, reads as follows:

"This Agreement applies to:

- (a) any law, regulation, procedure and practice regarding any procurement of products, through such methods as purchase or as lease, rental or hire-purchase, with or without an option to buy, by the entities subject to this Agreement. This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts per se."

The relationship between the NSF and ASA

3.7 The European Community argued that the procurement of the sonar mapping system was covered by Article I of the Agreement because, notwithstanding the fact that in contractual terms it was to be effected through a subcontract between two private companies, in reality an entity covered by the Agreement (the NSF) was effecting the procurement of a product, whose value was above the threshold of SDR 130,000. The fact that this was done through an upstream contract between two private companies, which was linked to a service contract between the NSF and ASA, was irrelevant.

3.8 In normal circumstances an upstream contract between two private companies would not in principle be regarded as government procurement and would fall outside the scope of the Agreement on Government Procurement. In such a case the application of the "Buy American" requirement could be held to be inconsistent with Article III of the GATT. This would still hold true, even if public funds were used: these funds would be expended at the moment that the basic (service) contract was concluded. If upstream contracts were concluded by the contractor, he would be spending the contract money, not any longer government funds stricto sensu. Certain guarantees to the government to ensure that the contract money was well spent by the contractor would be acceptable. Such guarantees would be obtained primarily in the selection of the person of the contractor, the inclusion of certain arm's length conditions in the contract, and in the fact that the government was allowed to discontinue the contract, if the contractor could not live up to its terms.

3.9 However, there were strong indications in this particular case which justified the judgment that the Government went beyond this and steered the acquisition of the sonar mapping system directly. In other words this was a case of a direct government procurement through an intermediary, irrespective of the legal framework (a subcontract of a service contract) in which it took place. The purchase of the good was separate from the rendering of the service. The case at hand was one where governmental interest in the procurement could be seen as separate from its interest in the "service contract per se", as witnessed by the subjection of the product purchase to government regulations and by the direct control of the procurement by the governmental entity. Numerous Federal Acquisition Regulation clauses were included in the contract for the acquisition of the sonar mapping system, in particular clause 52.249-2 ("Termination for Convenience of the Government"), under which the NSF had the power to terminate this subcontract if it were in the Government's interest to do so - which showed that the NSF could directly interfere with the subcontract - and clause 52.225-3, the "Buy American Act" (Supplies), which was also included in the NSF-ASA contract. In addition, the subcontract between the ASA and the supplier of the sonar mapping system gave ASA the option to assign the subcontract to any joint venture member, to the NSF or to any parties selected by the NSF. Furthermore, the NSF would retain title to the sonar mapping system. In addition, the United States Congress had singled out the sonar mapping system in Section 307 of the Emergency Appropriations Act (P.L. 101-302) by subjecting its procurement to a "Buy American" clause and by fixing an earmarked maximum sum

for its acquisition, thereby setting special conditions of origin for the procurement of the system. As a result, a company originating in the Community was denied the opportunity to bid, which it had sought.

3.10 Finally, according to a specific clause (H.6) in the NSF-ASA contract, the contract for the purchase of the system could only be concluded with a United States firm and any teaming through subcontracting had to be between United States firms. Therefore, even without a "Buy American" requirement imposed by United States Congress, ASA would have been bound by the contract with the NSF to exclude non-United States offerers from the tender for the system. Whatever the ultimate source of the obligation, it could not be contested that the procurement of the system was subject to a "Buy American" provision.

3.11 All these factors were indications of the direct government grasp on the procurement of the sonar mapping system and pointed to the fact that the acquisition of the system was in reality a direct and distinct government procurement - through an intermediary - of a good above the threshold.

3.12 The European Community put forward as a further argument in favour of the separation of the purchase of the good from the rendering of the service that the sonar mapping system was physically separable from the provision of the service; in other words the system was not consumed in rendering the service and would be recoverable when the service was completed.

3.13 The United States responded that the procurement of the sonar mapping system was being made as part of the service contract between the NSF and ASA, and therefore fell outside the scope of the Agreement, pursuant to the exclusion contained in Article I:1(a). The language of Article I:1(a) indicated quite clearly that all aspects of a service contract, including product procurement elements in the contract, were excluded from its coverage. The existence and terms of the NSF-ASA contract were dispositive concerning the contractual provisions under which the sonar mapping system was being acquired. ASA was not merely an agent of the NSF nor an intermediary through which the NSF effected a procurement. The relationship between the NSF and ASA was that of buyer and seller, and the NSF, as a customer, was free to set specifications. The fact that it did so, with respect to a portion of a service contract - the procurement of the sonar mapping system - did not alter the fact that it was a portion of a service contract, nor did the application to its purchase of certain FAR regulations. Under United States law, such a flow-down of FAR regulations was required in all subcontracts to United States Government purchases to ensure that United States laws and policies were followed in the expenditure of Government funds. Hence FAR requirements applied to all subcontracts concluded by ASA in pursuance of the government contract and not only to the subcontract for the purchase of the sonar mapping system. Their flow-down to the sonar mapping subcontract therefore did not single out the subcontract for special treatment and there was no government interest additional to that found in any subcontract.

3.14 In addition, because the cost risk fell on the United States Government, a number of terms and conditions were put into this type of contract in order to exercise cost control. One such control was the Subcontract Clause which required the contractor to provide pricing and technical data supporting best value selection. The role of the Government in this exercise was that of a reviewer and not a participant; the Government did not interject itself into the negotiations between the prime and the potential subcontractors.

3.15 Furthermore, the fact that the NSF would hold title to the sonar mapping system did not prove any additional Government interest in the system as distinct from the services it was designed to provide. Retention of title reflected the fact that the system was to be purchased with government money. It also protected the Government from additional disruption to the Antarctic Research Program in case the Government should terminate the contract with ASA, for whatever reason. If the contractor were to hold title, it could require the removal of the system from the vessel, with substantial attendant cost, which was now avoided.

3.16 Finally, the assignment clause appeared in the subcontract for the purchase of the sonar mapping system as a matter of routine. These clauses were always used in long-term subcontracts. They were designed to provide continuity in the provision of products or services by a subcontractor if the prime contract was terminated or expired before the subcontract was completed. The legal significance of the clause depended on whether the assignment had been accepted by another party. In answer to a question from the Panel, the NSF stated that in case funds were cut off by Congress, ASA could not avoid its contractual responsibilities to the sonar mapping supplier by assignment.

3.17 The United States observed that the EC's interpretation of clause H.6 of the NSF-ASA contract was incorrect, because H.6 applied solely to the "nationality" of the entity that ASA could team with through subcontracting. It did not restrict the origin of products that could be supplied by a subcontractor. Rather, it concerned only personnel working on the United States Antarctic Program. The clause was included in the contract so that the Program would be staffed by United States citizens, pursuant to the directive of the Executive Order requiring the NSF to maintain a United States presence in Antarctica.

3.18 The United States furthermore argued that for all practical purposes the sonar mapping system would probably be exhausted at the end of the contract. The NSF/ASA contract could run up to as much as ten years and six months, by which time in all likelihood the system would be technologically obsolete. Furthermore, the sonar mapping system could only be removed from the research vessel by placing the vessel in a dry dock and cutting open the hull. According to the NSF, technological advances during the life of the contract would probably reduce the value of the sonar mapping system to less than the cost of its removal. In any case there was no basis in the Agreement to make "separability" or "exhaustibility" of the product element of a service contract a determining factor in the question of coverage under the Agreement. Moreover, the exhaustibility of a product was not a useful test because it would be quite problematic to define the concept of exhaustibility in the procurement context. Finally, the United States argued that it was impossible to believe that, as the Community implied, the Agreement would require procurement officers to separate certain parts of contracts - essentially making them separate transactions - without guidance or specific requirements to do so.

3.19 The United States noted further that the European Community had referred to the subcontract for the procurement of the sonar mapping system as an "upstream contract", a term which did not appear in the Agreement and whose use in this context was misleading, since it appeared to suggest that the subcontract was created subsequent, or as an afterthought, to the prime contract. In fact the requirement to provide instrumentation support, which covered the purchase of the sonar mapping system, was provided for in the prime contract from the outset: it was an intrinsic part of the services which ASA contracted to provide to the NSF. This structure was a continuation of the way the NSF had structured its procurement of such services since long before the Agreement on Government Procurement came into being and it was not a pretext to evade the terms of the Agreement.

3.20 The European Community responded that it was not clear that the conclusion of a subcontract for the acquisition of a sonar mapping system was required by the terms of the prime contract between the NSF and ASA, which made no specific reference to the sonar mapping system, in contrast to some other goods, such as the research vessel, whose procurement was specifically mentioned in the prime contract. In the only place where there was reference to a swath mapping system, it was said that this "will be provided" on the ship, which seemed to indicate that the NSF was to provide it, presumably as government furnished property. In another place there was reference to "instrumentation support" for research projects on the vessel; the United States maintained that this was the reference in pursuance of which the subcontract was proposed. The connection between the prime contract and the subcontract, however, was not clear on the face of the former.

3.21 The Community, in this context, referred to a case which was linked to this one and had been

considered in the past by the Committee on Government Procurement, viz. the question of the procurement of an Antarctic research vessel with ice-breaking capability. ASA had been charged by the NSF with making the necessary arrangements for the construction of such an Antarctic vessel. In the Request for Proposal for the research vessel and in the replies provided by ASA's predecessor, the sonar mapping system was indicated as government furnished property. This, in combination with the fact that in the current NSF-ASA contract a modern suite of oceanographic equipment was to be provided - presumably by the NSF - including swath mapping and multi-channel seismic systems, showed that it was the original intention to have the system purchased directly by the government (NSF) - which would have implied that the government made a direct government procurement, outside any service contract. This was confirmed by the legislation (P.L. 101-302, Section 307) which was clearly aimed at the procurement of a product by a government agency. The Community noted that during bilateral consultations the United States had stated that ASA's reference to the system as government furnished property was erroneous. The document from which the reference to government furnished property was taken was a pre-purchase conference document drawn up by ASA and not a United States Government document. Nevertheless, the Community could not totally dismiss the importance of the argument that the system was referred to as "government furnished property", since it tended to show how the purchase was originally intended to be made and how the present organisation of the purchase, even if entirely in good faith, merely served to reach the same goal.

3.22 In any case, the fact that the agreement between ASA and another private company for the procurement of a sonar mapping system was drafted as a subcontract to the NSF-ASA contract was not decisive. Any procurement contract might be presented as a subcontract of another one, but this might be done for purely fortuitous reasons. In another situation, the procuring entity might draw a separate contract for the procurement of a good which was acquired in connection with a services contract. It was better, therefore, to use the neutral term "upstream contracts". In the view of the European Community, the contract between ASA and the supplier of the sonar mapping system was such an upstream contract. There was no indication in the Agreement that upstream contracts (whether called subcontracts or not) automatically followed the main contract. Whether or not it was covered by the Agreement depended on whether it was concluded on behalf of a covered entity - whether a covered entity *de facto* determined the conditions of purchase of the good - and on whether its intrinsic subject matter was the procurement of services or a product. In this case, the subject matter - the purchase of the sonar mapping system - was clearly a product procurement. Therefore, in the view of the Community, this was a direct purchase of a product by a covered entity through an intermediary.

3.23 As to the United States interpretation of clause H.6, the European Community pointed out that on the face of it this clause was not restricted merely to the personnel working on the United States Antarctic Program. If ASA could team up only with United States companies for the purpose of subcontracting, that would clearly have practical implications for the origin of the goods to be supplied by such subcontractor. Moreover, Article II:1 of the Agreement on Government Procurement was not restricted to non-discrimination, as between goods, but encompassed also discrimination between suppliers.

3.24 Furthermore, the European Community pointed out that the "Buy American" requirement in this case was not only the doing of the executive, but also of the legislative arm of government. The fact that Section 307 of P.L. 101-302 singled out the procurement of the sonar mapping system (a good) for "Buy American" was all the more remarkable in the light of the United States argument that this procurement was in any case excluded from the application of the Agreement on Government Procurement as being a subcontract of a service contract. If the United States Congress had shared this viewpoint, there would have been no need for Section 307. Obviously the Congress had not shared this view and therefore it had interfered in what it obviously regarded as the government procurement of a product and had subjected it to an unambiguous "Buy American" requirement.

3.25 The United States stated that it was not true that the United States Government had referred to the

sonar mapping system as government furnished property. The sole reference to the sonar mapping system as government furnished property appeared in answers prepared by ASA to questions submitted by potential bidders in connection with ASA's request for proposals for procurement of the sonar mapping system. That reference in the ASA document, which was neither prepared nor reviewed by the NSF or any other United States Government agency, was erroneous. Under United States procurement law, government furnished property was "property in the possession of, or directly acquired by, the government and subsequently made available to the contractor" (FAR 45.101). The sonar mapping system did not meet this criterion. Consequently, under United States law the sonar mapping system was contractor-acquired property, i.e. "property acquired or otherwise provided by the contractor for performing a contract and to which the Government had title". ASA had been notified of its erroneous use of the term "government furnished property", and had in turn notified potential bidders about its error.

"Service Contracts per se"

3.26 The European Community noted that in bilateral consultations the United States had always maintained that what was decisive was the fact that the prime contract, i.e. the contract between the NSF and ASA for logistical support of the Antarctic Program, was a service contract and thus not covered by the Agreement on Government Procurement, pursuant to the exclusion of "service contracts per se" in Article I:1(a). The procurement of a sonar mapping system by ASA on behalf of the NSF would be effected under a subcontract to this service contract and since the main contract was not covered by the Agreement, the subcontract could not be covered by it either.

3.27 The European Community did not accept this analysis of the relationship between the two contracts, but also maintained that the words "service contracts per se" in Article I:1(a) could not be read as excluding "products incidental to services". There were no indications in the text of the Agreement on Government Procurement (and, in particular, in Article I:1(a)) that the Agreement's coverage of services incidental to the supply of products (as long as their value does not exceed that of the products themselves) could be interpreted a contrario so as to imply that the procurement of products incidental to the supply of services was excluded from the coverage of the Agreement. It was not said in Article I:1(a) that service contracts per se were any contracts in which the value of the incidental product procurement did not exceed that of the services themselves. To the contrary, the clear implication of the first part of that sentence was that the product procurement remained in principle covered by the Agreement on Government Procurement, but that incidental services were no longer included therein, if their value were above that of the product concerned. Since, in the view of the Community "service contracts per se" could not simply be defined as mixed contracts, more than 50 per cent of whose value was attributed to services, the term "service contracts per se" must be defined by reference to the essential subject matter of the contracts concerned. On this basis it could be agreed that the NSF-ASA contract was a service contract per se (because its subject matter was essentially services), but this did not imply that all its upstream contracts were also service contracts.

3.28 The United States argued that the exclusion of "service contracts per se" from the coverage of the Agreement must be understood as meaning that service contracts in their entirety, including incidental product procurement elements of those contracts, were excluded. The plain language of Article I:1(a) could be read only in this sense. First, the provision spoke of service contracts, not services, which implied that its coverage extended to more than services alone. Secondly, limitation of the exclusion to the services portion alone of a service contract would render the final phrase of Article I:1(a) superfluous. The first sentence of that paragraph made it clear that services were not covered, and a special, narrow expansion of the coverage of the Agreement had been necessary to include incidental services. The final phrase of the paragraph would therefore have been unnecessary if its only purpose had been to repeat that services were excluded from the coverage of the Agreement. To give it any effective meaning required that it should be construed as covering all aspects of a service contract, including product procurement elements.

3.29 Moreover, the United States argued that the word "contract", throughout the Agreement, referred to the legal instrument under which a service was to be performed or products were to be procured. The contract was the basic unit of coverage with which the Agreement was concerned. Accordingly, coverage under the Agreement was determined, for purposes of the threshold, by the value of the contract. The Agreement referred to "procurement" when it was addressing the procurement process generally. By contrast, "contract" was used in the context of a specific transaction.

3.30 The United States noted that the Agreement on Government Procurement did not define the term "service contract". Under United States law, the nature of a contract was determined by looking at its purpose, and in determining further whether the Agreement on Government Procurement applied to a particular contract, United States law considered whether the predominant value of the contract was allocated for services or for goods. The United States maintained that by either measure, whether in terms of its purpose or in terms of the predominant value, the NSF-ASA contract was not covered by the Agreement.

3.31 The European Community maintained the contrary view that the words "per se" should be interpreted as meaning that the subject matter of the contract concerned, rather than its purpose, must be services. Such an interpretation would lead to a narrower exclusion from the coverage of the Agreement than would a "purpose-determined" interpretation of the concept, under which it would be difficult to distinguish product procurement from services procurement so long as the product procurement could arguably have the "purpose" of rendering a service. Such a narrow interpretation of the exclusion was consistent with the fact that the Agreement was intended to apply to "any procurement of products" and with the general way in which the Agreement was drafted: exclusions in product coverage needed to be indicated explicitly. Article I:1(a) limited the Agreement's coverage of services but not its coverage of the procurement of products. "Service contracts per se" should therefore be understood as contracts whose subject matter was intrinsically limited to services and which in principle did not extend to upstream procurement of products. The Community added that the United States view on this was based on United States law, which had no authoritative value for the interpretation of the Agreement and which was without foundation in the text of the Agreement itself.

3.32 In response to a question from the Panel, the Community noted that in the French version of the Agreement the words "en tant que tels" in Article I:1(a) referred equally to "marchés" and to "services". In the Community's view therefore, if they referred indeed to "services", Article I:1(a) should be interpreted even more restrictively than had been proposed by it thus far.

Article V of the Agreement on Government Procurement

3.33 The United States argued that, had the drafters of the Agreement intended to cover subcontracts of service contracts, it would have been inconceivable that there would be no specific provisions to this effect in Article V. However, Article V:4 referred only to the fact that entities should publish notice of each proposed procurement, and made no reference to subcontractors. The Agreement imposed no obligation to publish proposed subcontracts, which would surely have been done if it had been intended to cover subcontracts of service contracts.

3.34 The United States further contended that the Agreement's specific requirements with respect to tendering covered procurement by covered entities, not the procurement procedures of successful bidders, such as ASA, in their potential subcontracting.

3.35 The European Community responded that giving notice of a proposed upstream procurement would be unnecessary if the procurement were a purely private upstream procurement. However, if it were a procurement by a covered entity through an intermediary, it would be necessary for the entity to discharge its obligations under Article V:4 of the Agreement by imposing these, together with all other conditions imposed, upon the intermediary. The Community noted that, in the present case, it might be

argued that the United States had done just that.

Article III of the General Agreement on Tariffs and Trade

3.36 The European Community took the position that should the Panel not be able to follow its thesis that the procurement of the sonar mapping system was a direct government procurement of a product by a covered entity, the acquisition of the sonar mapping system by ASA was made pursuant to an upstream contract of the basic contract. Nowhere in the Agreement on Government Procurement was there any indication that such upstream contracts (even if construed as subcontracts) would automatically follow the nature of the basic contract. Hence the contract between ASA and the prospective seller of the sonar mapping system was then to be regarded as a private procurement. The imposition of a "Buy American" requirement on such a private procurement falls outside the Agreement on Government Procurement but should be deemed to be in contravention of the national treatment clause of Article III:4 of the GATT.

3.37 The United States stated that there was no doubt whatever that the procurement of the sonar mapping system was part of a government procurement, since it would be purchased with government money pursuant to ASA's contract to provide services to the NSF, a United States Government agency.

IV. FINDINGS

4.1 The Panel noted that the issues before it arose essentially from the following facts: the National Science Foundation (NSF) is a United States Government agency and an entity listed under the Agreement on Government Procurement (Agreement). In October 1989 it concluded with Antarctic Support Associates (ASA), a private company, a six- to ten-year contract to provide a wide range of services and products in support of government research programmes in the Antarctic. This contract is in the amount of US\$251 million. In the period 1 April 1990 to 30 September 1991 the budgeted amount under the contract was approximately \$70 million, of which 56 per cent was allocated to the acquisition of services, and which included an appropriation for the sonar mapping system. As part of the contract, ASA was to procure, lease, equip, and operate a research vessel, and furnish instrumentation support for research projects carried out on board. A suite of oceanographic equipment, including a sonar mapping system, would be provided in the vessel. In May 1990, Congress passed an Emergency Appropriations Act which specifically limited the total cost of the sonar mapping system to \$2.4 million and imposed a "Buy American" requirement, provided this latter was not contrary to the Agreement. In February 1991, ASA announced that it intended to procure a sonar mapping system. In May 1991 it issued a Request for Proposal for the procurement of the sonar mapping system, and setting out "Buy American" and other government contractual requirements.

4.2 It was not disputed that the acquisition of the sonar mapping system would constitute a "procurement contract of a value of SDR 130,000 or more" in terms of Article I:1(b) of the Agreement, that it concerned a product and that the NSF was a covered entity in terms of Article I:1(c). However, the parties differed as to whether the procurement is covered by the Agreement and should therefore be subject to the disciplines governing the procurement of products under the Agreement, notably those relating to national treatment and non-discrimination in Article II and the tendering procedures in Article V. The European Community argued that the proposed acquisition of the sonar mapping system was government procurement of a product subject to all obligations under the Agreement and that the application of a "Buy American" requirement to the procurement was therefore contrary to Article II:1 of the Agreement: in the alternative, the Community argued that it could be regarded as a private procurement subject to obligations under the GATT. The United States maintained that the acquisition was government procurement, but argued that it was not covered by the Agreement because it was part of a service contract and was therefore excluded by virtue of the exclusion of "service contracts per

se" contained in Article I:1(a), second sentence. The full text of Article I:1(a) is as follows:

"This Agreement applies to:

- (a) any law, regulation, procedure and practice regarding any procurement of products, through such methods as purchase or as lease, rental or hire-purchase, with or without an option to buy, by the entities subject to this Agreement. This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts per se;"

4.3 The Panel decided to examine successively:

- (a) whether the acquisition of the sonar mapping system was a procurement of a product by a covered entity within the meaning of Article I:1(a), first sentence, of the Agreement; and, if so,
- (b) whether the acquisition of the sonar mapping system was nonetheless excluded from the scope of the Agreement through the operation of Article I:1(a), second sentence, and was therefore exempt from the disciplines of the Agreement.

A. Does the acquisition of the sonar mapping system constitute government procurement under Article I:1(a), first sentence?

4.4 Though the primary thesis of the European Community was that the procurement was a case of government procurement subject to the obligations of the Agreement, it argued in the alternative that the acquisition, which was to be the subject of a contract between two private companies, ASA and the eventual supplier of the sonar mapping system, might constitute "private" procurement outside the scope of the Agreement but subject to the disciplines of the GATT. The Panel began with an examination of that issue, since if it were to find that this was not a case of government procurement, it would be outside the Panel's terms of reference to consider it further.

4.5 The Panel noted that there was no definition of government procurement in the Agreement. The scope of the Agreement was instead determined by the wording of Article I which spoke of "any procurement of products ... by" covered entities. It specified further that procurement could be "through such methods as purchase or as lease, rental or hire-purchase, with or without an option to buy". The Panel considered that, since these methods were all means of obtaining the use or benefit of a product, the word "procurement" could be understood to refer to the obtaining of such use or benefit. At the same time, the wording of Article I:1(a) made it clear that such use was to be obtained through procurement "by" an entity, which suggests that the entity has some form of controlling influence over the obtaining of the product.

4.6 Some guidance as to the meaning of government procurement can be obtained from examination of those provisions of the General Agreement in which reference is made to it. The Panel noted that the General Agreement, in referring to government procurement, spoke in terms of "products for immediate or ultimate consumption in governmental use" (Article XVII:2), and "procurement by governmental agencies of products purchased for governmental purposes" (Article III:8(a)). The Panel noted that the emphasis in these provisions on the concepts of governmental use, governmental purposes and procurement by government agencies supported its own understanding of the concept of government procurement as explained in paragraph 4.7 below.

4.7 While not intending to offer a definition of government procurement within the meaning of Article I:1(a), the Panel felt that in considering the facts of any particular case the following characteristics, none of which alone could be decisive, provide guidance as to whether a transaction

should be regarded as government procurement within the meaning of Article I:1(a): payment by government, governmental use of or benefit from the product, government possession and government control over the obtaining of the product.

4.8 In the present case the European Community suggested that the fact that the procurement of the sonar mapping system would take place by means of a contract between two private companies could lead to the conclusion that it is a private transaction outside the scope of the Agreement. The Panel concurred with the Community's view that this would normally be the case; the purchase by service contractors of products they need in order to be able to render the services contracted for would not normally be government procurement. The fact that government money was used would not necessarily overturn such a view. Nor would the fact that a number of conditions and guarantees relating to the procurement were required by the government necessarily lead to the conclusion that it was procurement by the government; they could simply reflect normal concern for the proper use of government funds.

4.9 However, there were a number of factors in this case which, when taken together, led the Panel to conclude that it was indeed a case of government procurement. The Panel noted first that payment for the system would be made with government money; due to the contractually-prescribed reimbursement of ASA's costs by the NSF, the purchase money for the system remained government money. The amount of the purchase was also specifically determined by the government, with the maximum permissible price legislatively prescribed (Section 307 of P.L. 101-302).

4.10 Secondly, the NSF would take title to the sonar mapping system as of the time of its delivery; at no stage would it become the property of ASA. Having obtained title at the moment of the purchase the NSF, at the expiry of the contract with ASA, would be able to choose whether to continue to use, or to dispose of, the system. Whereas ownership is not a necessary element of government procurement, as is clear from the various methods of procurement mentioned in Article I:1(a), transfer of title to the Government is a strong indication that government procurement is involved. The NSF would also enjoy the benefits of the system's purchase - Antarctic research and the preparation of seabed maps - which were clearly for government purposes, and the Government can thus be regarded as the ultimate beneficiary of the system.

4.11 Thirdly, the Panel noted that the selection of the system was subject to the final approval of the NSF, which also retained the right to cancel the contract between ASA and the supplier of the sonar mapping system, with compensation, at its convenience. Other indicators of the extent of the Government's control of the procurement, perhaps less significant, include the fact that the NSF attached to the procurement many non-technical requirements, some of which could influence the final selection of the system. These requirements include the application of numerous Federal Acquisition Regulations (FARs), including the "Buy American" domestic sourcing rules, implementing various social and political objectives of the United States Government.

4.12 Fourthly, the Panel noted that the nature of the contract between the NSF and ASA meant that ASA would have no commercial interest in the transaction in the sense of a profit motive or a commercial risk, since it would not directly profit from the selection of the lowest-cost bid among competing manufacturers of sonar mapping systems. In making its selection therefore ASA would be functioning less like a private buyer than like a procurement agency acting on behalf of a third party.

4.13 The Panel concluded that, in the light of the Government's payment for, ownership and use of the sonar mapping system and given the extent of its control over the obtaining of the system, the acquisition of the sonar mapping system was government procurement within the meaning of Article I:1(a), first sentence, and not "private" procurement outside the Agreement as proposed in the alternative by the European Community.

B. Is the procurement, although a government procurement under Article I:1(a), first sentence, nonetheless excluded from the scope of the Agreement by virtue of Article I:1(a), second sentence?

4.14 The Panel then considered whether the procurement of the sonar mapping system, found to be within the scope of Article I:1(a), first sentence, was nonetheless excluded from the Agreement by virtue of Article I:1(a), second sentence. The Community had advanced two propositions: first, that the procurement of the sonar mapping system was a direct or separate product procurement, not in reality or for practical purposes part of the service contract between the NSF and ASA; and secondly that, even if it were held to be part of the service contract, it would still be subject to the disciplines of the Agreement, since the exclusion of "service contracts per se", contrary to the view of the United States, did not extend to products procured under such contracts.

4.15 The Panel noted that if the second of these propositions is true, the first is irrelevant; if the sonar mapping system procurement is covered by the Agreement even if part of a service contract, there is no need to demonstrate that it is not part of such a contract. Conversely, if the first proposition were true it would be unnecessary to consider the meaning of the exclusion of service contracts per se.

4.16 Because this was the primary thesis of the Community, and in order to satisfy itself that it was essential to address the second proposition above, the Panel examined in detail all the arguments, set out in paragraphs 3.9 to 3.12 and paragraphs 3.20 to 3.24, advanced by the Community in support of the view that this was a direct product procurement and not part of the service contract. The Panel accepted that there were a number of considerations which attested to the close and direct interest of the NSF in the process of acquisition of the sonar mapping system; most of these are referred to in paragraphs 4.8 to 4.12, since they were also raised in relation to the question whether this was in fact a case of government procurement at all. On the other hand, one of the arguments put forward by the Community - that the sonar mapping system might in fact be property furnished by the government to the contractor - was not persuasive; the Panel accepted the explanation of the United States that the reference to government furnished property in a document issued by the contractor was merely an error. Furthermore, the Panel was unable to set aside the fact that there is a service relationship between ASA and the NSF in the purchase of the sonar mapping system; carrying out the purchase is a service rendered to the NSF by ASA. The Community disputed whether the services relating to the sonar mapping system were part of, or entailed by, the prime contract between the NSF and ASA; the United States maintained that they were so entailed by virtue of the ASA's obligation to provide instrumentation support to the research projects in the Antarctic. For these reasons, the Panel found it impossible to justify a conclusion that the procurement of the sonar mapping system must be seen as a separate transaction to which the service contract is essentially irrelevant. The Panel therefore found it necessary to consider the question whether the procurement of the sonar mapping system, if it were part of a service contract, would be excluded from the scope of the Agreement by virtue of Article I:1(a), second sentence.

4.17 The United States had argued that any procurement of a product under a service contract is excluded from the Agreement, based on the ordinary meaning of the words in Article I:1(a):

"This includes services incidental to the supply of products ... but not service contracts per se".

First, it pointed out that the provision spoke of "service contracts", not "services", which implied that its coverage extended to more than services alone. Secondly, limitation of the exclusion to the services portion alone of a service contract would render the final phrase of Article I:1(a) redundant, since it was already made clear in the first sentence of the paragraph that services were not covered by the Agreement. The exclusion of "service contracts per se" must therefore be understood to mean that contracts whose essential or major purpose was the procurement of services were excluded in their entirety, including any products procured under them, from the Agreement's coverage. The European Community disagreed, arguing that the purpose of the Agreement was to secure coverage of "any procurement of products" by covered entities, and that any exclusions from the coverage of products would have to be explicitly stated. The fact that services incidental to the supply of products were

covered by the Agreement did not imply, a contrario, that products incidental to the supply of services were excluded from coverage. It argued that service contracts per se must be understood as meaning contracts for the procurement of services as such. Thus, only the service portions of contracts under which both goods and services were procured would be excluded.

4.18 The Panel found that analysis of the meaning of the phrase "service contracts per se" in isolation could not provide a convincing answer as to which of these interpretations was correct. It could be read as meaning either "service contracts as such" or "contracts for services as such". Nor could conclusive guidance be derived from examination of the French and Spanish texts of the Agreement, which are also authentic. The French version of the phrase in question is "mais non les marchés de services en tant que tels". The corresponding Spanish version reads "la contratación de servicios propiamente dicha". The words "marchés" and "contratación" would normally be understood to refer to the subject matter of the procurement - the services procured - rather than to the legal form of the transaction - the contract. However, the Panel thought that it would be unsafe to place much reliance on this interpretation. It was therefore necessary to consider the meaning of the second sentence of paragraph I:1(a) in its context and in the light of the object and purpose of the Agreement.

4.19 The Panel noted that the Agreement applies to "any procurement of products" by the entities subject to the Agreement. This wide statement of coverage is subject to the exception of procurement contracts below the threshold of SDR 130,000, but no other class of product procurements is explicitly excepted from the coverage of the Agreement as stated in Article I. The Agreement states that "services incidental to the supply of products" are included if their value does not exceed that of the products themselves, but that "service contracts per se" are not included. In the Panel's understanding, this provision as a whole describes only the circumstances in which services incidental to the supply of products are covered by the Agreement. The only implication of this provision for the coverage of products is that a product procurement whose value was below SDR 130,000 would be brought within the scope of the Agreement if the cost of the services incidental to its supply brought the value of the contract above that threshold. The Panel did not accept that it implied that products procured pursuant to service contracts were excluded from the Agreement's coverage.

4.20 The United States has pointed out that the words "but not service contracts per se" are redundant if they mean only that services as such are not covered by the Agreement. But the implication of the interpretation proposed by the United States is that any product procurements, whatever their value, would be excluded from the Agreement's coverage if the contract under which they were procured included services of greater value. This is potentially a very large derogation from the principle that "any procurement of products" is covered; in the Panel's view, if such an important exception were intended, it would be stated explicitly, and would not be left to be inferred from a reference to the non-inclusion of service contracts. The acceptance of this interpretation would lead to two important anomalies. First, a product procurement would be outside the scope of the Agreement if it comprised 49 per cent of the value of the contract under which it was procured, but inside if it comprised 51 per cent; these proportions would often be fortuitous, and sometimes impossible to foresee at the time of drafting a contract. In the case of a multi-year contract, in which the proportion of products to services is unknown at the outset (which appears to be the case of the NSF-ASA contract), the "preponderant value" criterion would make it impossible for procurement officers to know what were their obligations under the Agreement, thus creating considerable legal uncertainty. Second, it would very often be within the power of covered entities to determine the extent of their legal obligations under the Agreement, simply by choosing a legal form under which procurements were grouped in the desired proportions.

4.21 It would also seem anomalous that while even products below the threshold can be brought within coverage by the inclusion of the value of services incidental to their supply - which attests the Agreement's objective of securing wide product coverage - products of much greater value should be

excluded because the preponderant value of the contract is for services. The Panel found it more difficult to accept that these anomalies were consistent with the intent of the text than to imagine that it included a redundant phrase. It also recalled the general principle that in the interpretation of agreements, exceptions provisions should normally be construed narrowly rather than broadly.

4.22 In the present case, if the sonar mapping system were to be purchased directly from its manufacturer by the NSF, there would be no doubt that the NSF's obligations under the Agreement would apply; but it was suggested that because the NSF had chosen to employ ASA to carry out the procurement as part of a large service contract these obligations were no longer applicable. It was not disputed that the contract between the NSF and ASA was a service contract. The relationship of ASA to the NSF is that of a service provider, and these services take many forms, including the provision, construction and maintenance of equipment, and also including the administrative and technical functions involved in selecting, ordering and installing the sonar mapping system. Except insofar as they might constitute services incidental to the supply of products, such services are in principle outside the Agreement's coverage, so the NSF was under no obligation to put them out to tender; in this case, in the Panel's view, they constituted the subject matter of a "service contract per se". But by contracting these service functions to ASA, the NSF cannot alter its obligations under the Agreement in relation to the procurement of the product itself. There was no suggestion that the NSF had sought to escape its obligations in this way, but the danger of allowing the legal form of a procurement to determine its coverage by the Agreement was very obvious.

4.23 In the light of the foregoing the Panel considered that in any event it would not have been essential, in order to determine the consistency of the sonar mapping system procurement with the Agreement, to make a finding on the contention of the European Community that the procurement of the sonar mapping system was not in fact part of the service contract between the NSF and ASA. Having decided that it was government procurement of a product above the threshold, and that the obligations of the NSF under the Agreement could not be modified by its choice of the legal means through which the procurement was carried out, it made no difference whether the draft contract between ASA and the eventual supplier of the sonar mapping system was or was not a subcontract of the service contract between the NSF and ASA. This was a mere question of form within the control of the NSF.

4.24 The Panel therefore concluded that the exclusion of "service contracts per se" cannot be taken to mean the exclusion of any products above threshold procured through them by covered entities. Consequently the procurement of the sonar mapping system, whether or not it was to take place under a service contract, was covered by the Agreement.

V. CONCLUSIONS

5.1 The Panel concludes that the procurement of a sonar mapping system falls within the scope of the Agreement on Government Procurement and is thus subject to the provisions contained therein.

5.2 The Panel recommends that the Committee on Government Procurement request the United States to conduct the proposed procurement consistently with its obligations under the Agreement on Government Procurement.

ANNEX 1

Commission of the European Communities
31 July 1991

Geneva,

AIDE MEMOIRE

Multibeam sonar mapping system

The facts

By a tender notice published in the Commerce Business Daily of 27 February 1991, Antarctic Support Associates (ASA) announced its intention to procure a sonar mapping system. It was indicated that "Buy American" provisions would apply to the purchase.

By letter of 30 May 1991, ASA informed potential suppliers that it was seeking "a company to manufacture in the United States" a sonar mapping system. This letter refers to a prime contract with the National Science Foundation (NSF).

The National Science Foundation is a United States Government agency whose responsibilities include ensuring the provision of facilities in connection with the United States Antarctic Program. This activity is financed by means of government appropriations, notably those contained in P.L. 101.302, which required the NSF to use 1990 funds to purchase a sonar mapping system that is manufactured in the United States.

The NSF has contracted with ASA to provide certain facilities for the Antarctic Program on its behalf.

The structure of responsibility is, therefore, clear. Public appropriations are provided to the NSF which finances ASA to carry out the job. This arrangement has given rise to a number of contracts.

These include, in particular, a contract for the leasing to ASA of a research ice-breaking vessel, for the duration of the survey. This vessel is to be built, owned and operated by Edison Chouest.

The request for proposal which led to the ASA/Edison Chouest contract provides that the vessel should incorporate certain items of government furnished property, including a sonar mapping system whose value is estimated at \$2.5 million. It is stated that government furnished property "... shall remain the Government's separate property, and shall not be considered as vessel's appurtenance, gear, fixture or equipment. Title to all Government furnished property shall remain in the Government". Although the operator of the vessel is required to incorporate, maintain and administer the property, it is to be used only for the performance of the contract.

The tender notice of 27 February 1991 and the request for proposals of 30 May 1991 clearly relate to the purchase of this item of "government furnished property".

Although the purchase is being carried out by ASA, it is clearly being done on behalf of NSF.

The contract (referred to throughout by ASA as "the sub-contract"), which incorporates clauses

from the Federal Acquisition Regulations (FAR) provides for assignment of the contract "at any time ... to the Foundation (the NSF), or to any party selected by the Foundation".

The purchase is financed by public funds provided through the NSF.

The sonar mapping system will become the property of the NSF.

NSF is a covered entity under the Government Procurement Agreement.

There is no exception under the Agreement on Government Procurement for purchase of a sonar mapping system.

The value of the sonar mapping system is clearly above the threshold of the Agreement (estimated value \$2.4 million).

The procurement of the sonar mapping system can be separated from the services to be rendered under the various NSF and ASA contracts. The embedding of this procurement in contracts which, otherwise, largely relate to the provision of services does not make it fall outside the scope of the Government Procurement Agreement, defined in Article I as relating to "any law, regulation, procedure and practice regarding any procurement of products". The "Buy American" clause of P.L. 101.302, repeated in the tender notice of 27 February and the letter of 30 May is, therefore, covered by the Agreement and is contrary to the national treatment and non-discrimination provisions of Article II.

Further issue

A detailed examination of the request for proposal showed that the supplier is required to furnish an "Analog hardcopy recorder (EPC-3200s, Raytheon UGR)." This reference to a proprietary product is an infringement of Article IV:3 of the Agreement on Government Procurement.

Contacts between Parties

After twice requesting information from the United States delegation in the Committee on Government Procurement, the European Community requested consultations with the United States under Article VII:3-5 of the Agreement on Government Procurement. These took place in Washington on 26 June 1991.

The EC considered the results of these consultations to be unsatisfactory and, by letter of 2 July 1991, requested the Committee to meet under the terms of Article VII:6 of the Agreement on Government Procurement.

Conclusion

The "Buy American" provision, incorporated in the tender notice and the request for proposals for the sonar mapping system constitutes an infringement of United States obligations under Article II of the Agreement on Government Procurement.

The reference in the specifications to a proprietary product constitutes an infringement of Article IV of the Agreement on Government Procurement.