

## CHAPTER ELEVEN GOVERNMENT PROCUREMENT

### Article 11.1: Definitions

For purpose of this Chapter:

**build-operate-transfer contract and public works concession contract** means a contractual arrangement the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plants, buildings, facilities, or other government-owned works and under which, as consideration for a supplier's execution of a contractual arrangement, a procuring entity grants to the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of those works for the duration of the contract;

**commercial goods or services** means goods or services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes;

**construction service** means a service that has as its objective the realization by whatever means of civil or building works, based on Division 51 of the United Nations Provisional Central Product Classification (CPC);

**days** means calendar days;

**in writing** or **written** means any worded or numbered expression that can be read, reproduced and may be later communicated, and may include electronically transmitted and stored information;

**limited tendering** means a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice;

**multi-use list** means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once;

**notice of intended procurement** means a notice published by a procuring entity inviting interested suppliers to submit a request for participation, a tender, or both;

**offset** means any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade, and a similar action or requirement;

**open tendering** means a procurement method whereby all interested suppliers may submit a tender;

**procuring entity** means an entity listed in Annex 11-A (Government Procurement Schedules);

**qualified supplier** means a supplier that a procuring entity recognizes as having satisfied the conditions for participation;

**selective tendering** means a procurement method whereby the procuring entity invites only qualified suppliers to submit a tender;

**services** includes construction services, unless otherwise specified;

**supplier** means a person or group of persons that provides or could provide a good or service to a procuring entity; and

**technical specification** means a tendering requirement that:

- (a) lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or
- (b) addresses terminology, symbols, packaging, marking, or labelling requirements, as they apply to a good or service.

## **Article 11.2: Scope**

### *Application of Chapter*

1. This Chapter shall apply to any measure regarding covered procurement.
2. For the purposes of this Chapter, covered procurement means government procurement:
  - (a) of a good, service, or any combination thereof:
    - (i) as specified in each Party's Schedule to Annex 11-A (Government Procurement Schedules); and
    - (ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;
  - (b) by any contractual means, including: purchase; rental or lease, with or without an option to buy; build-operate-transfer contracts; and public works concessions contracts;
  - (c) for which the value, as estimated in accordance with paragraphs 9 to 11, equals or exceeds the relevant threshold specified in a Party's Schedule to Annex 11-A (Government Procurement Schedules), at the time of publication of a notice of intended procurement;
  - (d) by a procuring entity; and
  - (e) that is not otherwise excluded from coverage under this Agreement.

### *Activities Not Covered*

3. Unless otherwise provided in a Party's Schedule to Annex 11-A (Government Procurement Schedules), this Chapter does not apply to:

- (a) the acquisition or rental of land, existing buildings or other immovable property or the rights thereon;
- (b) non-contractual agreements or any form of assistance that a Party, including its procuring entities, provides, including cooperative agreements, grants, loans, equity infusions, guarantees, subsidies, fiscal incentives, and sponsorship arrangements;
- (c) the procurement or acquisition of: fiscal agency or depository services; liquidation and management services for regulated financial institutions; or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;
- (d) public employment contracts;
- (e) procurement:
  - (i) conducted for the specific purpose of providing international assistance, including development aid;
  - (ii) funded by an international organization or foreign or international grants, loans or other assistance to which procurement procedures or conditions of the international organization or donor apply. If the procedures or conditions of the international organization or donor do not restrict the participation of suppliers then the procurement shall be subject to Article 11.5.1; or
  - (iii) conducted under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project.

### *Schedules*

4. Each Party shall specify the following information in its Schedule to Annex 11-A (Government Procurement Schedules):

- (a) in Section A, the central government entities for which procurement is covered by this Chapter;
- (b) in Section B, the goods covered by this Chapter;
- (c) in Section C, the services, other than construction services, covered by this Chapter;
- (d) in Section D, the construction services covered by this Chapter;
- (e) in Section E, General Notes;
- (f) in Section F, any procurement preferences;
- (g) in Section G, Threshold Adjustment; and

(h) in Section H, Procurement Information.

5. Where a procuring entity, in the context of covered procurement, requires persons not covered in Section A to procure in accordance with particular requirements, Article 11.5 shall apply *mutatis mutandis* to such requirements.

#### *Compliance*

6. Each Party shall ensure that its procuring entities comply with this Chapter in conducting covered procurements.

7. No procuring entity shall prepare or design a procurement, or otherwise structure or divide a procurement into separate procurements in any stage of the procurement, or use a particular method to estimate the value of a procurement, in order to avoid the obligations of this Chapter.

8. Nothing in this Chapter shall be construed to prevent a Party, including its procuring entities, from developing new procurement policies, procedures or contractual means, provided that they are not inconsistent with this Chapter.

#### *Valuation*

9. In estimating the value of a procurement for the purposes of ascertaining whether it is a covered procurement, a procuring entity shall include the estimated maximum total value of the procurement over its entire duration, taking into account:

- (a) all forms of remuneration, including any premium, fee, commission, interest, or other revenue stream that may be provided for under the contract;
- (b) the value of any option clause; and
- (c) any contract awarded at the same time or over a given period to one or more suppliers under the same procurement.

10. Where an individual requirement for a procurement results in the award of more than one contract, or in the award of contracts in separate parts (hereinafter referred to as “recurring contracts”), the calculation of the estimated maximum total value shall be based on:

- (a) the total maximum value of the procurement over its entire duration;
- (b) the value of recurring contracts of the same type of good or service awarded during the preceding 12 months or the procuring entity’s preceding fiscal year, adjusted, where possible, to account for anticipated changes in the quantity or value of the good or service being procured over the following 12 months; or
- (c) the estimated value of recurring contracts of the same type of good or service to be awarded during the 12 months following the initial contract award or the procuring entity’s fiscal year.

11. If the total estimated maximum value of a procurement over its entire duration is not known, the procurement shall be deemed a covered procurement, unless otherwise excluded under this Agreement.

### **Article 11.3: General Provision**

The Parties recognize the importance of government procurement in trade relations and set as their objective the effective, reciprocal, and gradual opening of their government procurement markets, in order to maximize, *inter alia*, competitive opportunities for the suppliers of the Parties.

### **Article 11.4: Exceptions**

1. Subject to the requirement that the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail, or a disguised restriction on international trade between the Parties, nothing in this Chapter shall be construed to prevent a Party, including its procuring entities, from adopting or maintaining a measure:

- (a) necessary to protect public morals, order or safety;
- (b) necessary to protect human, animal, or plant life or health;
- (c) necessary to protect intellectual property; or
- (d) relating to the good or service of a person with disabilities, of philanthropic or not-for-profit institutions, or of prison labor.

2. Nothing in this Chapter shall be construed to prevent a Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests related to the procurement of arms, ammunition, or war materials, or to procurement indispensable for national security or for national defense purposes.

### **Article 11.5: General Principles**

#### *National Treatment and Non-Discrimination*

1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the other Party and to the suppliers of the other Party, treatment no less favorable than the treatment that the Party, including its procuring entities, accords to domestic goods, services, and suppliers.

2. With respect to a measure regarding covered procurement, neither Party, including its procuring entities, shall:

- (a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation to or ownership by, a person of the other Party; or
- (b) discriminate against a locally established supplier on the basis that the good or service offered by that supplier for a particular procurement is a good or service of the other Party.

3. All orders under contracts awarded for covered procurement shall be subject to paragraphs 1 and 2.

#### *Procurement Methods*

4. A procuring entity shall use an open tendering procedure for covered procurement unless Article 11.9 or 11.10 applies.

5. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

- (a) is consistent with this Chapter, using methods such as open tendering, selective tendering, and limited tendering;
- (b) avoids conflicts of interest; and
- (c) prevents corrupt practices.

#### *Rules of Origin*

6. For the purposes of covered procurement, a Party shall not apply rules of origin to goods or services imported from or supplied from the other Party that are different from the rules of origin the Party applies at the same time in the normal course of trade to imports or supplies of the same goods or services from the same Party.

#### *Measures Not Specific to Procurement*

7. Paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations or formalities, and measures affecting trade in services other than measures governing covered procurement.

#### *Use of Electronic Means*

8. The Parties shall seek to provide opportunities for covered procurement to be undertaken through electronic means, including for the publication of procurement information, notices and tender documentation, for the receipt of tenders and generally, [for] the full cycle of procure to pay.

9. When conducting covered procurement by electronic means, a procuring entity shall:

- (a) ensure that the procurement is conducted using financial systems, information technology systems, and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available financial systems, information technology systems, and software; and
- (b) establish and maintain mechanisms that ensure the integrity of information provided by suppliers, including requests for participation and tenders.

#### *Offsets*

10. With regard to covered procurement, a Party, including its procuring entities, shall not

seek, take account of, impose, or enforce offsets except as otherwise provided in its Schedule, included in Annex 11-A (Government Procurement Schedules).

**Article 11.6: Publication of Procurement Information**

1. Each Party shall promptly publish any measure of general application relating to covered procurement, and any change or addition to this information.
2. Each Party shall list in Section H of its Schedule to Annex 11-A (Government Procurement Schedules) the paper or electronic means through which the Party publishes the information described in paragraph 1 and the notices required by Articles 11.7 and 11.9.4.
3. Each Party shall, on request, provide an explanation in response to an inquiry relating to the information referred to in paragraph 1.

**Article 11.7: Notices of Intended Procurement**

1. For each covered procurement, except in the circumstances described in Article 11.10, a procuring entity shall publish a notice of intended procurement through the appropriate paper or electronic means listed in Annex 11-A (Government Procurement Schedules). The notices shall remain readily accessible to the public until at least the expiration of the time period for responding to the notice or the deadline for submission of the tender.
2. Each Party shall ensure for covered procurements that its procuring entities, as set out in Section A of its Schedule, included in Annex 11-A (Government Procurement Schedules), publish notices of intended procurement in a single point of entry to an electronic publication, that is accessible free of charge through the internet or a comparable network.
3. Unless otherwise provided in this Chapter, each notice of intended procurement shall include the following information, unless that information is provided in the tender documentation that is made available free of charge to all interested suppliers at the same time as the notice of intended procurement:
  - (a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and the cost and terms of payment to obtain the relevant documents, if any;
  - (b) a description of the procurement, including, if appropriate, the nature and quantity of the goods or services to be procured and a description of any options, or the estimated quantity if the quantity is not known;
  - (c) if applicable, the time-frame for delivery of goods or services or the duration of the contract;
  - (d) if applicable, the address and any final date for the submission of requests for participation in the procurement;
  - (e) the address and the final date for the submission of tenders;
  - (f) the language or languages in which tenders or requests for participation may be submitted, if they may be submitted in a language other than an official language of the Party of the procuring entity;

- (g) a list and a brief description of any conditions for participation of suppliers, that may include any related requirements for specific documents or certifications that suppliers must provide;
- (h) if, pursuant to Article 11.9, a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, if applicable, any limitation on the number of suppliers that will be permitted to tender; and
- (i) an indication that the procurement is covered by this Chapter.

#### *Notice of Planned Procurement*

4. Procuring entities shall be encouraged to publish as early as possible in each fiscal year a notice regarding their future procurement plans (hereinafter referred to as “notice of planned procurement”), which should include the subject matter of the procurement and the planned date of publication of the notice of intended procurement.

#### **Article 11.8: Conditions for Participation**

1. A procuring entity shall limit any conditions for participation in a covered procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to fulfil the requirements of that procurement.

2. In establishing the conditions for participation, a procuring entity:

- (a) shall not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of a given Party or that the supplier has prior work experience in the territory of that Party; and
- (b) may require relevant prior experience if essential to meet the requirements of the procurement.

3. In assessing whether a supplier satisfies the conditions for participation, a procuring entity shall:

- (a) evaluate the financial capacity, the commercial and technical abilities, the regulatory compliance practices, and the corporate social responsibility practices of a supplier on the basis of that supplier’s business activities both inside and outside the territory of the Party of the procuring entity;<sup>1</sup> and
- (b) base its evaluation solely on the conditions that the procuring entity has specified in advance in notices or tender documentation.

4. If there is supporting evidence, a Party, including its procuring entities, may exclude a supplier on grounds such as:

- (a) bankruptcy or insolvency;

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<sup>1</sup> For greater certainty, it is the responsibility of the supplier to provide accurate information, and the procuring entity may reasonably rely on information provided to it by the supplier.



- (b) false declarations;
- (c) significant or persistent deficiencies in the performance of any substantive requirement or obligation under a prior contract or contracts;
- (d) final judgments in respect of serious crimes or other serious offences;
- (e) professional misconduct or actions or omissions that adversely reflect on the commercial integrity of the supplier; or
- (f) failure to pay taxes.

### **Article 11.9: Qualification of Suppliers**

#### *Registration Systems and Qualification Procedures*

1. A Party, including its procuring entities, may maintain a supplier registration system under which interested suppliers are required to register and provide certain information and documentation.
2. Each Party shall ensure that:
  - (a) its procuring entities make efforts to minimize differences in their qualification procedures; and
  - (b) where its procuring entities maintain registration systems, the entities make efforts to minimize differences in their registration systems.
3. Neither Party, including its procuring entities, shall:
  - (a) adopt or apply any registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of the other Party in its procurement; or
  - (b) use such registration system or qualification procedure to prevent or delay the inclusion of suppliers of the other Party on a list of suppliers or prevent those suppliers from being considered for a particular procurement.

#### *Selective Tendering*

4. If a procuring entity intends to use selective tendering, the procuring entity shall:
  - (a) publish a notice of intended procurement that invites qualified suppliers to submit a request for participation in a covered procurement; and
  - (b) include in the notice of intended procurement the information specified in Article 11.7.3(a), (b), (d), and (g) through (i).
5. The procuring entity shall:
  - (a) publish the notice sufficiently in advance of the procurement to allow interested suppliers to request participation in the procurement;

- (b) provide, by the commencement of the time period for tendering, at least the information in Article 11.7.3(c), (e), and (f) to the qualified suppliers that it notifies as specified in Article 11.14.3(b); and
- (c) allow all qualified suppliers to submit a tender, unless the procuring entity stated in the notice of intended procurement a limitation on the number of suppliers that will be permitted to tender and the criteria or justification for selecting the limited number of suppliers.

6. If the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 4, the procuring entity shall ensure that the tender documentation is made available at the same time to all the qualified suppliers selected in accordance with paragraph 5(c).

#### *Multi-Use Lists*

7. A Party, including its procuring entities, may establish or maintain a multi-use list provided that it publishes annually, or otherwise makes continuously available by electronic means, a notice inviting interested suppliers to apply for inclusion on the list. The notice shall include:

- (a) a description of the goods and services, or categories thereof, for which the list may be used;
- (b) the conditions for participation to be satisfied by suppliers for inclusion on the list and the methods that the procuring entity or other government agency will use to verify a supplier's satisfaction of those conditions;
- (c) the name and address of the procuring entity or other government agency and other information necessary to contact the procuring entity and to obtain all relevant documents relating to the list;
- (d) the period of validity of the list and the means for its renewal or termination or, if the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list;
- (e) the deadline for submission of applications for inclusion on the list, if applicable; and
- (f) an indication that the list may be used for procurement covered by this Chapter, unless that indication is publicly available through information published pursuant to Article 11.6.2.

8. A Party, including its procuring entities, that establishes or maintains a multi-use list, shall include on the list, within a reasonable period of time, all suppliers that satisfy the conditions for participation set out in the notice referred to in paragraph 7.

9. Notwithstanding paragraph 7, where a multi-use list will be valid for three years or less, a procuring entity may publish the notice referred to in paragraph 7 only once, at the beginning of the period of validity of the list, provided that the notice:

- (a) states the period of validity and that further notices will not be published; and

- (b) is published by electronic means and is made available continuously during the period of its validity.

10. A procuring entity shall allow suppliers to apply for inclusion on a multi-use list and shall include on the list all qualified suppliers within a reasonably short time.

11. If a supplier that is not included on a multi-use list submits a request for participation in a procurement based on the multi-use list and submits all required documents, within the time period provided for in Article 11.14.2, a procuring entity shall examine the request. The procuring entity shall not exclude the supplier from consideration in respect of the procurement on the grounds that the entity has insufficient time to examine the request, unless, in exceptional cases due to the complexity of the procurement, the entity is not able to complete the examination of the request within the time period allowed for the submission of tenders.

#### *Information on Procuring Entity Decisions*

12. A procuring entity or other entity of a Party shall promptly inform any supplier that submits a request for participation in a procurement or application for inclusion on a multi-use list of the decision with respect to the request or application.

13. If a procuring entity or other entity of a Party rejects a supplier's request for participation in a procurement or application for inclusion on a multi-use list, ceases to recognize a supplier as qualified, or removes a supplier from a multi-use list, the entity shall promptly inform the supplier and, on request of the supplier, promptly provide the supplier with a written explanation of the reason for its decision.

#### **Article 11.10: Limited Tendering**

1. Subject to paragraph 2 and provided that it does not use this provision for the purpose of avoiding competition between suppliers, to protect domestic suppliers, or in a manner that discriminates against suppliers of the other Party, a procuring entity may use limited tendering.

2. If a procuring entity uses limited tendering, it may choose, according to the nature of the procurement, not to apply Articles 11.7 through 11.9 and Articles 11.11 through Article 11.15. A procuring entity may use limited tendering only under the following circumstances:

- (a) if, in response to a prior notice, invitation to participate, or invitation to tender:
  - (i) no tenders were submitted or no suppliers requested participation;
  - (ii) no tenders were submitted that conform to the essential requirements in the tender documentation;
  - (iii) no suppliers satisfied the conditions for participation; or
  - (iv) the tenders submitted were collusive;

provided that the procuring entity does not substantially modify the essential requirements set out in the notices or tender documentation;

- (b) if the good or service can be supplied only by a particular supplier and no reasonable alternative or substitute good or service exists for any of the following reasons:

- (i) the requirement is for a work of art;
  - (ii) the protection of patents, copyrights, or other exclusive rights; or
  - (iii) due to an absence of competition for technical reasons;
- (c) for additional deliveries by the original supplier or its authorized agents, of goods or services that were not included in the initial procurement if a change of supplier for such additional goods or services:
  - (i) cannot be made for technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services, or installations procured under the initial procurement, or due to conditions under original supplier warranties; and
  - (ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;
- (d) for a good purchased on a commodity market or exchange;
- (e) if a procuring entity procures a prototype or a first good or service that is intended for limited trial or that is developed at its request in the course of, and for, a particular contract for research, experiment, study, or original development. Original development of a prototype or a first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the prototype or the first good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs. Subsequent procurements of these newly developed goods or services, however, shall be subject to this Chapter;
- (f) for new services consisting of the repetition of similar services which conform to a basic project for which an initial contract was awarded and for which the entity has indicated in the notice of intended procurement concerning the initial service that limited tendering procedures might be used in awarding contracts for such new services;
- (g) for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals, liquidation, bankruptcy, or receivership, but not for routine purchases from regular suppliers;
- (h) if a contract is awarded to the winner of a design contest, provided that:
  - (i) the contest has been organized in a manner that is consistent with this Chapter; and
  - (ii) the contest is judged by an independent jury with a view to award a design contract to the winner; or

- (i) in so far as is strictly necessary if, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the good or service could not be obtained in time by means of open or selective tendering.

3. For each contract awarded in accordance with paragraph 2, a procuring entity shall prepare a report in writing, or maintain a record, that includes the name of the procuring entity, the value and kind of good or service procured, and a statement that indicates the circumstances and conditions described in paragraph 2 that justified the use of limited tendering.

#### **Article 11.11: Negotiations**

1. A Party may provide for its procuring entities to conduct negotiations in the context of covered procurement if:

- (a) the procuring entity has indicated its intent to conduct negotiations in the notice of intended procurement required under Article 11.7;
- (b) it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice of intended procurement or tender documentation;
- (c) there is a need to clarify the terms and conditions; or
- (d) all bids exceed the allocated prices provided for in the procuring entity's budget.

2. A procuring entity shall:

- (a) ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the notice of intended procurement or tender documentation; and
- (b) when negotiations are concluded, provide a common deadline for the remaining participating suppliers to submit any new or revised tenders.

#### **Article 11.12: Technical Specifications**

1. A procuring entity shall not prepare, adopt, or apply any technical specification or prescribe any conformity assessment procedure with the purpose or effect of creating an unnecessary obstacle to trade between the Parties.

2. In prescribing the technical specifications for the good or service being procured, a procuring entity shall, if appropriate:

- (a) set out the technical specifications in terms of performance and functional requirements, rather than design or descriptive characteristics; and
- (b) base the technical specifications on international standards, if these exist; otherwise, on national technical regulations, recognized national standards or building codes.

3. Where design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, where appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfil the requirements of the procurement by including words such as "or equivalent" in the tender documentation.

4. A procuring entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer, or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in these cases, the procuring entity includes words such as “or equivalent” in the tender documentation.

5. A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.

6. For greater certainty, a procuring entity may conduct market research in developing specifications for a particular procurement.

7. For greater certainty, this Article is not intended to preclude a procuring entity from preparing, adopting, or applying technical specifications to promote the conservation of natural resources or the protection of the environment.

8. For greater certainty, this Chapter is not intended to preclude a Party, or its procuring entities, from preparing, adopting, or applying technical specifications required to protect sensitive government information, including specifications that may affect or limit the storage, hosting, or processing of such information outside the territory of the Party.

#### **Article 11.13: Tender Documentation**

1. A procuring entity shall promptly make available or provide on request to any interested supplier tender documentation that includes all information necessary to permit the supplier to prepare and submit a responsive tender. Unless already provided in the notice of intended procurement, that tender documentation shall include a complete description of:

- (a) the procurement, including the nature, scope and, if known, the quantity of the good or service to be procured or, if the quantity is not known, the estimated quantity and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings, or instructional materials;
- (b) any conditions for participation, including any financial guarantees, information, and documents that suppliers are required to submit;
- (c) all criteria to be considered in the awarding of the contract and the relative importance of those criteria;
- (d) where there will be a public opening of tenders, the date, time, and place for the opening of tenders and, where appropriate, the persons authorized to be present;
- (e) where the procuring entity will conduct the procurement by electronic means, any authentication and encryption requirements or other requirements related to the submission of information by electronic means;
- (f) any other terms or conditions relevant to the evaluation of tenders;

- (g) any other terms or conditions, including terms of payment and any limitation on the means by which tenders may be submitted, e.g., paper or electronic means; and
  - (h) any date for delivery of a good or supply of a service.
2. To the extent possible and subject to any applicable fees, an entity should make relevant tender documentation publicly available through electronic means or a computer-based telecommunications network openly accessible to all suppliers.
3. In establishing any date for the delivery of a good or the supply of a service being procured, a procuring entity shall take into account factors such as the complexity of the procurement.
4. A procuring entity shall promptly reply to any reasonable request for relevant information by an interested or participating supplier, provided that the information does not give that supplier an advantage over other suppliers.

#### *Modifications*

5. If, prior to the award of a contract, a procuring entity modifies the evaluation criteria or requirements set out in a notice of intended procurement or tender documentation provided to a participating supplier, or amends, or re-issues a notice or tender documentation, it shall publish or provide in writing those modifications, or the amended or re-issued notice or tender documentation:
- (a) to all suppliers that are participating in the procurement at the time of the modification, amendment, or re-issuance, if those suppliers are known to the procuring entity, and in all other cases, in the same manner as the original information was made available; and
  - (b) in adequate time to allow those suppliers to modify and re-submit their initial tender, if appropriate.

### **Article 11.14: Time Periods**

#### *General*

1. A procuring entity shall, consistent with its own reasonable needs, provide sufficient time for a supplier to obtain the tender documentation and to prepare and submit a request for participation and a responsive tender, taking into account factors such as:
- (a) the nature and complexity of the procurement;
  - (b) the extent of subcontracting anticipated; and
  - (c) the time necessary for transmitting tenders by non-electronic means from foreign as well as domestic points if electronic means are not used.

Such time-periods, including any extension of the time-periods, shall be the same for all interested or participating suppliers.

#### *Deadlines*

2. A procuring entity that uses selective tendering shall establish that the final date for the submission of a request for participation shall not, in principle, be less than 25 days from the date of publication of the notice of intended procurement. If a state of urgency duly substantiated by the procuring entity renders this time period impracticable, the time period may be reduced to no less than 10 days.

3. Except as provided in paragraphs 4 and 5, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 40 days from the date on which:

- (a) in the case of open tendering, the notice of intended procurement is published; or
- (b) in the case of selective tendering, the procuring entity notifies the suppliers that they will be invited to submit tenders, whether or not it uses a multi-use list.

4. A procuring entity may reduce the time period for tendering set out in paragraph 3 by five days for each one of the following circumstances:

- (a) the notice of intended procurement is published by electronic means;
- (b) the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and
- (c) the procuring entity accepts tenders by electronic means.

5. A procuring entity may reduce the time period for tendering set out in paragraph 3 to no less than 10 days if:

- (a) the procuring entity has published a notice of planned procurement under Article 11.7 at least 40 days and no more than 12 months in advance of the publication of the notice of intended procurement, and the notice of planned procurement contains:
  - (i) a description of the procurement;
  - (ii) the approximate final dates for the submission of tenders or requests for participation;
  - (iii) the address from which documents relating to the procurement may be obtained; and
  - (iv) as much of the information that is required for the notice of intended procurement as is available;
- (b) the procuring entity, for recurring contracts, indicates in an initial notice of intended procurement that subsequent notices will provide time-periods for tendering based on this paragraph;
- (c) a state of urgency duly substantiated by the procuring entity renders impracticable the time period for tendering set out in paragraph 3; or



(d) the procuring entity procures commercial goods or services.

6. The use of paragraph 4, in conjunction with paragraph 5, shall in no case result in the reduction of the time periods for tendering set out in paragraph 3 to less than 10 days, from the date on which the notice of intended procurement is published.

7. A procuring entity shall require all interested or participating suppliers to submit requests for participation or tenders in accordance with a common deadline. These time periods, and any extension of these time periods, shall be the same for all interested or participating suppliers.

#### **Article 11.15: Treatment of Tenders and Awarding of Contracts**

##### *Treatment of Tenders*

1. A procuring entity shall receive, open, and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process and the confidentiality of tenders.

2. If the tender of a supplier is received after the time specified for receiving tenders, the procuring entity shall not penalize that supplier if the delay is due solely to the mishandling on the part of the procuring entity.

3. If a procuring entity provides a supplier with an opportunity to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunity to all participating suppliers.

##### *Awarding of Contracts*

4. To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the notice and tender documentation and be submitted by a supplier who satisfies the conditions for participation.

5. Unless a procuring entity determines that it is not in the public interest to award a contract, it shall award the contract to the supplier that the procuring entity has determined to be fully capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notice and tender documentation has submitted:

(a) the most advantageous tender; or

(b) if price is the sole criterion, the lowest price.

6. If a procuring entity received a tender with a price that is abnormally lower than the prices in other tenders submitted, it may verify with the supplier that it satisfies the conditions for participation and is capable of fulfilling the terms of the contract.

7. A procuring entity shall not use options, cancel a covered procurement, or modify or terminate awarded contracts in order to avoid the obligations of this Chapter.

#### **Article 11.16: Transparency and Post-Award Information**

##### *Information Provided to Suppliers*

1. A procuring entity shall promptly inform suppliers that have submitted a tender of the contract award decision. The procuring entity may do so in writing or through the prompt publication of the notice, provided that the notice includes the date of award. If a supplier has requested the information in writing, the procuring entity shall provide it in writing.

2. Subject to Article 11.17, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select the unsuccessful supplier's tender or an explanation of the relative advantages of the successful supplier's tender.

#### *Maintenance of Records*

3. A procuring entity shall maintain the documentation, records and reports relating to tendering procedures and contract awards for covered procurement, including the records and reports provided for in Article: 11.10.3, for at least three years after the award of a contract.

### **Article 11.17: Disclosure of Information**

#### *Provision of Information to Parties*

1. On request of the other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Chapter, including information on the characteristics and relative advantages of the successful tender. In cases where release of the information would prejudice competition in future tenders, the Party that receives the information shall not disclose it to any supplier, except after consulting with, and obtaining the agreement of, the Party that provided the information.

#### *Non-Disclosure of Information*

2. Notwithstanding any other provision of this Chapter, a Party, including its procuring entities, shall not, except to the extent required by law or with the written authorization of the supplier that provided the information, disclose information that would prejudice legitimate commercial interests of a particular supplier or that might prejudice fair competition between suppliers.

3. Nothing in this Chapter shall be construed to require a Party, including its procuring entities, authorities, and review bodies, to disclose confidential information if that disclosure:

- (a) would impede law enforcement;
- (b) might prejudice fair competition between suppliers;
- (c) would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or
- (d) would otherwise be contrary to the public interest.

### **Article 11.18: Ensuring Integrity in Procurement Practices**

Each Party shall ensure that criminal or administrative measures exist to address corruption in its government procurement. These measures may include procedures to render ineligible for participation in the Party's procurements, either indefinitely or for a stated period of time, suppliers that the Party has determined to have engaged in fraudulent or other illegal actions

in relation to government procurement in the Party's territory. Each Party shall also ensure that it has in place policies and procedures to eliminate to the extent possible or manage any potential conflict of interest on the part of those engaged in or having influence over a procurement.

#### **Article 11.19: Domestic Review**

1. Each Party shall maintain, establish, or designate at least one impartial administrative or judicial authority (hereinafter referred to as a "review authority") that is independent of its procuring entities to review, in a non-discriminatory, timely, transparent, and effective manner, a challenge or complaint (hereinafter referred to as a "complaint") by a supplier that there has been:

- (a) a breach of this Chapter; or
- (b) if the supplier does not have a right to directly challenge a breach of this Chapter under the law of a Party, a failure of a procuring entity to comply with the Party's measures implementing this Chapter,

arising in the context of a covered procurement, in which the supplier has, or had, an interest. The procedural rules for these complaints shall be in writing and made generally available.

2. In the event of a complaint by a supplier, arising in the context of covered procurement in which the supplier has, or had, an interest, that there has been a breach or a failure as referred to in paragraph 1, the Party of the procuring entity conducting the procurement shall encourage, the procuring entity and the supplier to seek resolution of the complaint through consultations. The procuring entity shall accord impartial and timely consideration to the complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement or to its right to seek corrective measures under the administrative or judicial review procedure. Each Party shall make information on its complaint mechanisms generally available.

3. If a body other than the review authority initially reviews a complaint, a Party shall ensure that the supplier may appeal the initial decision to the review authority that is independent of the procuring entity that is the subject of the complaint.

4. If the review authority has determined that there has been a breach or a failure as referred to in paragraph 1, a Party may limit compensation for the loss or damages suffered to either the costs reasonably incurred in the preparation of the tender or in bringing the complaint, or both.

5. Each Party shall ensure that, if the review authority is not a court, its review procedures are conducted in accordance with the following procedures:

- (a) a supplier shall be allowed sufficient time to prepare and submit a complaint in writing, which in no case shall be less than 10 days from the time when the basis of the complaint became known or reasonably should have become known to the supplier;
- (b) a procuring entity shall respond in writing to a supplier's complaint and provide all relevant documents to the review authority;

- (c) a supplier that initiates a complaint shall be provided an opportunity to reply to the procuring entity's response before the review authority takes a decision on the complaint; and
  - (d) the review authority shall provide its decision on a supplier's complaint in a timely manner, in writing, with an explanation of the basis for the decision.
6. Each Party shall adopt or maintain procedures that provide for:
- (a) prompt interim measures, pending the resolution of a complaint, to preserve the supplier's opportunity to participate in the procurement and to ensure that the procuring entities of the Party comply with its measures implementing this Chapter; and
  - (b) corrective action that may include compensation under paragraph 4.

The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether those measures should be applied. Just cause for not acting shall be provided in writing.

**Article 11.20: Modifications and Rectifications of Annex**

1. A Party shall notify any proposed modification or rectification (hereinafter referred to as a "modification") to its Schedule in Annex 11-A (Government Procurement Schedules) by circulating a notice in writing to the other Party through the Joint Committee. A Party shall provide compensatory adjustments for a change in coverage if necessary to maintain a level of coverage comparable to the coverage that existed prior to the modification. The Party may include the offer of compensatory adjustment in its notice.

2. A Party is not required to provide compensatory adjustments to the other Party if the proposed modification concerns one of the following:

- (a) a procuring entity over which the Party has effectively eliminated its control or influence in respect of covered procurement by that procuring entity; or
- (b) rectifications of a purely formal nature and minor modifications to its Schedule in Annex 11-A (Government Procurement Schedules), such as:
  - (i) changes in the name of a procuring entity;
  - (ii) the merger of one or more procuring entities listed in its Schedule;
  - (iii) the separation of a procuring entity listed in its Schedule into two or more procuring entities that are all added to the procuring entities listed in the same Section of the Annex; or
  - (iv) changes in website references;

and the other Party does not object under paragraph 3 on the basis that the proposed modification does not concern subparagraphs (a) or (b).

3. If a Party considers that its rights under this Chapter are affected by a proposed modification that is notified under paragraph 1, it shall notify the other Party of any objection to the proposed modification within 45 days of the date of circulation of the notice.

4. If a Party objects to a proposed modification, including a modification regarding a procuring entity on the basis that government control or influence over the entity's covered procurement has been effectively eliminated, that Party may request additional information, including information on the nature of any government control or influence, with a view to clarifying and reaching agreement on the proposed modification, including the procuring entity's continued coverage under this Chapter. The modifying Party and the objecting Party shall make every attempt to resolve the objection through consultations.

5. The Joint Committee shall modify Annex 11-A (Government Procurement Schedules) to reflect any agreed modification.

#### **Article 11.21: Facilitation of Participation by SMEs**

1. The Parties recognize the important contribution that small- and medium-sized enterprises (hereinafter referred to as the "SMEs") can make to economic growth and employment and the importance of facilitating the participation of SMEs in government procurement.

2. If a Party maintains a measure that provides preferential treatment for SMEs, the Party shall ensure that the measure, including the criteria for eligibility, is transparent.

3. To facilitate participation by SMEs in covered procurement, each Party shall, to the extent possible and if appropriate:

- (a) provide comprehensive procurement-related information that includes a definition of SMEs in a single electronic portal;
- (b) endeavor to make all tender documentation available free of charge;
- (c) conduct procurement by electronic means or through other new information and communication technologies; and
- (d) consider the size, design, and structure of the procurement, including the use of subcontracting by SMEs.

#### **Article 11.22: Financial Obligations**

1. This Chapter shall not entail any financial obligations to the Parties.

2. Each Party is responsible for any financial expenses to fulfill their role in this Chapter.

#### **Article 11.23: Language**

To improve market access to each Party's procurement market, each Party shall, where possible, use English in its publication of materials or information pursuant to Article 11.7, including in the publications listed in Section H of each Party's Schedule in Annex 11-A (Government Procurement Schedules).