

## CHAPTER ELEVEN

### GOVERNMENT PROCUREMENT

#### **Article 11.1: Definitions**

For purposes of this Chapter:

- (a) **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;
- (b) **conditions for participation** means registration, qualification, or other pre-requisites for participation in a procurement;
- (c) **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) or the Common Procurement Vocabulary<sup>1</sup> (CPV) codes (45100000, 45200000, 45300000, 45400000);
- (d) **days** means calendar days;
- (e) **electronic auction** means an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders;
- (f) **in writing or written** means any worded or numbered expression that can be read, reproduced and later communicated. It may include electronically uploaded, downloaded, transmitted and stored information;
- (g) **limited tendering** means a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice;<sup>2</sup>

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<sup>1</sup> This is defined in the *European Commission Regulation (EC) No 213/2008* - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0213>

<sup>2</sup> For Georgia, “limited tendering” is equivalent to “negotiated procedure without prior publication”.

- (h) **measure** means any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement;
- (i) **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;<sup>3</sup>
- (j) **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;<sup>4</sup>
- (k) **notice of planned procurement** means a notice published by a procuring entity providing future procurement plans;
- (l) **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 similar action or requirement;
- (m) **open tendering** means a procurement method whereby all interested suppliers may submit a tender;<sup>5</sup>
- (n) **person** means a natural person or a juridical person;
- (o) **procuring entity** means an entity covered under a Party's Schedule to Annex 11-A;
- (p) **qualified supplier** means a supplier that a procuring entity recognizes as having satisfied the conditions for participation;
- (q) **selective tendering** means a procurement method whereby only qualified suppliers are invited by the procuring entity to submit a tender;<sup>6</sup>
- (r) **services** includes construction services, unless otherwise specified;
- (s) **standard** means a document approved by a recognized body that provides for common and repeated use, rules, guidelines or

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<sup>3</sup> For Georgia, “multi-use list” is equivalent to “dynamic purchasing system”.

<sup>4</sup> For Georgia, “notice of intended procurement” is equivalent to “prior information notice”.

<sup>5</sup> For Georgia, “open tendering” is equivalent to “open procedure”.

<sup>6</sup> For Georgia, “selective tendering” is equivalent to “restricted procedure”.

characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a good, service, process or production method;

- (t) **supplier** means a person or group of persons that provides or could provide goods or services; and
- (u) **technical specification** means a tendering requirement that:
  - (i) 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
  - (ii) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service.

## **Article 11.2: General Provisions**

1. The Parties recognize that this Chapter will contribute to expand bilateral trading opportunities in each Party's government procurement market.
2. The Parties recognize their shared interest in promoting the effective, reciprocal and progressive opening of government procurement markets. The Parties will endeavor to cooperate bilaterally on procurement matters.

## **Article 11.3: Scope and Coverage**

### *Application of Chapter*

1. This Chapter applies to any measure regarding covered procurement, whether or not it is conducted exclusively or partially by electronic means.
2. For purposes of this Chapter, covered procurement means procurement for governmental purposes:
  - (a) 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, lease, and rental or hire purchase, with or without an option to buy;

- (c) for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant threshold specified in a Party's Schedule under Annex 11-A, at the time of publication of a notice in accordance with Article 11.7;
- (d) by a procuring entity; and
- (e) that is not otherwise excluded from coverage in paragraph 3, and subject to the conditions specified in Annex 11-A.

3. Except where provided otherwise in Annex 11-A, 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 provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;
- (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 conducted:
  - (i) for the specific purpose of providing international assistance, including development aid;
  - (ii) 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; or
  - (iii) under the particular procedure or condition of an international organization, or funded by international grants, loans or other assistance where the applicable procedure or condition would be inconsistent with this Chapter.

4. Each Party shall specify the following information in its Schedule to Annex 11-A:

- (a) in Section A, the central government entities whose procurement is covered by this Chapter;
- (b) in Section B, the sub-central government entities whose procurement is covered by this Chapter;
- (c) in Section C, all other entities whose procurement is covered by this Chapter;
- (d) in Section D, the goods covered by this Chapter;
- (e) in Section E, the services, other than construction services, covered by this Chapter;
- (f) in Section F, the construction services covered by this Chapter;
- (g) in Section G, any General Notes; and
- (h) in Section H, publication of information.

5. Where a procuring entity, in the context of covered procurement, requires persons not covered under a Party's Schedule to Annex 11-A to procure in accordance with particular requirements, Article 11.5 shall apply *mutatis mutandis* to such requirements.

#### *Valuation*

6. In estimating the value of a procurement for the purpose of ascertaining whether it is a covered procurement, a procuring entity shall:<sup>7</sup>

- (a) neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Chapter; and

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<sup>7</sup> For Georgia, when determining the estimated value of government procurement, a procuring entity shall take into account any expenses, existing by the day of opening the competition, related to conduct of government procurement within the frames of a specific government procurement, estimated duration of a procurement contract, and payment, excluded VAT, to be paid for supplying the object of procurement within the frames of a specific government procurement.

- (b) include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including:
  - (i) premiums, fees, commissions, and interest; and
  - (ii) where the procurement provides for the possibility of options, the total value of such options.

7. 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 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 take into account anticipated changes in the quantity or value of the good or service being procured over the following 12 months; or
- (b) 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.

8. In the case of procurement by lease, rental or hire purchase of goods or services, or procurement for which a total price is not specified, the basis for valuation shall be:

- (a) in the case of a fixed-term contract:
  - (i) where the term of the contract is 12 months or less, the total estimated maximum value for its duration; or
  - (ii) where the term of the contract exceeds 12 months, the total estimated maximum value, including any estimated residual value;
- (b) where the contract is for an indefinite period, the estimated monthly instalment multiplied by 48; and
- (c) where it is not certain whether the contract is to be a fixed-term contract, subparagraph (b) shall be used.

## **Article 11.4: Security and General Exceptions**

1. 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 relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.
2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent a Party from imposing or enforcing measures:

- (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 goods or services of persons with disabilities, philanthropic institutions, or prison labor.

## **Article 11.5: General Principles**

### *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 offering the goods or services, treatment no less favorable than that accorded to domestic goods, services, and suppliers.
2. With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:
  - (a) treat a locally established supplier less favorably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or
  - (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

### *Use of Electronic Means*

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

- (a) ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software; and
- (b) maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access.

*Conduct of Procurement*

4. 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*

5. For 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.

*Offsets*

6. With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset.

*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.

## **Article 11.6: Information on the Procurement System**

Each Party shall:

- (a) promptly publish any law, regulation, administrative ruling of general application, standard contract clause mandated by law or regulation and incorporated by reference in notices or tender documentation, and procedure regarding covered procurement, and any modifications thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public; and
- (b) provide an explanation thereof to a Party, on request.

## **Article 11.7: Notices**

### *Notice of Intended Procurement*

1. For each covered procurement, a procuring entity shall publish a notice of intended procurement in electronic medium listed in Annex 11-A, except in the circumstances described in Article 11.13. Such medium shall be widely disseminated and such notices shall remain readily accessible to the public, at least until expiration of the time-period indicated in the notice.

2. Except as otherwise provided in this Chapter, each notice of intended procurement shall include:

- (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 their cost and terms of payment, if any;
- (b) a description of the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity;
- (c) for recurring contracts, an estimate, if possible, of the timing of subsequent notices of intended procurement;
- (d) a description of any options or variants;
- (e) the time-frame for delivery of goods or services or the duration of the contract;

- (f) the procurement method that will be used and whether it will involve negotiation or electronic auction;
- (g) where applicable, the address and any final date for the submission of requests for participation in the procurement;
- (h) the address and the final date for the submission of tenders;
- (i) 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;
- (j) a list and brief description of any conditions for participation of suppliers, including any requirements for specific documents or certifications to be provided by suppliers in connection therewith, unless such requirements are included in tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement;
- (k) where, 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, where applicable, any limitation on the number of suppliers that will be permitted to tender; and
- (l) an indication that the procurement is covered by this Chapter.

#### *Summary Notice*

3. For each case of intended procurement, a procuring entity shall publish a summary notice that is readily accessible, at the same time as the publication of the notice of intended procurement, in English. The summary notice shall contain at least the following information:

- (a) the subject-matter of the procurement;
- (b) the final date for the submission of tenders or, where applicable, any final date for the submission of requests for participation in the procurement or for inclusion on a multi-use list; and
- (c) the address from which documents relating to the procurement may be requested.

#### *Notice of Planned Procurement*

4. Procuring entities are encouraged to publish in the electronic medium listed in Section H of Annex 11-A as early as possible in each fiscal year a notice regarding their future procurement plans (hereinafter referred to as "notice of planned procurement"). The notice of planned procurement should include the subject-matter of the procurement and the planned timeframe of the publication of the notice of intended procurement.

5. A procuring entity covered under Section B or C may use a notice of planned procurement as a notice of intended procurement provided that the notice of planned procurement includes as much of the information referred to in paragraph 2 as is available to the entity and a statement that interested suppliers should express their interest in the procurement to the procuring entity.

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

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

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

- (a) may 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 that Party; and
- (b) may require relevant prior experience where essential to meet the requirements of the procurement.

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

- (a) shall evaluate the financial capacity and the commercial and technical abilities 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; and
- (b) shall base its evaluation on the conditions that the procuring entity has specified in advance in notices or tender documentation.

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

- (a) bankruptcy;
- (b) false declarations;
- (c) significant or persistent deficiencies in 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 acts 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 may maintain a supplier registration system under which interested suppliers are required to register and provide certain information.
- 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. A Party, including its procuring entities, shall not 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.

### *Selective Tendering*

- 4. Where a procuring entity intends to use selective tendering, the entity shall:
  - (a) include in the notice of intended procurement at least the information specified in Article 11.7.2(a), (b), (f), (g), (j), (k),

and (l) and invite suppliers to submit a request for participation; and

- (b) provide, by the commencement of the time-period for tendering, at least the information in Article 11.7.2(c), (d), (e), (h), and (i) to the qualified suppliers that it notifies as specified in Article 11.11.3(b).

5. A procuring entity shall allow all qualified suppliers to participate in a particular procurement, unless the procuring entity states in the process of procurement operation any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers.

#### *Multi-Use Lists*

6. A procuring entity may maintain a multi-use list of suppliers, provided that a notice inviting interested suppliers to apply for inclusion on the list is:

- (a) published annually; and
- (b) where published by electronic means, made available continuously,

in the appropriate medium listed in Annex 11-A.

7. The notice provided for in paragraph 6 shall include:

- (a) a description of the goods or 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 will use to verify that a supplier satisfies the conditions;
- (c) the name and address of the procuring entity and other information necessary to contact the entity and 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 where 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; and
- (e) an indication that the list may be used for procurement covered by this Chapter.

8. Notwithstanding paragraph 6, where a multi-use list will be valid for three years or less, a procuring entity may publish the notice referred to in paragraph 6 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.

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

#### *Information on Procuring Entity Decisions*

10. A procuring entity 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 procuring entity's decision with respect to the request or application.

11. Where a procuring entity 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 reasons for its decision.

### **Article 11.10: Technical Specifications and Tender Documentation**

#### *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 the effect of creating unnecessary obstacles to international trade.

2. In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, where appropriate:

- (a) set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics; and

- (b) base the technical specification on international standards, where such 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 such cases, the 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 Party, including its procuring entities, may, in accordance with this Article, prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment.

#### *Tender Documentation*

7. A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:

- (a) the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity, and any requirements to be fulfilled, including any technical specifications, conformity assessment certification, plans, drawings, or instructional materials;
- (b) any conditions for participation of suppliers, including a list of information and documents that suppliers are required to submit in connection with the conditions for participation;

- (c) all evaluation criteria the entity will apply in the awarding of the contract, and, except where price is the sole criterion, the relative importance of such criteria;
- (d) 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;
- (e) where the procuring entity will hold an electronic auction, the rules, including identification of the elements of the tender related to the evaluation criteria, on which the auction will be conducted;
- (f) where there will be a public opening of tenders, the date, time, and place for the opening and, where appropriate, the persons authorized to be present;
- (g) any other terms or conditions, including terms of payment and any limitation on the means by which tenders may be submitted, such as whether on paper or by electronic means; and
- (h) any dates for the delivery of goods or the supply of services.

8. In establishing any date for the delivery of goods or the supply of services being procured, a procuring entity shall take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated, and the realistic time required for production, de-stocking, and transport of goods from the point of supply or for supply of services.

9. The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics, and terms of delivery.

10. A procuring entity shall promptly:

- (a) make available tender documentation to ensure that interested suppliers have sufficient time to submit responsive tenders;
- (b) provide, on request, the tender documentation to any interested supplier; and
- (c) reply to any reasonable request for relevant information by any interested or participating supplier, provided that such information does not give that supplier an advantage over other suppliers.

### *Modifications*

11. Where, prior to the award of a contract, a procuring entity modifies the criteria or requirements set out in the notice of intended procurement or tender documentation provided to participating suppliers, or amends or reissues a notice or tender documentation, it shall transmit in writing all such modifications or amended or re-issued notice or tender documentation:

- (a) To all suppliers that are participating at the time of the modification, amendment, or re-issuance, where such suppliers are known to the entity, and in all other cases, in the same manner as the original information was made available; and
- (b) in adequate time to allow such suppliers to modify and re-submit amended tenders, as appropriate.

### **Article 11.11: Time-Periods**

#### *General*

1. A procuring entity shall, consistent with its own reasonable needs, provide sufficient time for suppliers to prepare and submit requests for participation and responsive tenders, taking into account such factors 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 where 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 requests for participation shall not, in principle, be less than 25 days from the date of publication of the notice of intended procurement. Where a state of urgency duly substantiated by the procuring entity renders this time-period impracticable, the time-period may be reduced to not less than 10 days.

3. Except as provided for in paragraphs 4, 5, 7, and 8, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 30 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 entity notifies 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 established in accordance with paragraph 3 to not less than 10 days where:

- (a) the procuring entity has published a notice of planned procurement as described in Article 11.7 at least 35 days and not 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) a statement that interested suppliers should express their interest in the procurement to the procuring entity;
  - (iv) the address from which documents relating to the procurement may be obtained; and
  - (v) as much of the information that is required for the notice of intended procurement under Article 11.7, 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; or
- (c) a state of urgency duly substantiated by the procuring entity renders the time-period for tendering established in accordance with paragraph 3 impracticable.

5. A procuring entity may reduce the time-period for tendering established in accordance with paragraph 3 by five days for each one of the following circumstances:

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

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

7. Where a procuring entity covered under Section B or C has selected all or a limited number of qualified suppliers, the time-period for tendering may be fixed by mutual agreement between the procuring entity and the selected suppliers. In the absence of agreement, the period shall not be less than 10 days.

### **Article 11.12: Negotiation**

- 1. A Party may provide for its procuring entities to conduct negotiations or procurement operation via negotiated procedure:
  - (a) where the entity has indicated its intent to conduct negotiations in the notice of intended procurement required under Article 11.7; or
  - (b) where 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.
- 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) where negotiations are concluded, provide a common deadline for the remaining participating suppliers to submit any new or revised tenders.

### **Article 11.13: Limited Tendering**

1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles 11.7 through 11.9, 11.10.7 through 11.10.11, 11.11, 11.12, 11.14, and 11.15 only under any of the following circumstances:

(a) where:

- (i) no tenders were submitted or no suppliers requested participation;
- (ii) no tenders that conform to the essential requirements of the tender documentation were submitted;
- (iii) no suppliers satisfied the conditions for participation; or
- (iv) the tenders submitted have been collusive,

provided that the requirements of the tender documentation are not substantially modified;

(b) where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist 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 of goods or services that were not included in the initial procurement where a change of supplier for such additional goods or services:

- (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services, or installations procured under the initial procurement; and
- (ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;

(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;

(e) for goods purchased on a commodity market;

(f) where a procuring entity procures a prototype or a first good or service 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 first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the 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;

(g) for purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership, or bankruptcy, but not for routine purchases from regular suppliers; or

(h) where a contract is awarded to a winner of a design contest provided that:

- (i) the contest has been organized in a manner that is consistent with the principles of this Chapter, in particular relating to the publication of a notice of intended procurement; and
- (ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner.

2. A procuring entity shall prepare a report in writing on each contract awarded under paragraph 1. The report shall include the name of the procuring entity, the value and kind of goods or services procured, and a statement

indicating the circumstances and conditions described in paragraph 1 that justified the use of limited tendering.

#### **Article 11.14: Electronic Auctions**

Where a procuring entity intends to conduct a covered procurement using an electronic auction, the entity shall provide each participant, before commencing the electronic auction, with:

- (a) the automatic evaluation method, that is based on the evaluation criteria set out in the tender documentation and that will be used in the automatic ranking or re-ranking during the auction;
- (b) the results of any initial evaluation of the elements of its tender where the contract is to be awarded on the basis of the most advantageous tender; and
- (c) any other relevant information relating to the conduct of the auction.

#### **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. Where 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*

3. 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 notices and tender documentation and be from a supplier that satisfies the conditions for participation.

4. Unless a procuring entity determines that it is not in the public interest to award a contract, the entity shall award the contract to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and

that, based solely on the evaluation criteria specified in the notices and tender documentation, has submitted:

- (a) the most advantageous tender; or
- (b) where price is the sole criterion, the lowest price.

5. Where a procuring entity receives a tender with a price that is abnormally lower than the prices in other tenders submitted, according to the Parties' domestic legislation threshold, it may verify with the supplier that it satisfies the conditions for participation and is capable of fulfilling the terms of the contract.

6. A procuring entity shall not use options, cancel a procurement, or modify awarded contracts in a manner that circumvents the obligations under this Chapter.

## **Article 11.16: Transparency of Procurement Information**

### *Information Provided to Suppliers*

1. A procuring entity shall promptly inform participating suppliers of the entity's contract award decisions in writing. Subject to Articles 11.18.2 and 11.18.3, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender.

### *Publication of Award Information*

2. Not later than 72 days after the award of each contract covered by this Chapter, a procuring entity shall publish a notice in electronic medium listed in Section H of Annex 11-A. The notice shall remain readily accessible for a reasonable period of time and shall include at least the following information:

- (a) a description of the goods or services procured;
- (b) the name and address of the procuring entity;
- (c) the name and address of the successful supplier;
- (d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;
- (e) the date of award; and

- (f) the type of procurement method used, and in cases where limited tendering was used in accordance with Article 11.13, a description of the circumstances justifying the use of limited tendering.

#### *Maintenance of Documentation, Reports and Electronic Traceability*

3. Each procuring entity shall, for a period of at least three years from the date it awards a contract, maintain:

- (a) the documentation and reports of tendering procedures and contract awards relating to covered procurement, including the reports required under Article 11.14; and
- (b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.

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

#### *Provision of Information*

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 provide to any particular supplier information 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 where 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: Domestic Review Procedures**

1. Each Party shall provide a timely, effective, transparent, and non-discriminatory administrative or judicial review procedure through which a supplier may challenge:

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

arising in the context of a covered procurement, in which the supplier has, or has had, an interest. The procedural rules for all challenges shall be 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 has 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 entity and the supplier to seek resolution of the complaint through consultations. The entity shall accord impartial and timely consideration to any such complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement or its right to seek corrective measures under the administrative or judicial review procedure.

3. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge, which in no case shall be less than 10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier.

4. Each Party shall establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement.

5. Where a body other than an authority referred to in paragraph 4 initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is

independent of the procuring entity whose procurement is the subject of the challenge.

6. Each Party shall ensure that a review body that is not a court shall have its decision subject to judicial review or have procedures that provide that:

- (a) the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body;
- (b) the participants to the proceedings (hereinafter referred to as "participants") shall have the right to be heard prior to a decision of the review body being made on the challenge;
- (c) the participants shall have the right to be represented and accompanied;
- (d) the participants shall have access to all proceedings;
- (e) the participants shall have the right to request that the proceedings take place in public and that witnesses may be presented; and
- (f) the review body shall make its decisions or recommendations in a timely fashion, in writing, and shall include an explanation of the basis for each decision or recommendation.

7. Each Party shall adopt or maintain procedures that provide for:

- (a) rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing; and
- (b) where a review body has determined that there has been a breach or a failure as referred to in paragraph 1, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.

#### **Article 11.19: Modifications and Rectifications to Coverage**

1. A Party may make rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to its Schedules in Annex 11-A, provided that it notifies the other Party in writing and the other Party does not object in writing within 30 days of receipt of the notification. A Party that makes such a rectification or minor amendment need not provide compensatory adjustments to the other Party.

2. A Party may otherwise modify its coverage under this Chapter provided that:

- (a) it notifies the other Party in writing and simultaneously offers in the notification appropriate compensatory adjustments to the other Party to maintain a level of coverage comparable to that existing prior to the modification where necessary; and
- (b) the other Party shall not object in writing within 30 days of receipt of the notification.

3. A Party need not provide compensatory adjustments in those circumstances where the Parties agree that the proposed modification covers a procuring entity over which a Party has effectively eliminated its control or influence. Where a Party objects to the assertion that such government control or influence has been effectively eliminated, the objecting Party shall object in writing within 30 days of receipt of the notification and may request further information or consultations with a view to clarifying the nature of any government control or influence and reaching agreement on the procuring entity's continued coverage under this Chapter.

4. Where the Parties concerned have agreed on rectification, minor amendment, adjustment, or proposed modification, or where no objection has been made within 30 days of the receipt of the notification, the modifications shall be made in conformity with the provisions of paragraph 5.

5. The Joint Committee of the Agreement shall modify the relevant section of Annex 11-A to reflect any agreed rectification, minor amendment, or modification.

## **Article 11.20: Micro, Small, and Medium Enterprises' Participation**

1. The Parties recognize the importance of the participation of micro, small, and medium-sized enterprises (hereinafter referred to as "MSMEs") in government procurement.

2. The Parties also recognize the importance of business alliances between suppliers of each Party, and in particular of MSMEs, including the

joint participation in tendering procedures.

3. The Parties shall endeavor to work jointly towards exchanging information and facilitating access of MSMEs to government procurement procedures, methods, and contracting requirements, focusing on their special needs.

### **Article 11.21: Cooperation**

1. The Parties recognize the importance of cooperation with a view to achieving a better understanding of their respective government procurement systems, as well as a better access to their respective markets, in particular for MSMEs.

2. The Parties shall endeavor to cooperate in matters such as:

- (a) exchange of experiences and information, such as regulatory frameworks, bestpractices, and statistics;
- (b) development and use of electronic communications in government procurement systems;
- (c) capacity building and technical assistance to suppliers with respect to access to the government procurement market; and
- (d) institutional strengthening for the fulfillment of this Chapter, including training of government personnel.

### **Article 11.22: Committee on Government Procurement**

1. The Parties hereby establish a Committee on Government Procurement (hereinafter referred to as the “Committee”) comprising representatives of each Party.

2. The Committee shall:

- (a) evaluate the implementation of this Chapter, including its application, and recommend to the Parties the appropriate activities;
- (b) coordinate the cooperation activities;
- (c) evaluate and follow up the activities related to cooperation that the Parties present;

- (d) work as an enquiry point for the purposes of the notifications under Article 11.19; and
- (e) carry out other functions as may be assigned by the Joint Committee or agreed by the Parties.

3. The Committee shall meet upon request of a Party or as mutually agreed by the Parties.

4. Meetings may be conducted in person or by any technological means available to the Parties.

#### **Article 11.23: Further Negotiations**

In a case that a Party offers, after the entry into force of this Agreement, to a non-Party additional advantages with regard to its government procurement market access coverage agreed under this Chapter, it shall agree, upon request of the other Party, to enter into negotiations with a view to extending coverage under this Chapter on a reciprocal basis.