

## CHAPTER 15

### GOVERNMENT PROCUREMENT

#### Article 15.1: Definitions

For the purposes 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;

**in writing or written** means any worded or numbered expression that can be read, reproduced and may be later communicated. It 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 requires the use of domestic content, a domestic supplier, the licensing of technology, technology transfer, investment, counter-trade or similar action to encourage local development or to improve a Party's balance of payments accounts;

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

**procuring entity** means an entity listed in Annex 15-A;

**publish** means to disseminate information through paper or electronic means that is distributed widely and is readily accessible to the general public;

**qualified supplier** means a supplier that a procuring entity recognises 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) sets out the characteristics of:
  - (i) goods to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production; or
  - (ii) services to be procured, or the processes or methods for their provision, including any applicable administrative provisions; or
- (b) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service.

## **Article 15.2: Scope**

### *Application of Chapter*

1. This Chapter applies 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 as specified in each Party's Schedule to Annex 15-A;
  - (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 8 and 9, equals or exceeds the relevant threshold specified in a Party's Schedule to Annex 15-A, 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 15-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, 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 organisation or foreign or international grants, loans or other assistance to which procurement procedures or conditions of the international organisation or donor apply. If the procedures or conditions of the international organisation or donor do not restrict the participation of suppliers then the procurement shall be subject to Article 15.4.1 (General Principles); 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; and

- (f) procurement of a good or service outside the territory of the Party of the procuring entity, for consumption outside the territory of that Party.

#### *Schedules*

4. Each Party shall specify the following information in its Schedule to Annex 15-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, 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;
- (h) in Section H, the applicable Threshold Adjustment Formula;
- (i) in Section I, the publication information required under Article 15.6.2 (Publication of Procurement Information); and
- (j) in Section J, any transitional measures in accordance with Article 15.5 (Transitional Measures).

#### *Compliance*

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

6. 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.

7. 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*

8. 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.

9. 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 15.3: 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 labour.

2. The Parties understand that subparagraph 1(b) includes environmental measures necessary to protect human, animal or plant life or health.

## **Article 15.4: 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 any other Party and to the suppliers of any other Party, treatment no less favourable than the treatment that the Party, including its procuring entities, accords to:

- (a) domestic goods, services and suppliers; and
- (b) goods, services and suppliers of any other Party.

For greater certainty, this obligation refers only to the treatment accorded by a Party to any good, service or supplier of any other Party under this Agreement.

2. With respect to any measure regarding covered procurement, no Party, including its procuring entities, shall:

- (a) treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership; 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 any other Party.

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

### *Procurement Methods*

4. A procuring entity shall use an open tendering procedure for covered procurement unless Article 15.9 (Qualification of Suppliers) or Article 15.10 (Limited Tendering) applies.

### *Rules of Origin*

5. Each Party shall apply to covered procurement of a good the rules of origin that it applies in the normal course of trade to that good.

### *Offsets*

6. With regard to covered procurement, no Party, including its procuring entities, shall seek, take account of, impose or enforce any offset, at any stage of a procurement.

### *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, and for the receipt of tenders.

9. 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) establish and maintain mechanisms that ensure the integrity of information provided by suppliers, including requests for participation and tenders.

### **Article 15.5: Transitional Measures**

1. A Party that is a developing country (developing country Party) may, with the agreement of the other Parties, adopt or maintain one or more of the following transitional measures, during a transition period set out in, and in accordance with, Section J of the Party's Schedule to Annex 15-A:

- (a) a price preference programme, provided that the programme:
  - (i) provides a preference only for the part of the tender incorporating goods or services originating in that developing country Party; and
  - (ii) is transparent, and that the preference and its application in the procurement are clearly described in the notice of intended procurement;
- (b) an offset, provided that any requirement for, or consideration of, the imposition of the offset is clearly stated in the notice of

intended procurement;

- (c) the phased-in addition of specific entities or sectors; and
- (d) a threshold that is higher than its permanent threshold.

A transitional measure shall be applied in a manner that does not discriminate between the other Parties.

2. The Parties may agree to the delayed application of any obligation in this Chapter, other than Article 15.4.1(b) (General Principles), by the developing country Party while that Party implements the obligation. The implementation period shall be only the period necessary to implement the obligation.

3. Any developing country Party that has negotiated an implementation period for an obligation under paragraph 2 shall list in its Schedule to Annex 15-A the agreed implementation period, the specific obligation subject to the implementation period and any interim obligation with which it has agreed to comply during the implementation period.

4. After this Agreement has entered into force for a developing country Party, the other Parties, on request of that developing country Party, may:

- (a) extend the transition period for a measure adopted or maintained under paragraph 1 or any implementation period negotiated under paragraph 2; or
- (b) approve the adoption of a new transitional measure under paragraph 1, in special circumstances that were unforeseen.

5. A developing country Party that has negotiated a transitional measure under paragraphs 1 or 4, an implementation period under paragraph 2, or any extension under paragraph 4, shall take those steps during the transition period or implementation period that may be necessary to ensure that it is in compliance with this Chapter at the end of any such period. The developing country Party shall promptly notify the other Parties of each step in accordance with Article 27.7 (Reporting in relation to Party-specific Transition Periods).

6. Each Party shall give consideration to any request by a developing country Party for technical cooperation and capacity building in relation to that Party's implementation of this Chapter.



## **Article 15.6: 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 I of its Schedule to Annex 15-A the paper or electronic means through which the Party publishes the information described in paragraph 1 and the notices required by Article 15.7 (Notices of Intended Procurement), Article 15.9.3 (Qualification of Suppliers) and Article 15.16.3 (Post-Award Information).
3. Each Party shall, on request, respond to an inquiry relating to the information referred to in paragraph 1.

## **Article 15.7: Notices of Intended Procurement**

1. For each covered procurement, except in the circumstances described in Article 15.10 (Limited Tendering), a procuring entity shall publish a notice of intended procurement through the appropriate paper or electronic means listed in Annex 15-A. 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. The notices shall, if accessible by electronic means, be provided free of charge:
  - (a) for central government entities that are covered under Annex 15-A, through a single point of access; and
  - (b) for sub-central government entities and other entities covered under Annex 15-A, through links in a single electronic portal.
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 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 15.9 (Qualification of Suppliers), 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, unless that indication is publicly available through information published pursuant to Article 15.6.2 (Publication of Procurement Information).

4. For greater certainty, paragraph 3 does not preclude a Party from charging a fee for tender documentation if the notice of intended procurement includes all of the information set out in paragraph 3.

5. For the purposes of this Chapter, each Party shall endeavour to use English as the language for publishing the notice of intended procurement.

*Notice of Planned Procurement*

6. Procuring entities are encouraged to publish as early as possible in each fiscal year a notice regarding their future procurement plans (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 15.8: Conditions for Participation**

1. A procuring entity shall limit any conditions for participation in a covered procurement to those conditions that 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 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) 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 material, a Party, including its procuring entities, may exclude a supplier on grounds such as:
  - (a) bankruptcy or insolvency;
  - (b) false declarations;
  - (c) significant or persistent deficiencies in the performance of any substantive requirement or obligation under a prior contract or contracts; or
  - (d) failure to pay taxes.
5. For greater certainty, this Article is not intended to preclude a procuring entity from promoting compliance with laws in the territory in which the good is produced or the service is performed relating to labour rights as recognised by the Parties and set forth in Article 19.3 (Labour Rights), provided that such measures are applied in a manner consistent with Chapter 26 (Transparency and Anti-Corruption), and are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on

trade between the Parties.<sup>1</sup>

## **Article 15.9: 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.
2. No 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 another Party in its procurement; or
  - (b) use such registration system or qualification procedure to prevent or delay the inclusion of suppliers of other Parties on a list of suppliers or prevent those suppliers from being considered for a particular procurement.

### *Selective Tendering*

3. If a Party's measures authorise the use of selective tendering, and if a procuring entity intends to use selective tendering, the procuring entity shall:
  - (a) publish a notice of intended procurement that invites 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 15.7.3(a), (b), (d), (g), (h) and (i) (Notices of Intended Procurement).
4. 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 15.7.3 (c), (e) and (f) (Notices of Intended Procurement) to the qualified suppliers that it notifies as specified in Article 15.14.3(b) (Time Periods); and

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<sup>1</sup> The adoption and maintenance of these measures by a Party should not be construed as evidence that another Party has breached the obligations under Chapter 19 (Labour) with respect to labour.

- (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.

5. If the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 3, 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 4(c).

#### *Multi-Use Lists*

6. 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 15.6.2 (Publication of Procurement Information).

7. 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 6.

8. 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 15.14.2 (Time Periods), a procuring entity shall examine the request. The procuring entity shall not exclude the supplier from consideration in respect of the procurement unless the procuring 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*

9. 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.

10. If a procuring entity or other entity of a Party rejects a supplier's request for participation or application for inclusion on a multi-use list, ceases to recognise 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 15.10: Limited Tendering**

1. 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 any 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 Article 15.7 (Notices of Intended Procurement), Article 15.8 (Conditions for Participation), Article 15.9 (Qualification of Suppliers), Article 15.11 (Negotiations), Article 15.12 (Technical Specifications), Article 15.13 (Tender Documentation), Article 15.14 (Time Periods) or Article 15.15 (Treatment of Tenders and Awarding of Contracts). 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 authorised 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) if additional construction services that were not included in the initial contract but that were within the objectives of the original tender documentation have, due to unforeseeable circumstances, become necessary to complete the construction services described therein. However, the total value of contracts awarded for additional construction services may not exceed 50 per cent of the value of the initial contract;
- (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 organised 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 15.11: 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 15.7 (Notices of Intended Procurement); or
- (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.

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 15.12: 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, recognised national standards or building codes.
3. 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.
4. 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.
5. For greater certainty, a procuring entity may conduct market research in developing specifications for a particular procurement.
6. 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.

7. 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 15.13: 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) if there will be a public opening of tenders, the date, time and place for the opening;
- (e) any other terms or conditions relevant to the evaluation of tenders; and
- (f) any date for delivery of a good or supply of a service.

2. 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.

3. 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*

4. 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 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 15.14: 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; and
- (b) the time necessary for transmitting tenders by non-electronic means from foreign as well as domestic points if electronic means are not used.

#### *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 15.7 (Notices of Intended Procurement) 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) a state of urgency duly substantiated by the procuring entity renders impracticable the time period for tendering set out in paragraph 3; or
- (c) 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.

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 15.15: 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 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 notice and tender documentation and be submitted by a supplier who satisfies the conditions for participation.

4. 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, submits:

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

5. 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 15.16: 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 in paragraph 3, 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 15.17 (Disclosure of Information), 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.

#### *Publication of Award Information*

3. A procuring entity shall, promptly after the award of a contract for a covered procurement, publish in an officially designated publication a notice containing at least the following information:

- (a) a description of the good or service procured;
- (b) the name and address of the procuring entity;
- (c) the name and address of the successful supplier;
- (d) the value of the contract award;
- (e) the date of award or, if the procuring entity has already informed suppliers of the date of the award under paragraph 1, the contract date; and
- (f) the procurement method used and, if a procedure was used pursuant to Article 15.10 (Limited Tendering), a brief description of the circumstances justifying the use of that procedure.

#### *Maintenance of Records*

4. 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 15.10.3 (Limited Tendering), for at least three years after the award of a contract.

### **Article 15.17: Disclosure of Information**

#### *Provision of Information to Parties*

1. On request of any other Party, a Party shall provide promptly information sufficient to demonstrate whether a procurement was conducted fairly, impartially and in accordance with this Chapter, including, if applicable, information on the characteristics and relative advantages of the successful tender, without disclosing

confidential information. 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 authorisation 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 15.18: 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 15.19: Domestic Review**

1. Each Party shall maintain, establish or designate at least one impartial administrative or judicial authority (review authority) that is independent of its procuring entities to review, in a non-discriminatory, timely, transparent and effective manner, a challenge or complaint (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 all 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, if appropriate, 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, the 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 fashion, 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 15.20: Modifications and Rectifications of Annex**

1. A Party shall notify any proposed modification or rectification (modification) to its Schedule to Annex 15-A by circulating a notice in writing to the other Parties through the overall contact points designated under Article 27.5 (Contact Points). 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 Parties 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 to Annex 15-A, 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;  
and

(iv) changes in website references,

and no Party objects under paragraph 3 on the basis that the proposed modification does not concern subparagraph (a) or (b).

3. Any Party whose rights under this Chapter may be affected by a proposed modification that is notified under paragraph 1 shall notify the other Parties 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 any objecting Party shall make every attempt to resolve the objection through consultations.

5. If the modifying Party and any objecting Party resolve the objection through consultations, the modifying Party shall notify the other Parties of the resolution.

6. The Commission shall modify Annex 15-A to reflect any agreed modification.

#### **Article 15.21: Facilitation of Participation by SMEs**

1. The Parties recognise the important contribution that 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) endeavour 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 15.22: Cooperation**

1. The Parties recognise their shared interest in cooperating to promote international liberalisation of government procurement markets with a view to achieving enhanced understanding of their respective government procurement systems and to improving access to their respective markets.

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

- (a) facilitating participation by suppliers in government procurement, in particular, with respect to SMEs;
- (b) exchanging experiences and information, such as regulatory frameworks, best practices and statistics;
- (c) developing and expanding the use of electronic means in government procurement systems;
- (d) building capability of government officials in best government procurement practices;
- (e) institutional strengthening for the fulfilment of the provisions of this Chapter; and
- (f) enhancing the ability to provide multilingual access to procurement opportunities.

#### **Article 15.23: Committee on Government Procurement**

The Parties hereby establish a Committee on Government Procurement (Committee), composed of government representatives of each Party. On request of a Party, the Committee shall meet to address matters related to the implementation and operation of this Chapter, such as:

- (a) cooperation between the Parties, as provided for in Article 15.22 (Cooperation);

- (b) facilitation of participation by SMEs in covered procurement, as provided for in Article 15.21 (Facilitation of Participation by SMEs);
- (c) use of transitional measures; and
- (d) consideration of further negotiations as provided for in Article 15.24 (Further Negotiations).

#### **Article 15.24: Further Negotiations**

1. The Committee shall review this Chapter and may decide to hold further negotiations with a view to:

- (a) improving market access coverage through enlargement of procuring entity lists and reduction of exclusions and exceptions as set out in Annex 15-A;
- (b) revising the thresholds set out in Annex 15-A;
- (c) revising the Threshold Adjustment Formula in Section H of Annex 15-A; and
- (d) reducing and eliminating discriminatory measures.

2. No later than three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to achieving expanded coverage, including sub-central coverage<sup>2</sup>. Parties may also agree to cover sub-central government procurement prior to or following the start of those negotiations.

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<sup>2</sup> For those Parties that administer at the central level of government the kinds of procurement that other Parties may administer by sub-central entities, those negotiations may involve commitments at the central government level rather than at the sub-central government level.