

## **CHAPTER 16**

### **GOVERNMENT PROCUREMENT**

#### **Article 16.1 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;

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

“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;

“in writing” or “written” means any worded or numbered expression that can be read, reproduced and 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 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;

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

“procuring entity” means an entity listed in Annex 16A;

“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;

“standard” means a document approved by a recognised body that provides for common and repeated use, rules, guidelines or 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;

“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 16.2**

### **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 16A;
  - (b) by any contractual means, including: purchase; rental, lease or hire purchase, 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 16A, at the time of publication of a notice in accordance with Article 16.6 (Notices);
  - (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 16A, 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, 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 organisation, or funded by international grants, loans or other assistance if the applicable procedure or condition would be inconsistent with this Chapter.

#### *Schedules*

4. Each Party shall specify the following information in its Schedule to Annex 16A:
- (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; and

- (i) in Section I, the publication of information required under paragraph 2 of Article 16.5 (Information on the Procurement System).

### *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 16.3 General 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 the 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 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 16.4 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 the other Party and to the suppliers of the other Party, treatment no less favourable than the treatment that the Party, including its procuring entities, accords to domestic goods, services, and suppliers.
2. With respect to any measure regarding covered procurement, neither Party, including its procuring entities, shall:
  - (a) treat a locally established supplier less favourably 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 good or service offered by that supplier for a particular procurement is a good or service of the other Party.
3. All orders under contracts awarded for covered procurement shall be subject to paragraphs 1 and 2.

### *Use of Electronic Means*

4. When conducting covered procurement, a procuring entity shall use electronic means:
  - (a) for the publication of notices; and
  - (b) to the widest extent practicable, for information exchange and communication, the publication of tender documentation in procurement procedures, and for the submission of tenders.
5. 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, including establishment of the time of receipt and the prevention of inappropriate access.

### *Conduct of Procurement*

6. 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*

7. 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*

8. With regard to covered procurement, neither 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*

9. 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 those duties and charges, other import regulations or formalities, and measures affecting trade in services other than measures governing covered procurement.

**Article 16.5**  
**Information on the Procurement System**

1. Each Party shall:
  - (a) promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clause mandated by law or regulation and incorporated by reference in notices or tender documentation and procedures 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 the other Party, on request.
2. Each Party shall list in Section I of its Schedule to Annex 16A:
  - (a) the electronic or paper media in which the Party publishes the information described in paragraph 1; and
  - (b) the electronic media in which the Party publishes the notices required by Article 16.6 (Notices), paragraph 8 of Article 16.8 (Qualification of Suppliers), and paragraph 2 of Article 16.15 (Transparency of Procurement Information).



## **Article 16.6 Notices**

### *Electronic Publication of Procurement Notices*

1. For covered procurement, notices of intended procurement and notices of planned procurement shall be directly accessible by electronic means, free of charge:
  - (a) for central government entities that are covered under Annex 16A, through a single point of access, as listed in Section I of its Schedule to Annex 16A; and
  - (b) for sub-central government entities and other entities covered under Annex 16A, at least, through links in a single electronic portal, as listed in Section I of its Schedule to Annex 16A. If a Party maintains multiple points of access, it shall limit the number of points of access to the extent possible.

### *Notice of Intended Procurement*

2. For each covered procurement, except in the circumstances described in Article 16.12 (Limited Tendering), a procuring entity shall publish a notice of intended procurement. The notice shall remain readily accessible to the public, until at least the expiration of the time period indicated in the notice.
3. Unless 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;
  - (b) a description of the procurement, including the nature and the quantity of the goods or services to be procured, or the estimated quantity if the quantity is not known, and a description of any options;
  - (c) for recurring contracts, an estimate, if possible, of the timing of subsequent notices of intended procurement;
  - (d) the time-frame for delivery of goods or services or the duration of the contract;
  - (e) the procurement method that will be used and whether it will involve negotiation or electronic auction;

- (f) if applicable, the address and any final date for the submission of requests for participation in the procurement;
- (g) the address and the final date for the submission of tenders;
- (h) 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;
- (i) a list and a 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 those requirements are included in tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement; and
- (j) if, pursuant to Article 16.8 (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.

*Notice of Planned Procurement*

4. 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 16.7**  
**Conditions for Participation**

1. A procuring entity shall limit any conditions for participation in a covered procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant 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 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 on the conditions that the procuring entity has specified in advance in notices or tender documentation.
4. If there is supporting evidence, a Party, including its procuring entities, may exclude a supplier on grounds such as:
- (a) bankruptcy;
  - (b) false declarations;
  - (c) significant or persistent deficiencies in the performance of any substantive requirement or obligation under a prior contract or contracts;
  - (d) final judgments in respect of serious crimes or other serious offences;
  - (e) professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or
  - (f) failure to pay taxes.

## **Article 16.8**

### **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. Each Party shall ensure that:
  - (a) its procuring entities make efforts to minimise differences in their qualification procedures; and
  - (b) if its procuring entities maintain registration systems, the entities make efforts to minimise differences in their registration systems.
3. Neither Party, including its procuring entities, shall:
  - (a) adopt or apply any registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of the other Party in its procurement; or
  - (b) use that registration system or qualification procedure to prevent or delay the inclusion of suppliers of the other Party on a list of suppliers or prevent those suppliers from being considered for a particular procurement.
4. If a Party or a procuring entity maintains a supplier registration system, it shall:
  - (a) ensure that interested suppliers have access to information on the registration system through electronic means and that interested suppliers may request registration at any time; and
  - (b) if a request by a supplier is made, inform the supplier within a reasonable period of time of the decision to grant or reject this request, and if rejected, on request provide an explanation.

*Selective Tendering*

5. If a procuring entity intends to use selective tendering, the procuring entity shall:
  - (a) include in the notice of intended procurement at least the information specified in subparagraphs 3(a), 3(b), 3(e), 3(f), 3(i) and 3(j) of Article 16.6 (Notices) 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 subparagraphs 3(c), 3(d), 3(g) and 3(h) of Article 16.6 (Notices) to the qualified suppliers that it notifies as specified in subparagraph 3(b) of Article 16.10 (Time-Periods).

6. A procuring entity shall allow all qualified suppliers to participate in a particular procurement, unless the procuring entity states in the notice of intended procurement any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers.
7. If the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 5, 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 6.

*Multi-Use Lists*

8. A Party, including its procuring entities may establish or maintain a multi-use list provided that it makes continuously available by electronic means, in the appropriate medium listed in its Schedule to Annex 16A, a notice inviting interested suppliers to apply for inclusion on the list.
9. The notice provided for in paragraph 8 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 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; and
  - (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.
10. A Party, including its procuring entities, that establishes or maintains a multi-use list, shall:
  - (a) allow suppliers to apply at any time for inclusion on the multi-use list; and

- (b) 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.
- 11. If a supplier that is not included on a multi-use list submits a request for participation in a procurement based on the multi-use list and submits all required documents, within the time period provided for in paragraph 2 of Article 16.10 (Time-Periods), a procuring entity shall examine the request. The procuring entity shall not exclude the supplier from consideration in respect of the procurement on the grounds that the entity has insufficient time to examine the request, unless, in exceptional cases, due to the complexity of the procurement, the procuring entity is not able to complete the examination of the request within the time period allowed for the submission of tenders.

*Section B and Section C Entities*

- 12. A procuring entity covered under Sections B (Sub-Central Government Entities) or C (Other Entities) of a Party's Schedule to Annex 16A may use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement, provided that:
  - (a) the notice is published in accordance with paragraph 8 and includes the information required under paragraph 9, as much of the information required under paragraph 3 of Article 16.6 (Notices) as is available and a statement that it constitutes a notice of intended procurement or that only the suppliers on the multi-use list will receive further notices of procurement covered by the multi-use list; and
  - (b) the entity promptly provides to suppliers that have expressed an interest in a given procurement to the entity, sufficient information to permit them to assess their interest in the procurement, including all remaining information required in paragraph 3 of Article 16.6 (Notices), to the extent that information is available.
- 13. A procuring entity covered under Sections B (Sub-Central Government Entities) or C (Other Entities) of a Party's Schedule to Annex 16A may allow a supplier that has applied for inclusion on a multi-use list in accordance with paragraph 11 to tender in a given procurement, if there is sufficient time for the procuring entity to examine whether the supplier satisfies the conditions for participation.

*Information on Procuring Entity Decisions*

14. 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.
15. If a procuring entity or other entity of a Party rejects a supplier's request for participation in a procurement or application for inclusion on a multi-use list, ceases to 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 reasons for its decision.

**Article 16.9**

**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 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. If design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, if appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfil the requirements of the procurement by including words such as "or equivalent" in the tender documentation.
4. A procuring entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer or supplier, unless there is no other sufficiently

precise or intelligible way of describing the procurement requirements and provided that, in these cases, the procuring entity includes words such as "or equivalent" in the tender documentation.

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

#### *Tender Documentation*

8. 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, that documentation shall include a complete description of:
  - (a) the procurement, including the nature, and 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 assessment certification, plans, drawings or instructional materials;
  - (b) any conditions for participation, including information and documents that suppliers are required to submit;
  - (c) all evaluation criteria the entity will apply in the awarding of the contract, and the relative importance of those criteria;
  - (d) if 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) if 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) if there will be a public opening of tenders, the date, time and place for the opening and, if appropriate, the persons authorised 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 date for the delivery of a good or the supply of a service.
9. 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, 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.
10. 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.
11. 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 an interested or participating supplier, provided that the information does not give that supplier an advantage over other suppliers.

### *Modifications*

12. If, prior to the award of a contract, a procuring entity modifies the criteria or requirements set out in a notice of intended procurement or tender documentation provided to a participating supplier, or amends or reissues a notice or tender documentation, it shall transmit in writing all 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 tenders, as appropriate.

#### *Preliminary Market Research and Engagement*

13. For greater certainty, a procuring entity may, prior to publication of a notice of intended procurement, conduct market research and engagement with suppliers with a view to informing and developing technical specifications and other tender documentation for a particular procurement or informing suppliers of its procurement plans and requirements. A procuring entity shall take appropriate steps to ensure that suppliers participating in that market research or engagement do not gain an unfair advantage over other interested suppliers.

### **Article 16.10 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 factors such as:
  - (a) the nature and complexity of the procurement;
  - (b) the extent of subcontracting anticipated; and
  - (c) the time necessary for transmitting tenders by non-electronic means from foreign as well as domestic points if electronic means are not used.

#### *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. 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 for in paragraphs 4, 5, 8 and 9 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 to no less than 10 days if:
  - (a) the procuring entity has published a notice of planned procurement under Article 16.6 (Notices) 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) 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 paragraph 3 of Article 16.6 (Notices) 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 set out in paragraph 3 impracticable.
  
5. 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.
- 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 set out in paragraph 3 to less than 10 days from the date on which the notice of intended procurement is published.
- 7. A procuring entity shall require all interested or participating suppliers to submit requests for participation or tenders in accordance with a common deadline. These time periods, and any extension of these time periods, shall be the same for all interested or participating suppliers.
- 8. Notwithstanding any other provision in this Article, if a procuring entity purchases commercial goods or services, or any combination thereof, it may reduce the time-period for tendering established in accordance with paragraph 3 to not less than 13 days, provided that it publishes by electronic means, at the same time, both the notice of intended procurement and the tender documentation. In addition, if the entity accepts tenders for commercial goods or services by electronic means, it may reduce the time-period established in accordance with paragraph 3 to not less than 10 days.
- 9. If a procuring entity covered under Sections B (Sub-Central Government Entities) or C (Other Entities) of a Party's Schedule to Annex 16A has selected all or a limited number of qualified suppliers, the time-period for tendering may be fixed by agreement between the procuring entity and the selected suppliers. In the absence of agreement, the period shall not be less than 10 days.

#### **Article 16.11 Negotiations**

- 1. A Party may provide for its procuring entities to conduct negotiations if:
  - (a) the procuring entity has indicated its intent to conduct negotiations in the notice of intended procurement required under paragraph 2 of Article 16.6 (Notices); 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 16.12 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 16.6 (Notices) through 16.8 (Qualification of Suppliers), paragraphs 8 through 12 of Article 16.9 (Technical Specifications and Tender Documentation), and Articles 16.10 (Time-Periods), 16.11 (Negotiations), 16.13 (Electronic Auctions) and 16.14 (Treatment of Tenders and Awarding of Contracts) only under any of the following circumstances:
  - (a) if:
    - (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 requirements of the tender documentation are not substantially modified;
  - (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 of goods or services that were not included in the initial procurement if a change of supplier for those 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; and
  - (ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;
- (d) for goods purchased on a commodity market;
- (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 of the first good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs. Subsequent procurements of these newly developed goods or services, however, shall be subject to this Chapter;
- (f) for 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, bankruptcy or receivership, but not for routine purchases from regular suppliers;
- (g) if a contract is awarded to a 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

- (h) 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.
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 good or service procured, and a statement that indicates the circumstances and conditions described in paragraph 1 that justified the use of limited tendering.

### **Article 16.13 Electronic Auctions**

If 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, including the mathematical formula, 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 if 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 16.14 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. A procuring entity shall not penalise any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.

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

#### *Awarding of Contracts*

4. To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the notices and tender documentation and be submitted by a supplier who satisfies the conditions for participation.
5. Unless a procuring entity determines that it is not in the public interest to award a contract, it shall award the contract to the supplier that the procuring entity has determined to be 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.
6. If a procuring entity receives a tender with a price that is abnormally lower than the prices in other tenders submitted, it may verify with the supplier that it satisfies the conditions for participation and is capable of fulfilling the terms of the contract.
7. A procuring entity shall not use options, cancel a covered procurement, or modify or terminate awarded contracts in a manner that circumvents the obligations of this Chapter.

### **Article 16.15 Transparency of Procurement Information**

#### *Information Provided to Suppliers*

1. A procuring entity shall promptly inform participating suppliers of the contract award decision and, on the request of a supplier, shall do so in writing. Subject to paragraphs 2 and 3 of Article 16.16 (Disclosure of Information), 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 an appropriate electronic medium listed in Annex 16A and the information shall remain readily accessible for a reasonable period of time. The notice shall include 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 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 procurement method used, and in cases where limited tendering was used in accordance with Article 16.12 (Limited Tendering), 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 16.12 (Limited Tendering); and
  - (b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.

## **Article 16.16 Disclosure of Information**

### *Provision of Information to Parties*

1. On request of the other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Chapter, including information on the

characteristics and relative advantages of the successful tender. In cases where release of the information would prejudice competition in future tenders, the Party that receives the information shall not disclose it to any supplier, except after consulting with, and obtaining the agreement of the Party that provided the information.

*Non-Disclosure of Information*

2. Notwithstanding any other provision of this Chapter, a Party, including its procuring entities, shall not 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 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 16.17**  
**Environmental, Social and Labour Considerations**

A Party, including its procuring entities, may:

- (a) take into account environmental, social and labour considerations throughout the procurement procedure, provided they are:
  - (i) based on objectively verifiable criteria;
  - (ii) non-discriminatory; and
  - (iii) indicated in the notice of intended procurement or tender documentation; and
- (b) take appropriate measures to ensure compliance with its obligations in the fields of environmental, social and labour law, provided they are non-discriminatory.

**Article 16.18**  
**Ensuring Integrity in Procurement Practices**

1. Each Party shall ensure that criminal or administrative measures exist to address corruption, fraud, and other illegal acts in its government procurement.
2. These measures may include procedures to render ineligible for, or exclude from, 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 corrupt, fraudulent or other illegal acts in relation to government procurement in the Party's territory. When applying those procedures, each party, including its procuring entities:
  - (a) may consider the gravity of the supplier's acts or omissions, and any remedial measures or mitigating factors; and
  - (b) shall treat a supplier of the other Party with due process, in accordance with its government procurement policies and frameworks.
3. 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.
4. Each Party may put in place policies or procedures that require successful suppliers to maintain and enforce appropriate measures, such as internal controls, business ethics, and compliance programmes, for preventing and detecting corruption, fraud, and other illegal acts, provided they are non-discriminatory.

**Article 16.19**  
**Domestic Review Procedures**

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 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.
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. 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 whose procurement is the subject of the complaint.
5. 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.
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) a procuring entity shall respond in writing to a supplier's complaint and provide all relevant documents to the review authority;
  - (b) 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;
  - (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 authority shall provide its decisions or recommendations in a timely fashion, in writing, with an explanation of the basis for each decision or recommendation.
7. Each Party shall adopt or maintain procedures that provide for:
- (a) prompt interim measures to preserve the supplier's opportunity to participate in the procurement; and
  - (b) corrective action that may include compensation under paragraph 5.

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 16.20** **Modifications and Rectifications to Annex**

1. A Party may modify or rectify its Schedule to Annex 16A, pursuant to paragraphs 2 through 10.

##### *Notification of Proposed Modification*

2. A Party shall notify any proposed modification or rectification (collectively referred to as a "modification") to its Schedule to Annex 16A in writing to the other Party.
3. The notification of proposed modification shall contain:
- (a) for any proposed withdrawal of an entity from its Schedule to Annex 16A in exercise of its rights on the grounds that government control or influence over the procuring entity's covered procurement has been effectively eliminated, evidence of that elimination; or
  - (b) for any other proposed modification, information as to the likely consequences of the change for the coverage provided for in this Chapter; and
  - (c) a proposal for any necessary compensatory adjustments pursuant to paragraph 4.

### *Compensatory Adjustments*

4. Subject to paragraphs 5 and 6, a Party shall provide appropriate 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.
5. The Parties may agree another form of resolution as an alternative to compensatory adjustments.
6. A Party is not required to provide compensatory adjustments to the other Party if the proposed modification:
  - (a) covers 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) is minor or of a purely formal nature, including a rectification as described in paragraph 7.

### *Rectifications*

7. The following modifications to a Party's Schedule to Annex 16A shall be considered a rectification, provided that they do not affect the coverage provided for in this Chapter:
  - (a) a change in the name of a procuring entity;
  - (b) a merger of two or more procuring entities listed within a Section of a Party's Schedule to Annex 16A;
  - (c) the separation of a procuring entity listed in a Party's Schedule to Annex 16A into two or more procuring entities that are added to the procuring entities listed in the same Section of the Annex; and
  - (d) changes in website references.

### *Objection to Notification*

8. If the other Party disputes that:
  - (a) a compensatory adjustment proposed under sub-paragraph 3(c) is adequate to maintain a level of coverage comparable to the coverage that existed prior to the modification;
  - (b) the proposed modification covers a procuring entity over which the Party has effectively eliminated its control or influence; or

(c) the proposed modification is a change provided for in paragraph 6(b), it shall notify the modifying Party of its objection in writing within 45 days of receipt of the notification of proposed modification referred to in paragraphs 2 and 3 or shall be deemed to have agreed to the proposed modification.

9. Where a Party submits an objection pursuant to paragraph 8, it shall set out, as may apply, the reasons why it believes:
- (a) the modification is not a change provided for in subparagraphs 6(a) or 6(b) and describe the effect of the proposed modification on the coverage provided for in the Chapter; and
  - (b) a compensatory adjustment proposed under subparagraph 3(c) is not adequate to maintain a level of coverage comparable to the coverage that existed prior to the modification.

#### *Implementation of Modifications*

10. The Joint Committee shall adopt a modification to the Schedule to Annex 16A in accordance with paragraphs 2 and 3 of Article 16.2 (Functions of the Joint Committee – Administrative and Institutional Provisions) to reflect any agreed modification.

### **Article 16.21 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) make all tender documentation available free of charge;
  - (c) conduct procurement by electronic means or through other new information and communication technologies;

- (d) consider the size, design, and structure of the procurement, including the use of subcontracting by SMEs;
- (e) seek opportunities to simplify administrative processes; and
- (f) require prompt payment by procuring entities, and that procuring entities encourage its use in subcontracting.

### **Article 16.22** **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 and best practices, including on the use and adoption of measures to promote environmental, social and labour considerations in government procurement;
  - (c) exchanging government procurement statistics and data;
  - (d) developing and expanding the use of electronic means in government procurement systems;
  - (e) institutional strengthening for the fulfilment of the provisions of this Chapter;
  - (f) encouraging greater participation by women in government procurement to the extent possible; and
  - (g) exchanging information relating to government procurement opportunities in each Party.