

## CHAPTER 9 GOVERNMENT PROCUREMENT

### ARTICLE 9. 1: DEFINITIONS

For the purposes of this Chapter:

**commercial goods and 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;

**conditions for participation** means registration, qualification, and other pre-requisites for participation in a procurement;

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

**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;

**measure** means any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement;

**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 covered under a Party's Annex 9-A;

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

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

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

**standard** means a document approved by a recognized 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 labeling 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 goods or services; and

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

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

ARTICLE 9.2: SCOPE

1. This Chapter shall apply to any measure of a Party regarding covered procurement.
2. For the purposes of this Chapter, **covered procurement** means a government procurement:
  - (a) of goods, services or any combination thereof
    - (i) as specified in Annex 9-A;
    - (ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;
  - (b) by any contractual means, including purchase, lease, and rental or hire purchase, with or without an option to buy;
  - (c) for which the value, as estimated in accordance with paragraphs 5 and 6, equals or exceeds the relevant threshold specified in Annex 9-A at the time of publication of a notice in accordance with Article 9.6;
  - (d) by a procuring entity; and

(e) that is not otherwise excluded from coverage in paragraph 3 or in Annex 9-A.

3. This Chapter shall not apply to:

- (a) the acquisition or rental of land, existing buildings, or other immovable property or rights thereon;
- (b) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, subsidies;
- (c) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, or services related to the public debt, including loans and government bonds, notes and other securities. For greater certainty, this Chapter shall not apply to procurement of banking, financial, or specialized services related to the following activities:
  - (i) the incurring of public indebtedness; or
  - (ii) public debt management;
- (d) public employment contracts;
- (e) procurement 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, or under the particular procedure or condition of an international organization, or funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent with this Chapter;
- (f) procurement for the direct purpose of providing foreign assistance; and
- (g) purchases for a procuring entity from another public entity, provided that the procurement is directly related to the legal object of the supplying public entity.

4. Where a procuring entity, in the context of covered procurement, requires persons not listed in Annex 9-A to procure in accordance with particular requirements, Article 9.4 shall apply *mutatis mutandis* to such requirements.

#### *Valuation*

5. In estimating the value of a procurement for the purposes of ascertaining whether it is a covered procurement, a procuring entity shall:

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

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

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

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

7. Where the estimated maximum total value of a procurement over its entire duration is not known, the procurement shall be covered by this Chapter.

#### ARTICLE 9.3: SECURITY AND GENERAL EXCEPTIONS

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

2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where the same conditions prevail or a disguised restriction on trade between the Parties, nothing in this Chapter shall be construed to prevent a Party from imposing or enforcing measures:

- (a) necessary to protect public morals, order or safety;
- (b) necessary to protect human, animal, or plant life or health;
- (c) necessary to protect intellectual property; or
- (d) relating to goods or services of persons with disabilities, philanthropic institutions, or prison labor.

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

#### ARTICLE 9.4: 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 offering such goods or services, treatment no less favourable than that accorded to domestic goods, services and suppliers.

2. With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:

- (a) treat a locally established supplier less 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 goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

##### *Use of Electronic Means*

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

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

##### *Measures Not Specific to Procurement*

4. The provisions of 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.

##### *Offsets*

5. With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose, or enforce offsets at any stage of the procurement except as otherwise provided in Annex 9-A.

### *Rules of Origin*

6. For the purposes of covered procurement, each Party shall apply to covered procurements of goods or services, imported from or supplied by the other Party, the rules of origin that it applies in the normal course of trade to those goods or services.

### *Conduct of Procurement*

7. 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.

### ARTICLE 9.5: INFORMATION ON THE PROCUREMENT SYSTEM

1. Each Party shall promptly publish its procurement laws, regulations, procedures, policy guidelines, judicial decisions and administrative rulings of general application regarding covered procurements, as well as and any changes or additions to this information, in electronic or paper media that are widely disseminated and remain accessible to the public.

2. Each Party shall list in Annex 9-B the electronic or paper media in which the Parties publishes the information described in paragraph 1.

3. Each Party shall promptly reply to any request from the other Party for an explanation of any matter relating to its procurement laws, regulations, procedures, policy guidelines, judicial decisions and administrative rulings of general application.

### ARTICLE 9.6: PUBLICATION OF NOTICES

#### *Notice of Intended Procurement*

1. For each covered procurement, except in the circumstances described in Article 9.11, a procuring entity shall publish a notice inviting interested suppliers to submit tenders or, where appropriate, applications for participation in the procurement. Any such notice shall be published in an electronic or paper medium that is widely disseminated and readily accessible to the public, free of charge, for the entire period established for tendering. Each Party shall ensure for covered procurements that its central government procuring entities, as set out in Section A of Annex 9-A, publish notices of intended procurement in a single point of entry to an electronic publication, that is accessible through the Internet or a comparable network.

2. The Parties shall encourage their procuring entities covered under Section B or C of Annex 9-A, to publish their notices by electronic means free of charge through their respective single point of access.

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

- (a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and their cost and terms of payment, if any;
- (b) a description of the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity;
- (c) the time-frame for delivery of goods or services or the duration of the contract;
- (d) the procurement method that will be used and whether it will involve negotiation or electronic auction;
- (e) where applicable, the address and any final date for the submission of requests for participation in the procurement;
- (f) the address and the final date for the submission of tenders;
- (g) a list and brief description of any conditions for participation of suppliers, including any requirements for specific documents or certifications to be provided by suppliers in connection therewith, unless such requirements are included in tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement;
- (h) where, pursuant to Article 9.8, a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, where applicable, any limitation on the number of suppliers that will be permitted to tender;
- (i) the language or languages in which tenders or requests for participation may be submitted, in case they may be submitted in a language other than an official language of the Party of the procuring entity; and
- (j) an indication that the procurement is covered by this Chapter.

#### *Notice of Planned Procurement*

4. Each Party shall encourage its procuring entities to publish, prior to each fiscal year or as early as possible in each fiscal year, a notice regarding their procurement plans for that fiscal year. The notice should include the subject-matter of the procurement and the planned date of the publication of the notice of the intended procurement.

#### ARTICLE 9.7: CONDITIONS FOR PARTICIPATION

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

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

- (a) shall evaluate the financial, 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;
- (b) shall base its evaluation solely on the conditions that a procuring entity has specified in advance in notices or tender documentation;
- (c) shall not impose the condition that, in order for a supplier to participate in a procurement or be awarded a contract, the supplier has previously been awarded one or more contracts by a procuring entity of that Party or that the supplier has prior work experience in the territory of that Party; and
- (d) may require prior experience where essential to meet the requirements of the procurement.

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

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

ARTICLE 9.8: REGISTRATION AND 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 minimize differences in their qualification procedures; and
- (b) where its procuring entities maintain registration systems, the entities make efforts to minimize differences in their registration systems.

3. A Party, including its procuring entities, shall not adopt or apply any registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of the other Party in its procurement.

#### *Selective Tendering*

4. Where a Party's law allows the use of selective tendering procedures, a procuring entity shall, for each intended procurement:

- (a) include in the notice of intended procurement at least the information specified in Article 9.6.3 subparagraphs (a), (b), (d), (e), (g), (h), (i) and (j) and invite suppliers to submit a request for participation; and
- (b) provide, by the commencement of the time-period for tendering, at least the information in Article 9.6.3 subparagraphs (c), and (f) regarding the qualified suppliers that it notifies as specified in Articles 9.9.3(b).

5. 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.

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

#### *Multi-Use Lists*

7. A procuring entity may establish a multi-use list, provided that the entity annually publishes or otherwise makes available continuously in electronic form 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 will use to verify a supplier's satisfaction of the conditions;
- (c) the name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the list;

- (d) the period of validity of the list and the means for its renewal or termination, or where the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list; and
- (e) an indication that the list may be used for procurement covered by this Chapter.

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

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

- (a) states the period of validity and that further notices will not be published; and
- (b) is published by electronic means and is made available continuously during the period of its validity.

#### ARTICLE 9.9: TIME LIMITS

1. A procuring entity shall, consistent with its own reasonable needs, provide sufficient time for suppliers to prepare and submit requests for participation and responsive tenders, taking into account such factors as:

- (a) the nature and complexity of the procurement;
- (b) the extent of subcontracting anticipated; and
- (c) whether tenders can be received by electronic means.

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

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 15 days from the date of publication of the notice of intended procurement. Where a state of urgency duly substantiated by the procuring entity renders this time-period impracticable, the time-period may be reduced to not less than 10 days.

3. Except as provided for in paragraphs 4 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 entity notifies suppliers that they will be invited to submit tenders whether or not it uses a multi-use list.

4. A procuring entity may reduce the time-period for tendering set out in paragraph 3 to not less than 10 days where:

- (a) the procuring entity has published a notice in an electronic medium listed in Annex 9-B, containing the information specified in Article 9.6.3 at least 40 days and not more than 12 months in advance;
- (b) in the case of the second or subsequent publication of notices for procurement of a recurring nature; or
- (c) a state of urgency duly substantiated by the procuring entity renders such time-period 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) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and
- (c) the tenders can be received by electronic means by the procuring entity.

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. Notwithstanding any other time-period in this Article, where a procuring entity purchases commercial goods or services, it may reduce the time-period for tendering set out in 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. Where the entity also accepts tenders for commercial goods and services by electronic means, it may reduce the time-period set out in paragraph 3 to not less than 10 days.

8. Where a procuring entity in Sections B or C of Annex 9-A has selected all or a limited number of qualified suppliers, the time-period for tendering may be fixed by mutual agreement between the procuring entity and the selected suppliers. In the absence of agreement, the period shall not be less than 10 days.

#### ARTICLE 9.10: INFORMATION ON INTENDED PROCUREMENTS

##### *Tender Documentation*

1. A procuring entity shall promptly make available to any supplier interested in participating in a procurement tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders.

2. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:

- (a) the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity and any requirements to be fulfilled, including any technical specifications, conformity assessment certification, plans, drawings or instructional materials;
- (b) any conditions for participation of suppliers, including any financial guarantees, information, and documents that suppliers are required to submit;
- (c) all evaluation criteria to be considered in the awarding of the contract, and, except where price is the sole criterion, the relative importance of such criteria;
- (d) where the procuring entity will conduct the procurement by electronic means, any authentication and encryption requirements or other requirements related to the submission of information by electronic means;
- (e) where the procuring entity will hold an electronic auction, the rules, including identification of the elements of the tender related to the evaluation criteria, on which the auction will be conducted;
- (f) where there will be a public opening of tenders, the date, time, and place for the opening of tenders, where appropriate, the persons authorized to be present;
- (g) any other terms or conditions, including terms of payment and any limitation on the means by which tenders may be submitted, e.g., paper or electronic means; and
- (h) any dates for the delivery of goods or the supply of services.

3. A procuring entity shall promptly reply to any reasonable request for relevant information by any interested or participating supplier, provided that such information does not give that supplier an advantage over other suppliers.

4. If, in tendering procedures, an entity allows tenders to be submitted in several languages, one of those languages shall be English.

#### *Technical Specifications*

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

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

- (a) specify the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics; and
- (b) base the technical specification on international standards, where such exist; otherwise, on national technical regulations, recognized national standards or building codes.

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

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

9. 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.

10. For greater certainty, a procuring entity may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.

#### *Modifications*

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

- (a) to all the suppliers that are participating at the time the information is modified, if the identities of such suppliers are known, and, in all other cases, in the same manner that the original information was made available; and
- (b) in adequate time to allow such suppliers to modify and re-submit amended tenders, as appropriate.

#### ARTICLE 9.11: NEGOTIATION

1. A Party may provide for its procuring entities to conduct negotiations:

- (a) where the entity has indicated its intent to conduct negotiations in the notice of intended procurement as set forth in Articles 9.6.1 through 9.6.3; or

- (b) where it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice of intended procurement or tender documentation.

2. A procuring entity shall:

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

#### ARTICLE 9.12: LIMITED TENDERING

1. Provided that it does not use this provision for the purposes 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 9.6, 9.7, 9.8, 9.9, Articles 9.10.1 through 9.10.4, 9.10.11, and Articles 9.11, 9.13, 9.14, only under any of the following circumstances:

- (a) provided that the requirements of the tender documentation are not substantially modified, where:
  - (i) no tenders were submitted or no suppliers requested participation;
  - (ii) no tenders that conform to the essential requirements of the tender documentation were submitted;
  - (iii) no suppliers satisfied the conditions for participation; or
  - (iv) the tenders submitted have been collusive.
- (b) where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons:
  - (i) the requirement is for a work of art;
  - (ii) the protection of patents, copyrights or other exclusive rights; or
  - (iii) due to an absence of competition for technical reasons.
- (c) for additional deliveries by the original supplier of goods or services that were not included in the initial procurement, where:

- (i) a change of supplier for such additional goods or services cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; and
  - (ii) such separation would cause significant inconvenience or substantial duplication of costs for the procuring entity;
- (d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;
- (e) for goods purchased on a commodity market;
- (f) where a procuring entity procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. Original development of a first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs;
- (g) for purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership or bankruptcy, but not for routine purchases from regular suppliers;
- (h) where a contract is awarded to a winner of a design contest provided that:
- (i) the contest has been organized in a manner that is consistent with the principles of this Chapter, in particular relating to the publication of a notice of intended procurement; and
  - (ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner;
- and
- (i) where additional construction services, which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseen circumstances, become necessary to complete the construction services described therein. In such cases, the total value of contracts awarded for additional construction services may not exceed 50 percent of the amount of the initial contract.

2. For each contract awarded under paragraph 1, a procuring entity shall prepare a written report that includes:

- (a) the name of the procuring entity;
- (b) the value and kind of goods or services procured; and
- (c) a statement indicating the circumstances and conditions described in paragraph 1 that justify the use of limited tendering.

#### ARTICLE 9.13: ELECTRONIC AUCTIONS

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

- (a) the automatic evaluation method, 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 where the contract is to be awarded on the basis of the most advantageous tender; and
- (c) any other relevant information relating to the conduct of the auction.

#### ARTICLE 9.14: TREATMENT OF TENDERS AND AWARDING OF CONTRACTS

##### *Receipt and Opening 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 shall treat all tenders in confidence until at least the opening of the 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. Where a procuring entity provides suppliers with opportunities to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunities to all participating suppliers.

##### *Awarding of Contracts*

4. A procuring entity shall require that in order to be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the notices and tender documentation and be from a supplier that satisfies the conditions for participation.
5. Unless a procuring entity determines that it is not in the public interest to award a contract, the entity shall award the contract to the supplier that the entity has determined to be



capable of fulfilling the term of the contract and, based solely on the evaluation criteria specified in the notices and tender documentation, has submitted:

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

6. Where 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 terminate or modify awarded contracts in a manner that circumvents this Chapter.

#### ARTICLE 9.15: DISCLOSURE OF INFORMATION

##### *Provision of Information to Parties*

1. On request of any 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 procuring entity shall not provide information to particular suppliers that might prejudice fair competition between suppliers.

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

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

#### ARTICLE 9.16: POST-AWARD INFORMATION

1. A procuring entity shall promptly inform suppliers that have submitted tenders of its contract award decision. Subject to paragraphs 2 and 3 of Article 9.15, a procuring entity shall, upon request, provide an unsuccessful supplier with the reasons that the entity did not select that supplier's tender and the relative advantages of the successful supplier's tender.

2. Not later than 72 days after the award of each contract covered by this Chapter, a procuring entity shall publish a notice in the appropriate paper or electronic medium listed in Annex 9-B. Where the entity publishes the notice only in an electronic medium, 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 goods or services procured;
- (b) the name and address of the procuring entity;
- (c) the name and address of the successful supplier;
- (d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;
- (e) the date of award or the contract date; and
- (f) the type of procurement method used, and in cases where limited tendering was used in accordance with Article 9.12, a description of the circumstances justifying the use of limited tendering.

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 9.12 ; and
- (b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.

#### ARTICLE 9. 17: DOMESTIC REVIEW PROCEDURES

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

- (a) a breach of the Chapter; or

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

The procedural rules for all challenges 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 has had, an interest, that there has been a breach or a failure as referred to in paragraph 1, the Party of the procuring entity conducting the procurement shall encourage the entity and the supplier to seek resolution of the complaint through consultations. The entity shall accord impartial and timely consideration to any such complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement or its right to seek corrective measures under the administrative or judicial review procedure.

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

4. Each Party shall maintain at least one impartial administrative or judicial authority (hereinafter referred to as "review body") that is independent of its procuring entities to receive and review, in a non-discriminatory, timely, transparent and effective manner, complaints that a supplier of a Party submits, in accordance with the Party's law, relating to a covered procurement.

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

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

- (a) the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body;
- (b) the participants to the proceedings (hereinafter referred to as "participants") shall have the right to be heard prior to a decision of the review body being made on the challenge;
- (c) the participants shall have the right to be represented and accompanied;
- (d) the participants shall have access to all proceedings;
- (e) the participants shall have the right to request that the proceedings take place in public and that witnesses may be presented; and

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

#### ARTICLE 9.18: RECTIFICATIONS AND MODIFICATIONS TO COVERAGE

1. A Party may make rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to its schedules in Annex 9-A, provided that it notifies the other Party in writing and the other Party does not object in writing within 30 days from notification. A Party that makes such a rectification or minor amendment need not provide compensatory adjustments to the other Party.

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

- (a) it notifies the other Party in writing and simultaneously offers acceptable compensatory adjustments to the other Party to maintain a level of coverage comparable to that existing prior to the modification, where necessary; and
- (b) no objection in writing was submitted by the other Party within 30 days from notification.

3. A Party need not provide compensatory adjustments when proposing a modification on the grounds that government control or influence over the entity's covered procurement has been effectively eliminated. Where a Party objects to the assertion that such government control or influence has been effectively eliminated, the objecting Party may request further information or consultations with a view of clarifying the nature of any government control or influence and of reaching agreement on the procuring entity's continued coverage under this Chapter.

#### ARTICLE 9.19: SMALL AND MEDIUM ENTERPRISES' PARTICIPATION

1. The Parties recognize the importance of the participation of SMEs in government procurement.

2. The Parties also recognize the importance of business alliances between suppliers of each Party, and in particular of SMEs, including the joint participation in tendering procedures.

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

#### ARTICLE 9.20: COOPERATION

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

2. The Parties shall cooperate in matters such as:

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

#### ARTICLE 9.21: SUBCOMMITTEE ON GOVERNMENT PROCUREMENT

1. The Parties hereby establish a Subcommittee on Government Procurement comprising representatives of each Party.

2. The functions of the Subcommittee shall be the following:

- (a) evaluate the implementation of this Chapter and recommend appropriate activities to the Parties;
- (b) coordinate cooperation activities;
- (c) evaluate and follow up the activities related to cooperation that may be presented by the Parties; and
- (d) consider further negotiations aimed at broadening the coverage of this Chapter.

3. The Subcommittee shall meet upon request of a Party or as mutually agreed. The meetings may also be held, as necessary, by telephone, videoconference or other means, upon agreement of the Parties.

ARTICLE 9.22: FURTHER NEGOTIATIONS

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