

## **CHAPTER 11**

### **GOVERNMENT PROCUREMENT**

#### ARTICLE 11.1

##### ***Definitions***

For the purposes of this Chapter:

- (a) “commercial goods or services” means goods or services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes;
- (b) “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);
- (c) “days” means calendar days;
- (d) “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;
- (e) “in writing or written” means any worded or numbered expression that can be read, reproduced, and later communicated, including electronically transmitted and stored information;
- (f) “limited tendering” means a procurement procedure whereby the procuring entity contacts a supplier or suppliers of its choice;
- (g) “measure” means any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement;
- (h) “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;
- (i) “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;
- (j) “notice of planned procurement” means a notice published by a procuring entity regarding its future procurement plans;
- (k) “offset” means any condition or undertaking that encourages local development or improves a State Party’s balance-of-payments accounts,

such as the use of domestic content, the licensing of technology, investment, counter-trade, and similar actions or requirements;

- (l) “open tendering” means a procurement procedure where all interested suppliers may submit a tender;
- (m) “person” means a natural person or a juridical person;
  - (i) “natural person” means a person who has the nationality, or is a permanent resident, of a State Party in accordance with its applicable law;
  - (ii) “juridical person” means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;
- (n) “procuring entity” means an entity covered under Appendices 1 to 3 to Annex XVIII (Government Procurement);
- (o) “qualified supplier” means a supplier that a procuring entity recognises as having satisfied the conditions for participation;
- (p) “selective tendering” means a procurement procedure whereby only qualified suppliers are invited by the procuring entity to submit a tender;
- (q) “services” includes construction services as defined in subparagraph (b), unless otherwise specified;
- (r) “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;
- (s) “supplier” means a person or group of persons that provides or could provide goods or services; and
- (t) “technical specification” means a tendering requirement that:
  - (i) lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or
  - (ii) addresses terminology, symbols, packaging, marking, or labelling requirements, as they apply to goods or services.

## ARTICLE 11.2

### *Scope and Coverage*

1. This Chapter applies to covered procurement for governmental purposes:
  - (a) of goods, services, or any combination thereof:
    - (i) as specified in the Appendices to Annex XVIII (Government Procurement); and
    - (ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;
  - (b) by any contractual means, including purchase, lease, rental or hire purchase, with or without an option to buy;
  - (c) for which the value, as estimated in accordance with the rules specified in Article 11.3 (Valuation of Contracts) and Appendix 9 to Annex XVIII (Government Procurement) equals or exceeds the relevant threshold specified in Appendices 1 to 3 to Annex XVIII (Government Procurement) at the time of publication of a notice in accordance with Article 11.12 (Notices);
  - (d) by a procuring entity as specified in the Appendices to Annex XVIII (Government Procurement); and
  - (e) that is not otherwise excluded from coverage pursuant to paragraph 2 or Annex XVIII (Government Procurement).
2. This Chapter does not apply to:
  - (a) 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 State Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives;
  - (c) procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions or services related to 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 a 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 a particular procedure or condition of an international organisation, or funded by international grants, loans or other assistance where the applicable procedure or condition would be inconsistent with this Chapter.

### ARTICLE 11.3

#### *Valuation of Contracts*

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

- (a) neither divide a procurement into separate procurements nor use a particular 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, taking into account all forms of remuneration, including:
  - (i) premiums, fees, commissions, interest; and
  - (ii) where the procurement provides for the possibility of option clauses, the total value of such options.

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

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

3. Where a State Party’s domestic laws and regulations allow for contracts to be concluded for an indefinite period and a total price is not specified, the basis for valuation of such contracts shall be based on the estimated monthly instalment multiplied by 48.

#### ARTICLE 11.4

##### ***Security and General Exceptions***

1. Nothing in this Chapter shall be construed to prevent a State Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition, or war materials, or to procurement indispensable for national security or for national defence purposes.
2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the State Parties where the same conditions prevail or a disguised restriction on trade between the State Parties, nothing in this Chapter shall be construed to prevent a State 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, including environmental measures;
  - (c) necessary to protect intellectual property; or
  - (d) relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour.

#### ARTICLE 11.5

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

1. With respect to any measure related to covered procurement:
  - (a) Each EFTA State, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the MERCOSUR States and to the suppliers of the MERCOSUR States offering such goods or services, treatment no less favourable than the treatment accorded to its own goods, services and suppliers;
  - (b) Each MERCOSUR State, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the EFTA States and to the suppliers of the EFTA State offering such goods or services, treatment no less favourable than the treatment accorded to its own goods, services and suppliers.
2. With respect to any measure regarding covered procurement each State Party, including its procuring entities, shall not:
  - (a) treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or

- (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of another State Party.
- 3. This Article shall not apply to:
  - (a) customs duties and charges of any kind imposed on, or in connection with, importation;
  - (b) the method of levying such duties and charges; or
  - (c) other import regulations or formalities and measures affecting trade in services different to the ones which specifically regulate public procurement covered under this Chapter.

#### ARTICLE 11.6

##### *Use of Electronic Means*

1. The State Parties shall, to the extent possible, endeavour to use electronic means of communication to permit efficient dissemination of information on government procurement, particularly as regards tender opportunities offered by entities, in accordance with the principles of transparency and non-discrimination.
2. 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.

## ARTICLE 11.7

### ***Conduct of Procurement***

1. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:
  - (a) is consistent with this Chapter, using procedures such as open tendering, selective tendering, and limited tendering;
  - (b) avoids conflicts of interest; and
  - (c) prevents corrupt practices.
2. The State Parties may establish or maintain sanctions against corruptive practices according to their domestic laws and regulations.

## ARTICLE 11.8

### ***Rules of Origin***

For the purposes of covered procurement, no State Party may apply rules of origin to goods imported from another State Party that are different from the rules of origin the State Party applies at the same time in the normal course of trade to imports of the same goods from the same State Party.

## ARTICLE 11.9

### ***Denial of Benefits***

Upon prior notification to a service supplier of another State Party, a State Party may deny the benefits under this Chapter, if such supplier is a juridical person of another State Party not engaged in substantial business operation in the territory of that other State Party.

## ARTICLE 11.10

### ***Offsets***

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

## ARTICLE 11.11

### ***Information on the Procurement System***

1. Each State Party shall promptly publish any measure of general application regarding covered procurement and any modification to this information, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public.

2. Each State Party shall, upon request, provide another State Party with an explanation relating to such information.

## ARTICLE 11.12

### *Notices*

1. For each covered procurement, a procuring entity shall publish a notice of intended procurement, except in the circumstances referred to in Article 11.22 (Limited Tendering). The notice shall be published in the electronic or paper medium listed in Appendix 7 to Annex XVIII (Government Procurement). Such medium shall be widely disseminated and the notice shall remain accessible, at least, until expiration of the time period indicated in the notice. The notice shall:

- (a) be accessible by electronic means free of charge through a single point of access, for procuring entities covered by Appendix 1 to Annex XVIII (Government Procurement); and
- (b) where accessible by electronic means, be provided, to the extent possible, at least through links in a gateway electronic site that is accessible free of charge, for procuring entities covered by Appendix 2 or 3 to Annex XVIII (Government Procurement).

2. The State Parties, including such procuring entities covered by Appendix 2 or 3 to Annex XVIII (Government Procurement), are encouraged to publish their notices by electronic means free of charge through a 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) for recurring contracts, whenever possible, an estimate of the timing of subsequent notices of intended procurement;
- (d) a description of any options;
- (e) the time-frame for delivery of goods or services or the duration of the contract;
- (f) the procurement procedure that will be used and whether it will involve negotiation or electronic auction;
- (g) where applicable, the address and any final date for the submission of requests for participation in the procurement;
- (h) the address and the final date for the submission of tenders;



- (i) the language or languages in which tenders or requests for participation may be submitted, if they may be submitted in a language other than an official language of the State Party of the procuring entity;
- (j) a list and brief description of any conditions for participation of suppliers, including any requirements for specific documents or certifications to be provided by suppliers in connection therewith, unless such requirements are included in tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement; and
- (k) where, pursuant to Article 11.15 (Selective Tendering), 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.

4. Each State Party shall encourage its procuring entities to publish in the appropriate paper or electronic medium listed in Appendix 7 to Annex XVIII (Government Procurement), as early as possible in each fiscal year, a notice regarding their future procurement plans. The notice of planned procurement should include the subject-matter of the procurement and the planned date of the publication of the notice of intended procurement.

5. A procuring entity covered under Appendix 2 or 3 to Annex XVIII (Government Procurement) may use a notice of planned procurement as a notice of intended procurement, provided that the notice of planned procurement includes as much of the information referred to in paragraph 3 as is available to the entity and a statement that interested suppliers should express their interest in the procurement to the procuring entity.

## ARTICLE 11.13

### *Conditions for Participation*

1. In establishing the conditions for participation and assessing whether a supplier satisfies such conditions, a State Party, including its procuring entities:

- (a) shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement;
- (b) shall evaluate the financial capacity and the commercial and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside the territory of the State Party of the procuring entity;
- (c) shall base its evaluation solely on the conditions that the procuring entity has specified in advance in notices or tender documentation;
- (d) shall not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of a given State Party or that the supplier

has prior work experience in the territory of a given State Party; and

- (e) may require relevant prior experience where essential to meet the requirements of the procurement.

2. Where there is supporting evidence, a State 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) grave professional misconduct, which renders its integrity questionable if demonstrated by appropriate means by the contracting authority;
- (f) failure to pay taxes; or
- (g) other sanctions and grounds provided for in a State Party's domestic laws and regulations that disqualify the supplier to contract with entities of the State Parties.

#### ARTICLE 11.14

##### ***Registration Systems and Qualification Procedures***

1. A State Party, including its procuring entities provided that the State Party provides for it in its domestic laws and regulations, may maintain a supplier registration system under which interested suppliers are required to register and provide certain information.

2. A supplier registration system or a qualification procedure shall not be adopted or applied with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of another State Party in a State Party's procurement.

3. State Parties that use registration systems or qualification procedures shall:

- (a) ensure that suppliers are treated equally and without discrimination;
- (b) ensure that all requirements for inclusion in such registries or for participation in such procedures are publicly available; and
- (c) act in a transparent and reasonable manner.

## ARTICLE 11.15

### ***Selective Tendering***

1. Where a procuring entity intends to use selective tendering, the entity shall:
  - (a) include in the notice of intended procurement at least the information specified in subparagraphs 3 (a), 3 (b), 3 (f), 3 (g), 3 (j), and 3 (k) of Article 11.12 (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 (e), 3 (h) and 3 (i) of Article 11.12 (Notices) to the qualified suppliers that it notifies as specified in subparagraph 2 (b) of Appendix 8 to Annex XVIII (Government Procurement).
2. Where a procuring entity intends to use selective tendering, it 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.
3. Where the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 1, 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 2.

## ARTICLE 11.16

### ***Multi-Use Lists***

1. If a State Party, in its domestic laws and regulations, provides for the possibility for procuring entities to maintain a multi-use list of suppliers, such laws and regulations shall ensure that a notice inviting interested suppliers to apply for inclusion on the list is:
  - (a) published annually in the appropriate medium listed in Appendix 7 to Annex XVIII (Government Procurement); and
  - (b) where published by electronic means, made available continuously in the electronic medium listed in Appendix 7 of Annex XVIII (Government Procurement).
2. Where a multi-use list will be valid for three years or less, a procuring entity may publish the notice 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.
- 3. The notice referred to in paragraph 1 shall include:
  - (a) a description of the goods or services, or categories thereof, for which the list may be used;
  - (b) the conditions for participation to be satisfied by suppliers for inclusion on the list and the methods that the procuring entity will use to verify that a supplier satisfies the conditions;
  - (c) the name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the list;
  - (d) the period of validity of the list and the means for its renewal or termination, or where the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list; and
  - (e) to the extent possible, an indication that the list may be used for procurement covered by this Agreement unless that indication is publicly available through information published pursuant to Article 11.11 (Information on the Procurement System).
- 4. A procuring entity shall allow suppliers to apply at any time for inclusion on a multi-use list and shall include on that list all qualified suppliers within a reasonably short time.
- 5. Where a supplier that is not included on a multi-use list submits a request for participation in a procurement based on a multi-use list and all required documents relating thereto, within the time period provided for in Appendix 8 to Annex XVIII (Government Procurement), a procuring entity shall examine the request. The procuring entity shall not exclude the supplier from consideration in respect of the procurement on the grounds that the entity has insufficient time to examine the request, unless, in exceptional cases, due to the complexity of the procurement, the entity is not able to complete the examination of the request within the time period allowed for the submission of tenders.

#### ARTICLE 11.17

##### ***Information on Procuring Entity Decisions***

- 1. A procuring entity shall promptly inform any supplier that submits a request for participation in a procurement or application for inclusion on a multi-use list of the procuring entity's decision with respect to the request or application.
- 2. Where a procuring entity rejects a supplier's request for participation in a procurement or application for inclusion on a multi-use list, ceases to 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 it with a written explanation of the reasons for its decision.

#### ARTICLE 11.18

##### ***Tender Documentation***

1. 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 for in the notice of intended procurement, such documentation shall include a complete description of:

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

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

3. 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.

4. Where contracting entities do not offer free direct access to the entire tender documents and any supporting documents by electronic means, entities shall make promptly available the tender documentation at the request of any interested supplier of the State Parties. The procuring entities shall also promptly make available any relevant information requested by any interested or participating supplier, provided that such information does not give that supplier an advantage over other suppliers, and that the request was presented within the corresponding time limits.

5. Procuring entities may require bidders to provide guarantees for maintaining the offer, and the successful bidder to provide a guarantee for the execution of the contract.

#### ARTICLE 11.19

##### *Technical Specifications*

1. A procuring entity shall not prepare, adopt or apply any technical specification nor prescribe any conformity assessment procedure with the purpose or the effect of limiting competition, creating unnecessary obstacles to trade between the State Parties or discriminating between suppliers.

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

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

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

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

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

6. For greater certainty, a State 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.

## ARTICLE 11.20

### ***Modifications of the Tender Documentation and Technical Specifications***

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

2. A procuring entity may modify the criteria or requirements set out in a notice or tender documentation between the opening of tenders and the award of a contract, provided that such modification is in accordance with the State Party's domestic laws and regulations. In this case, a procuring entity shall not make substantial modifications to the criteria or requirements set out in the notice or tender documentation, and shall transmit in writing all such modifications in the same manner prescribed by paragraph 1.

## ARTICLE 11.21

### ***Time Periods***

1. A procuring entity shall, consistent with its own reasonable needs, provide suppliers sufficient time to prepare and submit requests for participation and responsive tenders, taking into account such factors as the nature and complexity of the procurement, the extent of subcontracting anticipated, the time for transmitting tenders from foreign as well as domestic points, where electronic means are not used.

2. Each State Party shall apply time-periods in accordance with Appendix 8 to Annex XVIII (Government Procurement). Such time periods, including any extension, shall be the same for all interested or participating suppliers.

## ARTICLE 11.22

### ***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 another State Party or protects domestic suppliers, a procuring entity of a State Party may use limited tendering, and, in accordance with the domestic laws and regulations of that State Party, may choose not to apply Articles 11.12 (Notices), 11.13 (Conditions for Participation), 11.14 (Registration Systems and Qualification Procedures), 11.15 (Selective Tendering), 11.16 (Multi-Use Lists), 11.17 (Information on Procuring Entity Decisions), 11.18 (Tender Documentation), 11.21 (Time Periods), 11.23 (Electronic Auctions), 11.24

(Negotiations), 11.25 (Treatment of Tenders) and 11.26 (Awarding of Contracts) only under the following circumstances:

- (a) provided that the requirements of the tender documentation are not substantially modified, where:
  - (i) no tenders were submitted, or no supplier 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 and services that were not included in the initial procurement, where a change of supplier for such additional goods and services:
  - (i) cannot be made for economic or technical reasons, such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; and
  - (ii) would cause significant inconvenience or substantial duplication of costs to 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 an open or selective tendering procedure;
- (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. When such contracts have been completed subsequent procurements of the developed goods or services shall be subject to this Chapter.



- (g) for purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership or bankruptcy, but not for routine purchases from regular suppliers; or
- (h) where a contract is awarded to a winner of a design contest provided that:
  - (i) the contest has been organised in a manner that is consistent with the principles of this Chapter, in particular relating to the publication of a notice of intended procurement; and
  - (ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner.

2. A procuring entity shall prepare a report in writing, or maintain records, on each contract awarded according to paragraph 1. The report or the records shall include the name of the procuring entity, the value and kind of goods or services procured and a statement indicating the circumstances and conditions described in paragraph 1 that justified the use of limited tendering.

#### ARTICLE 11.23

##### *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 11.24

##### *Negotiations*

1. If a State Party provides for its procuring entities to conduct procurement through negotiations, procuring entities may do so in the following cases:

- (a) where the entity has indicated such intent in the notice of intended procurement pursuant to Article 11.12 (Notices); or
- (b) where it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice of intended procurement or tender documentation.

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

#### ARTICLE 11.25

##### ***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 of a State Party, in accordance with the domestic laws and regulations of that State Party, 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 an opportunity to correct errors between the opening of tenders and the awarding of the contract, the entity shall provide all participating suppliers with the same opportunity, provided that the correction of the error does not substantially alter the submitted tender, nor affect the principles of transparency and fair competition between suppliers.

#### ARTICLE 11.26

##### ***Awarding of Contracts***

1. To be considered for 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.
2. 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 it has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notices and tender documentation, has submitted:
  - (a) the most advantageous tender; or
  - (b) where price is the sole criterion, the lowest price.
3. 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.
4. A procuring entity shall not use option clauses, cancel a procurement or modify awarded contracts in a manner that circumvents the obligations under this Chapter.

5. The State Parties may provide that if, for reasons imputable to the supplier to which the contract has been awarded, the contract is not concluded within a reasonable time, or the supplier does not fulfil the required guarantee for the execution of the contract or does not comply with the contract terms, the contract may be awarded to the next tenderer and so forth.

#### ARTICLE 11.27

##### ***Transparency of Procurement Information***

1. A procuring entity shall promptly inform participating suppliers of its contract award decisions and, upon request, shall do so in writing.

2. Subject to Article 11.28 (Disclosure of Information), a procuring entity shall, upon 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.

3. After the award of a contract covered by this Chapter, a procuring entity shall, as soon as possible, according to the time limits established in each State Party's domestic laws and regulations, and no later than 72 days from the award of the contract, publish in a paper or electronic medium listed in Appendix 7 of Annex XVIII (Government Procurement), a notice that includes at least the following information about the contract:

- (a) a description of the goods or services procured;
- (b) the name and address of the procuring entity;
- (c) the name and, if applicable, the address of the successful supplier;
- (d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;
- (e) the date of award; and
- (f) the type of procurement procedure used, and in cases where limited tendering was used pursuant to Article 11.22 (Limited Tendering), a description of the circumstances justifying the use of limited tendering.

4. Where the entity publishes the notice referred to in paragraph 3 only in an electronic medium, the information shall remain readily accessible for a reasonable period of time.

5. Each procuring entity shall, for a period of at least three years from the date it awards a contract, maintain the documentation and reports or records of tendering procedures and contract awards relating to covered procurement, including the reports or records provided for in Article 11.22 (Limited Tendering) and data that demonstrates how covered procurement by electronic means has been conducted.

## ARTICLE 11.28

### ***Disclosure of Information***

1. Upon request of another State Party, a State Party shall promptly provide 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.
2. In cases where the release of such information would prejudice competition in future tenders, the State Party that receives the information shall not disclose it to any supplier, except after consulting with, and obtaining the agreement of, the State Party that provided the information.
3. Notwithstanding any other provision of this Chapter, a State Party, including its procuring entities, shall not provide information to a supplier that might prejudice fair competition between suppliers.
4. Nothing in this Chapter shall be construed to require a State Party, including its procuring entities, authorities and review bodies, to disclose confidential information where disclosure:
  - (a) would impede law enforcement;
  - (b) might prejudice fair competition between suppliers;
  - (c) would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or
  - (d) would otherwise be contrary to the public interest.

## ARTICLE 11.29

### ***Domestic Review Procedures for Supplier Challenges***

1. Each State Party shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure according to the due process principle through which a supplier may challenge:
  - (a) breaches of this Chapter; or
  - (b) breaches of a State Party's measures implementing this Chapter, where the supplier does not have a right to challenge directly a breach of this Chapter under the domestic laws and regulations of a State Party,

arising in the context of a covered procurement, in which the supplier has, or has had, an interest. The procedural rules for all challenges shall be 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 as referred to in paragraph 1, the State Party of the procuring entity may encourage that entity and the supplier to seek resolution of the complaint through consultations.

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 ten days from the date the basis of the challenge became known or reasonably should have become known to the supplier.
4. Each State Party shall establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement.
5. Where a body other than an authority referred to in paragraph 4 initially reviews a challenge, the State 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 State Party shall ensure that a review body that is not a court shall either have its decisions subject to judicial review or have procedures that provide that:
  - (a) the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body;
  - (b) the participants to the proceedings (hereinafter referred to as “participants”) shall have the right to be heard prior to a decision of the review body being made on the challenge;
  - (c) the participants shall have the right to be represented and accompanied;
  - (d) the participants shall have access to all proceedings;
  - (e) the participants shall have the right to request that the proceedings take place in public and that witnesses may be presented; and
  - (f) the review body shall make its decisions or recommendations in a timely fashion in writing, and shall include an explanation of the basis for each decision or recommendation.
7. Each State 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 the 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 as referred to in paragraph 1, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.

## ARTICLE 11.30

### *Modifications and Rectifications to Coverage*

1. A State Party may modify or rectify its Appendices to Annex XVIII (Government Procurement) in accordance with paragraphs 2 to 10.

#### *Modifications*

2. A State Party intending to modify its Appendices to Annex XVIII (Government Procurement) shall:

- (a) notify the other State Parties in writing; and
- (b) include in the notification a proposal for appropriate compensatory adjustments to the other State Parties to maintain a level of coverage comparable to that existing prior to the modification.

3. Notwithstanding subparagraph 2 (b), a State Party does not need to provide compensatory adjustments if the modification covers an entity over which the State Party has effectively eliminated its control or influence.

4. If a State Party disputes that:

- (a) an adjustment proposed under subparagraph 2 (b) is adequate to maintain a comparable level of mutually agreed coverage; or
- (b) the modification covers an entity over which the State Party has effectively eliminated its control or influence according to paragraph 3,

it shall object in writing within 45 days from the receipt of the notification referred to in subparagraph 2 (a). If no such objection is submitted within 45 days from the receipt of the notification, the State Party shall be deemed to have agreed to the proposed modification. Thereafter, the State Party modifying its Appendices to Annex XVIII (Government Procurement) shall deposit the modification with the Depositary.

#### *Rectifications*

5. The following changes to a State Party's Appendices to Annex XVIII (Government Procurement) shall be considered a rectification of a purely formal nature, provided that they do not affect the mutually agreed coverage under this Chapter:

- (a) a change in the name of an entity;
- (b) a merger of two or more entities listed in an Appendix; and
- (c) the separation of an entity listed in an Appendix into two or more entities that are all added to the entities listed in the same Appendix.

6. The State Party making such rectification of a purely formal nature shall not be obliged to provide for compensatory adjustments.

7. In the case of proposed rectifications to a State Party's Appendices to Annex XVIII (Government Procurement), the State Party shall notify the other State Parties every two years following the entry into force of this Agreement.

8. A State Party may notify the other State Parties of an objection to a proposed rectification within 45 days from the receipt of the notification. Where a State Party submits an objection, it shall set out the reasons why it believes the proposed rectification is not a change provided for in paragraph 5 and describe the effect of the proposed rectification on the mutually agreed coverage under this Chapter. If no such objection is submitted in writing within 45 days from the receipt of the notification, the other State Parties shall be deemed to have agreed to the proposed rectification. Thereafter, the State Party rectifying its Appendices to Annex XVIII (Government Procurement) shall deposit the rectification with the Depositary.

#### *Consultations and Dispute Resolution*

9. If another State Party objects to the proposed modification or rectification, or to the proposed compensatory adjustments, the State Parties shall seek to resolve the issue through consultations. If no agreement is found within 60 days from the receipt of the objection, the State Party seeking to modify or rectify its Appendices to Annex XVIII (Government Procurement) may have recourse to Chapter 15 (Dispute Settlement) unless the State Parties concerned agree to extend the deadline.

10. Consultations under paragraph 9 shall be without prejudice to Chapter 15 (Dispute Settlement).

### ARTICLE 11.31

#### ***Further Negotiations***

If a State Party offers in the future to a non-Party, in an international agreement, additional benefits with regard to its respective government procurement market access coverage agreed under this Chapter, it shall, upon request of another State Party, enter into negotiations with a view to extending coverage, taking into consideration the needs of the State Parties.

### ARTICLE 11.32

#### ***Work Assignments on Government Procurement***

The Joint Committee or, if established in accordance with Chapter 14 (Institutional Provisions), a Sub Committee or a working group, may:

- (a) review the implementation and application of this Chapter and the mutual opening of procurement markets;
- (b) exchange information relating to the government procurement opportunities in each State Party, including exchanges on procurement statistical data;

- (c) discuss the extent and the means of cooperation in government procurement between the State Parties as referred to in Article 11.33 (Cooperation) and;
- (d) consider any other matters that may affect the operation of this Chapter.

#### ARTICLE 11.33

##### ***Cooperation***

1. The State Parties recognise the importance of cooperation with a view to achieving a better understanding of their respective government procurement systems, as well as a better access to their respective markets, in particular for MSMEs.
2. The State Parties shall endeavour to cooperate to ensure an effective implementation of this Chapter.
3. In particular, cooperation activities may be carried out *inter alia* through:
  - (a) exchange of experience and information in areas of mutual interest, such as best practices, statistical data, expertise and policies;
  - (b) exchange of best practices regarding the use of sustainable procurement practices;
  - (c) promoting networks, seminars and workshops in topics of mutual interest; and
  - (d) sharing of information between the State Parties, with a view to facilitating access to the government procurement markets of the State Parties, in particular for MSMEs, as well as to achieving a better understanding of their respective government procurement systems and statistics.



## ARTICLE 11.34

### *Facilitation of Participation of MSMEs*

1. The State Parties recognise the important contribution of MSMEs to economic growth and employment and the importance of facilitating their participation in government procurement.
2. If available, a State Party shall, upon request of another State Party, provide information regarding its measures aimed at promoting, encouraging and facilitating the participation of MSMEs in government procurement.
3. With a view to facilitating participation by MSMEs in government procurement, each State Party shall, to the extent possible, and if appropriate:
  - (a) share information related to MSMEs;
  - (b) endeavour to make all tender documentation available free of charge; and
  - (c) undertake activities aimed at facilitating the participation of MSMEs in government procurement.