

*This **document** is the European Union's (EU) proposal for a legal text on Government procurement in the EU-ESA5 deepening of interim agreement. It will be tabled for discussion with ESA5. The actual text in the final agreement will be a result of negotiations between the EU and ESA5.*

***DISCLAIMER:** The EU reserves the right to make subsequent modifications to this text and to complement its proposals at a later stage, by modifying, supplementing or withdrawing all, or any part, at any time.*

## CHAPTER [XY]

### Government procurement

#### Article 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 realization 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. It may include electronically transmitted and stored information;
- (f) **limited tendering** means a procurement method 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;

**LIMITED**

- (j) **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;
- (k) **open tendering** means a procurement method whereby all interested suppliers may submit a tender;
- (l) **person** means a natural person or a juridical person;
- (m) **procuring entity** means an entity covered under a Party's Section 1, 2 or 3 to Annex X;
- (n) **qualified supplier** means a supplier that a procuring entity recognizes as having satisfied the conditions for participation;
- (o) **selective tendering** means a procurement method whereby only qualified suppliers are invited by the procuring entity to submit a tender;
- (p) **services** includes construction services, unless otherwise specified;
- (q) **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 labelling requirements as they apply to a good, service, process or production method;
- (r) **supplier** means a person or group of persons that provides or could provide goods or services; and
- (s) **technical specification** means a tendering requirement that:
  - (i) lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or
  - (ii) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service.

**Article 2**

**Scope and coverage**

*Application of Agreement*

1. This Chapter applies to any measure relating to a covered procurement, whether or not it is conducted exclusively or partially by electronic means.
2. For the purposes of this Chapter, covered procurement means procurement for governmental purposes:

**LIMITED**

- (a) of a good, a service, or any combination thereof:
    - (i) as specified in each Party's Schedule for this Chapter; and
    - (ii) not procured with a view to commercial sale or resale, or for use in the production or supply of a good or a service for commercial sale or resale;
  - (b) by any contractual means, including: purchase; lease; and rental or hire purchase, with or without an option to buy;
  - (c) for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant threshold specified in a Party's Schedule for this Chapter, at the time of publication of a notice in accordance with Article 6;
  - (d) by a procuring entity; and
  - (e) that is not otherwise excluded from coverage in paragraph 3 or a Party's Schedule for this Chapter.
3. Except as otherwise provided in a Party's Schedule for this Chapter, this Chapter does not apply to:
- (a) the acquisition or rental of land, existing buildings or other immovable property or the rights thereon;
  - (b) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives
  - (c) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;
  - (d) public employment contracts;
  - (e) procurement conducted:

- (i) for the specific purpose of providing international assistance, including development aid
  - (ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or
  - (iii) under the particular procedure or condition of an international organisation, or funded by international grants, loans or other assistance if the applicable procedure or condition would be inconsistent with this Chapter.
4. A procurement subject to this Chapter shall be all procurement covered by the Schedules of **ESA 5** and the European Union, in which each Party's commitments are set out as follows:
- (a) in Section 1, the central government entities whose procurement is covered by this Chapter
  - (b) in Section 2, the sub-central government entities whose procurement is covered by this Chapter
  - (c) in Section 3, all other entities whose procurement is covered by this Chapter;
  - (d) in Section 4, the goods covered by this Chapter;
  - (e) in Section 5, the services, other than construction services, covered by this Chapter;
  - (f) in Section 6, the construction services covered by this Chapter; and
  - (g) in Section 7, any General Notes
  - (h) in Section 8, the media in which the Party publishes its procurement notices, award notices, and other information related to its public procurement system as set out in this Chapter.

*Valuation*

5. 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 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) if the procurement provides for the possibility of options, the total value of such options
6. If an individual requirement for a procurement results in the award of more than one contract, or in the award of contracts in separate parts ('recurring contracts') the calculation of the estimated maximum total value shall be based on:
  - (a) the value of recurring contracts of the same type of good or service awarded during the preceding 12 months or the procuring entity's preceding fiscal year, adjusted, if 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.
7. In the case of procurement by lease, rental or hire purchase of a good or a service, or procurement for which a total price is not specified, the basis for valuation shall be:

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

### **Article 3**

#### **Security and general exceptions**

1. Nothing in this Chapter shall be construed to prevent a Party from taking any action or from not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement:
  - (a) of arms, ammunition or war material;
  - (b) or to procurement indispensable for national security; or
  - (c) for national defence purposes.
2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent a Party from imposing or enforcing measures:
  - (a) necessary to protect public morals, order or safety;
  - (b) necessary to protect human, animal or plant life or health;
  - (c) necessary to protect intellectual property; or

- (d) relating to goods or services of persons with disabilities, of philanthropic institutions or of prison labour.

#### **Article 4**

#### **General principles**

##### *National Treatment of locally established suppliers*

1. Each Party shall ensure that the suppliers of the other Party that have established a commercial presence in its territory through the constitution, acquisition or maintenance of a juridical person are accorded national treatment with regard to any government procurement of the Party in its territory.

##### *Use of Electronic Means*

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.
  - (c) use electronic means of information and communication for the publication of notices and tender documentation in procurement procedures and, to the widest extent practicable, for the submission of tenders.

##### *Conduct of Procurement*

3. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

**LIMITED**

- (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.

*Offsets*

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

*Measures Not Specific to Procurement*

- 5. 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.

*Anti-corruption measures*

- 6. Each Party shall ensure that it has appropriate measures in place to address corruption in their government procurement. These measures may include procedures to render ineligible for participation in the Party's procurements, either indefinitely or for a stated period of time, suppliers that the judicial authorities of the Party have determined by final decision to have engaged in fraudulent or other illegal actions in relation to government procurement in the territory of that Party. Each Party shall also ensure that it has in place policies and procedures to eliminate to the extent possible or manage any potential conflict of interest on the part of those engaged in or having influence over procurement.

**Article 5**

**Information on the procurement system**

- 1. Each Party shall:

- (a) promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clause mandated by law or regulation and incorporated by reference in notices or tender documentation and procedure regarding covered procurement, and any modifications thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public; and
  - (b) provide an explanation thereof to the other Party, on request.
2. Each Party shall list, in Section 8 of its Schedule:
- (a) the electronic or paper media in which the Party publishes the information described in paragraph 1;
  - (b) the electronic or paper media in which the Party publishes the notices required by Articles 6, 8.7 and 15.2; and
  - (c) the website address or addresses where the Party publishes: its notices concerning awarded contracts pursuant to Article 15.2.
3. Each Parties shall promptly notify the Committee on Government Procurement of any modification to the Party's information listed in Section 8.

**Article 6**

**Notices**

*Notice of Intended Procurement*

1. For each covered procurement a procuring entity shall publish a notice of intended procurement, except in the circumstances described in Article 12.

All notices (notices of intended procurement, summary notice and notice of planned procurement) shall be directly accessible by electronic means free of charge through a single point of access on the internet. In addition, the notices may also be published in an appropriate paper medium which shall be widely disseminated and shall remain readily accessible to the public, at least until expiration of the time-period indicated in the notice.

The appropriate paper and electronic medium is listed by each Party in Section 8 of Annex [X].

2. Except as otherwise provided in this Chapter, each notice of intended procurement shall include:
  - (a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and their cost and terms of payment, if any;
  - (b) a description of the procurement, including the nature and the quantity of the goods or services to be procured or, if the quantity is not known, the estimated quantity;
  - (c) for recurring contracts, an estimate, if possible, of the timing of subsequent notices of intended procurement;
  - (d) a description of any options;
  - (e) the time-frame for delivery of goods or services or the duration of the contract;
  - (f) the procurement method that will be used and whether it will involve negotiation or electronic auction;
  - (g) if applicable, the address and any final date for the submission of requests for participation in the procurement;
  - (h) the address and the final date for the submission of tenders;
  - (i) the language or languages in which tenders or requests for participation may be submitted, if they may be submitted in a language other than an official language of the Party of the procuring entity;
  - (j) a list and brief description of any conditions for participation of suppliers, including any requirements for specific documents or certifications to be provided by suppliers in connection therewith, unless such requirements are included in

**LIMITED**

tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement;

- (k) if, pursuant to Article 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, if applicable, any limitation on the number of suppliers that will be permitted to tender; and
- (l) an indication that the procurement is covered by this Chapter.

*Summary Notice*

- 3. For each case of intended procurement, a procuring entity shall publish a summary notice that is readily accessible, at the same time as the publication of the notice of intended procurement, in English. The summary notice shall contain at least the following information:
  - (a) the subject-matter of the procurement;
  - (b) the final date for the submission of tenders or, if applicable, any final date for the submission of requests for participation in the procurement or for inclusion on a multi-use list; and
  - (c) the address from which documents relating to the procurement may be requested.

*Notice of Planned Procurement*

- 4. Procuring entities are encouraged to publish in the appropriate electronic and, if available, paper medium listed in Section 8 as early as possible in each fiscal year a notice regarding their future procurement plans ('notice of planned procurement'). The notice of planned procurement shall also be published in the single point of access site listed in Section 8, subject to paragraph 2. 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 Sections 2 or 3 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.

The appropriate paper and electronic medium is listed by each Party in Annex X-8.

## **Article 8**

### **Qualification of suppliers**

#### *Registration Systems and Qualification Procedures*

1. A Party, including its procuring entities, may maintain a supplier registration system under which interested suppliers are required to register and provide certain information. In this case, the Party shall ensure that interested suppliers have access to information on the registration system to the extent possible, through electronic means, and that they may request registration at any time. The competent authority shall inform them within a reasonable period of time of the decision to grant or reject this request. If the request is rejected, the decision must be duly motivated.
2. Each Party shall ensure that:
  - (a) its procuring entities make efforts to minimise differences in their qualification procedures; and
  - (b) if its procuring entities maintain registration systems, the entities make efforts to minimise differences in their registration systems.
3. A Party, including its procuring entities, shall not adopt or apply a 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. If a procuring entity intends to use selective tendering, the entity shall:
  - (a) include in the notice of intended procurement at least the information specified in Article 6.3(a), (b), (f), (g), (j), (k) and (l) and invite suppliers to submit a request for participation; and
  - (b) provide, by the commencement of the time-period for tendering, at least the information in Article 6.3(c), (d), (e), (h) and (i) to the qualified suppliers that it notifies as specified in Article 10.3(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. An invitation to submit a tender shall be addressed to a number of suppliers necessary to ensure effective competition.
6. If 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 maintain a multi-use list of suppliers, provided that a notice inviting interested suppliers to apply for inclusion on the list is:
  - (a) published annually; and
  - (b) if published by electronic means, made available continuously,in the appropriate medium listed in Section 8.

8. The notice provided for in paragraph 7 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 if the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list; and
  - (e) an indication that the list may be used for procurement covered by this Chapter.
9. Notwithstanding paragraph 7, if 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.
10. A procuring entity shall allow suppliers to apply at any time for inclusion on a multi-use list and shall include on the list all qualified suppliers within a reasonably short time.
11. If 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, within the time-period provided for in Article 10.2, 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.

*Annex 2 and Annex 3 Entities*

12. A procuring entity covered under Annexes X-2 or X-3 may use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement, provided that:
  - (a) the notice is published in accordance with paragraph 7 and includes the information required under paragraph 8, as much of the information required under Article 6.3 as is available and a statement that it constitutes a notice of intended procurement or that only the suppliers on the multi-use list will receive further notices of procurement covered by the multi-use list; and
  - (b) the entity promptly provides to suppliers that have expressed an interest in a given procurement to the entity, sufficient information to permit them to assess their interest in the procurement, including all remaining information required in Article 6.3, to the extent such information is available.
13. A procuring entity covered under Annexes 2 or 3 may allow a supplier that has applied for inclusion on a multi-use list in accordance with paragraph 10 to tender in a given procurement, if there is sufficient time for the procuring entity to examine whether the supplier satisfies the conditions for participation.
14. 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.
15. If 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 the supplier with a written explanation of the reasons for its decision.

**Article 9**

**Technical specifications and tender documentation**

*Technical Specifications*

1. A procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade.
2. In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, if 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, if they exist; otherwise, on national technical regulations, recognised national standards or building codes.
3. If design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, if appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfil the requirements of the procurement by including words such as 'or equivalent' in the tender documentation.
4. A procuring entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in 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. A Party may:

- (a) allow contracting authorities to take into account environmental and social considerations throughout the procurement procedure, provided they are non-discriminatory and they are linked to the subject-matter of the contract; and
- (b) take appropriate measures to ensure compliance with its obligations in the fields of environmental, social and labour law.

*Tender Documentation*

7. A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:
- (a) the procurement, including the nature and the quantity of the goods or services to be procured or, if the quantity is not known, the estimated quantity and any requirements to be fulfilled, including any technical specifications, conformity assessment certification, plans, drawings or instructional materials;
  - (b) any conditions for participation 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, unless price is the sole criterion, the relative importance of that criteria;
  - (d) if the procuring entity will conduct the procurement by electronic means, any authentication and encryption requirements or other requirements related to the submission of information by electronic means;
  - (e) if the procuring entity will hold an electronic auction, the rules, including identification of the elements of the tender related to the evaluation criteria, on which the auction will be conducted;
  - (f) if there will be a public opening of tenders, the date, time and place for the opening and, if appropriate, the persons authorised to be present;

- (g) any other terms or conditions, including terms of payment and any limitation on the means by which tenders may be submitted, such as whether on paper or by electronic means; and
  - (h) any dates for the delivery of goods or the supply of services.
8. In establishing any date for the delivery of goods or the supply of services being procured, a procuring entity shall take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the point of supply or for supply of services.
9. The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery.
10. A procuring entity shall promptly:
- (a) make available tender documentation to ensure that interested suppliers have sufficient time to submit responsive tenders;
  - (b) provide, on request, the tender documentation to any interested supplier; and
  - (c) reply to any reasonable request for relevant information by any interested or participating supplier, provided that such information does not give that supplier an advantage over other suppliers.

*Modifications*

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

**LIMITED**

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

**Article 10**

**Time-periods**

*General*

1. A procuring entity shall, consistent with its own reasonable needs, provide sufficient time for suppliers to prepare and submit requests for participation and responsive tenders, taking into account such factors as:
  - (a) the nature and complexity of the procurement;
  - (b) the extent of subcontracting anticipated; and
  - (c) the time necessary for transmitting tenders by non-electronic means from foreign as well as domestic points if electronic means are not used.

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

*Deadlines*

2. A procuring entity that uses selective tendering shall establish that the final date for the submission of requests for participation shall not, in principle, be less than 25 days from the date of publication of the notice of intended procurement. If a state of urgency duly substantiated by the procuring entity renders this time-period impracticable, the time-period may be reduced to not less than 10 days.

3. Except as provided for in paragraphs 4, 5, 7 and 8, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 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 established in accordance with paragraph 3 to not less than 10 days if:
  - (a) the procuring entity has published a notice of planned procurement as described in Article .6.4 at least 40 days and not more than 12 months in advance of the publication of the notice of intended procurement, and the notice of planned procurement contains:
    - (i) a description of the procurement;
    - (ii) the approximate final dates for the submission of tenders or requests for participation;
    - (iii) a statement that interested suppliers should express their interest in the procurement to the procuring entity;
    - (iv) the address from which documents relating to the procurement may be obtained; and
    - (v) as much of the information that is required for the notice of intended procurement under Article 6.2, as is available;
  - (b) the procuring entity, for contracts of a recurring nature, indicates in an initial notice of intended procurement that subsequent notices will provide time-periods for tendering based on this paragraph; or

**LIMITED**

- (c) a state of urgency duly substantiated by the procuring entity renders the time-period for tendering established in accordance with paragraph 3 impracticable.
5. A procuring entity may reduce the time-period for tendering established in accordance with paragraph 3 by five days for each one of the following circumstances:
- (a) the notice of intended procurement is published by electronic means;
  - (b) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and
  - (c) the entity accepts tenders by electronic means.
6. The use of paragraph 5, in conjunction with paragraph 4, shall in no case result in the reduction of the time-period for tendering established in accordance with paragraph 3 to less than 10 days from the date on which the notice of intended procurement is published.
7. Notwithstanding any other provision in this Article, if a procuring entity purchases commercial goods or services, or any combination thereof, it may reduce the time-period for tendering established in accordance with paragraph 3 to not less than 13 days, provided that it publishes by electronic means, at the same time, both the notice of intended procurement and the tender documentation. In addition, if the entity accepts tenders for commercial goods or services by electronic means, it may reduce the time-period established in accordance with paragraph 3 to not less than 10 days.
8. If a procuring entity covered under Sections 2 or 3 has selected all or a limited number of qualified suppliers, the time-period for tendering may be fixed by mutual agreement between the procuring entity and the selected suppliers. In the absence of agreement, the period shall not be less than 10 days.

**Article 11**

**Negotiation**

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

**LIMITED**

- (a) if the entity has indicated its intent to conduct negotiations in the notice of intended procurement required under Article 6.2; or
  - (b) if 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) if negotiations are concluded, provide a common deadline for the remaining participating suppliers to submit any new or revised tenders.

**Article 12**

**Limited tendering**

1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers, a procuring entity may use limited tendering and may choose not to apply Articles 6 through 8, paragraphs 7 through 11 of Article 9, and Articles 10, 11, 13 and 14 under any of the following circumstances:
- (a) if:
    - (i) no tenders were submitted or no suppliers requested participation;
    - (ii) no tenders that conform to the essential requirements of the tender documentation were submitted;
    - (iii) no suppliers satisfied the conditions for participation; or
    - (iv) the tenders submitted have been collusive,
- provided that the requirements of the tender documentation are not substantially modified;

**LIMITED**

- (b) if 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 if a change of supplier for such additional goods or services:
  - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; and
  - (ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;
- (d) only when strictly necessary if, 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) if 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;

**LIMITED**

- (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) if a contract is awarded to a winner of a design contest provided that:
    - (i) the contest has been organised in a manner that is consistent with the principles of this Chapter, in particular relating to the publication of a notice of intended procurement; and
    - (ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner.
2. A procuring entity shall prepare a report in writing on each contract awarded under paragraph 1. The report shall include the name of the procuring entity, the value and kind of goods or services procured and a statement indicating the circumstances and conditions described in paragraph 1 that justified the use of limited tendering.

**Article 13**

**Electronic auctions**

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

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

**Article 15**

**Transparency of procurement information**

*Information Provided to Suppliers*

1. A procuring entity shall promptly inform participating suppliers of the entity's contract award decisions and, on the request of a supplier, shall do so in writing. Subject to Articles 16.2 and 16.3, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender.

*Publication of Award Information*

2. Not later than 72 days after the award of each contract covered by this Chapter, a procuring entity shall publish a notice in the appropriate paper or electronic medium listed in Section 8 of Annex [X]. If 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; and
  - (f) the type of procurement method used, and in cases where limited tendering was used in accordance with Article 12, a description of the circumstances justifying the use of limited tendering.

*Maintenance of Documentation, Reports and Electronic Traceability*

3. Each procuring entity shall, for a period of at least three years from the date it awards a contract, maintain:
  - (a) the documentation and reports of tendering procedures and contract awards relating to covered procurement, including the reports required under Article 12; and
  - (b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.

Exchange of statistics

4. Each Party shall make available to the other Party statistics on public procurement on an annual basis.

**Article 16**

**Disclosure of information**

*Provision of Information to Parties*

1. On request of the other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Chapter, including information on the characteristics and relative advantages of the successful tender. In cases where release of the information would prejudice competition in future tenders, the Party that receives the information shall not disclose it to any supplier, except after consulting with, and obtaining the consent of, the Party that provided the information.

*Non-Disclosure of Information*

2. Notwithstanding any other provision of this Chapter, a Party, including its procuring entities, shall not provide to any particular supplier information that might prejudice fair competition between suppliers.
3. Nothing in this Chapter shall be construed to require a Party, including its procuring entities, authorities and review bodies, to disclose confidential information if 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 17**

**Domestic review procedures**

1. Both Parties 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) if the supplier does not have a right to challenge directly a breach of the Chapter under the domestic law of a Party, a failure to comply with a Party's measures implementing this Chapter,

arising in the context of a covered procurement, in which the supplier has, or has had, an interest. The procedural rules for all challenges shall be 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. Both Parties 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. If a body other than an authority referred to in paragraph 4 initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge.
6. Both Parties 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 ('participants') shall have the right to be heard prior to a decision of the review body being made on the challenge;
  - (c) the participants shall have the right to be represented and accompanied;
  - (d) the participants shall have access to all proceedings;

- (e) the participants shall have the right to request that the proceedings take place in public and that witnesses may be presented; and
  - (f) the review body shall make its decisions or recommendations in a timely fashion, in writing, and shall include an explanation of the basis for each decision or recommendation.
7. Each Party shall adopt or maintain procedures that provide for:
- (a) rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing; and
  - (b) where a review body has determined that there has been a breach or a failure as referred to in paragraph 1, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.

## **Article 18**

### **Modifications and Rectifications to Coverage**

A Party may modify or rectify its Annex to this Agreement.

#### *Modifications*

1. When a Party intends to modify an Annex under Section B of Appendix [X], the Party shall:
  - (a) notify the other Party in writing; and

- (b) include in the notification a proposal for appropriate compensatory adjustments to the other Party to maintain a level of coverage comparable to that existing prior to the modification.
2. Notwithstanding subparagraph 2(b), a Party does not need to provide compensatory adjustments if the modification covers an entity over which the Party has effectively eliminated its control or influence.

Government control or influence over the entities listed in Annex [X] to this Chapter is presumed to be effectively eliminated if and insofar as the entity exposed to competition on markets to which access is not restricted.

3. The other Party may object the modification if:
- (a) an adjustment proposed under sub-paragraph 2 (b) is not adequate to maintain a comparable level of mutually agreed coverage; or
  - (b) the modification covers an entity over which the Party has not effectively eliminated its control or influence as provided for in sub-paragraph 3.

The other Party shall submit the objection in writing within 45 days of receipt of the notification referred to in sub-paragraph 2 (a). After the expiry of that deadline the other Party is deemed to have accepted the adjustment or modification, including for the purposes of Chapter [XYZ] (Dispute Settlement).

*Rectifications*

4. The following changes to a Party's Annexes shall be considered a rectification of a purely formal nature, provided that they do not affect the mutually agreed coverage provided for in the Chapter:
- (a) a change in the name of an entity;
  - (b) a merger of two or more entities listed within an Annex; and

- (c) the separation of an entity listed in an Annex into two or more entities that are added to the entities listed in the same Annex.
- 5. In the case of proposed rectifications to a Party's Annexes, the Party shall notify the other Party every two years following the entry into force of this Chapter.
- 6. A Party may notify the other Party of an objection to a proposed rectification within 45 days from having received the notification. Where a 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 of this Article, and describe the effect of the proposed rectification on the mutually agreed coverage provided for in the Agreement. If no such objection is submitted in writing within 45 days after having received the notification, the Party shall be deemed to have agreed to the proposed rectification.

*Consultations and Dispute resolution*

- 7. If the other Party objects to the proposed modification or rectification, the Parties will seek to resolve the issue through consultations. If no agreement is found within [x] days of receipt of the objection, the Party seeking to modify or rectify its Annex may refer the matter to dispute settlement. The intended modification or rectification of the Annex will take effect only when both Parties have agreed or on the basis of a final decision of the Dispute Settlement body.

**Article 19**

**Institutional Provisions**

On a Party's request, the joint working body defined by the Agreement shall meet to address matters related to the implementation and operation of this Chapter, such as:

- (a) the modification of Appendix [X]
- (b) issues regarding government procurement that are referred to it by a Party.
- (c) any other matter related to the operation of this Chapter.

**ANNEX [X]**

**Section 1 – Central government entities**

**Section 2– Sub-central government entities**

**Section 3 - Other entities**

**Section 4 - Goods**

**Section 5 - Services**

**Section 6 Construction services**

**Section 7 - General Notes**