

## CHAPTER 13 GOVERNMENT PROCUREMENT

### Article 13.1 : General Provisions and Objectives

1. The Parties recognise their shared interest in promoting international liberalisation of government procurement markets and continued co-operation on procurement matters in APEC and other appropriate international fora.
2. The Parties recognise the importance of conducting government procurement in accordance with the fundamental principles of the *APEC Non-Binding Principles on Government Procurement* of transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination, in order to maximise competitive opportunities for suppliers of the Parties.

### Article 13.2 : Definitions

For the purposes of this Chapter:

**build-operate-transfer contract and public works concession contract** mean any contractual arrangement the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plant, buildings, facilities or other government-owned works and under which, as consideration for a supplier's execution of a contractual arrangement, a procuring entity grants to the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of such works for the duration of the contract;

**commercial goods or services** means goods or services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes;

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

**electronic auction** means an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders;

**in writing or written** means any worded or numbered expression that can be read, reproduced and later communicated. It may include electronically transmitted and stored information;

**limited tendering** means a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice;

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

**multi-use list** means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the entity intends to use more than once;

**offset** means any condition or undertaking that encourages local development or improves a Party's balance of payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement;

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

**person** means a natural person or a legal person;

**procuring entity** means an entity covered in Annex 13-A;

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

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

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

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

**standard** means a document approved by a recognised body that provides for common and repeated use, rules, guidelines or characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a good, service, process or production method;

**supplier** means a person or group of persons that provides or could provide goods or services; and

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

- (a) 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

- (b) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service.

### **Article 13.3 : Scope and Coverage**

#### *Application of Agreement*

1. This Chapter applies to any measure regarding 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:

- (a) of goods, services, or any combination thereof:
  - (i) as specified in Annex 13-A; 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; and build-operate-transfer contracts; and public works concession contracts;
- (c) for which the value, as estimated in accordance with this Article, equals or exceeds the relevant threshold specified in Annex 13-A, at the time of publication of a notice in accordance with Article 13.11;
- (d) by a procuring entity; and
- (e) that is not otherwise excluded from coverage under this Chapter.

3. Except where otherwise provided in Annex 13-A, this Chapter does not apply to:

- (a) the acquisition or rental of land, existing buildings or other immovable property or the rights thereon;
- (b) non-contractual agreements or any form of assistance that a Party provides, including co-operative 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; or
- (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 where the applicable procedure or condition would be inconsistent with this Chapter.

4. Where a procuring entity, in the context of covered procurement, requires persons not covered under Annex 13-A to procure in accordance with particular requirements, Article 13.4 shall apply *mutatis mutandis* to such requirements.

#### *Valuation*

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

- (a) neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Chapter; and
- (b) include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including:
  - (i) premiums, fees, commissions and interest; and
  - (ii) where the procurement provides for the possibility of options, the total value of such options.

6. Where an individual requirement for a procurement results in the award of more than one contract, or in the award of contracts in separate parts (hereinafter referred to as "recurring 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, 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.

7. In the case of procurement by lease, rental or hire purchase of goods or services, 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) where the term of the contract is 12 months or less, the total estimated maximum value for its duration; or
  - (ii) where the term of the contract exceeds 12 months, the total estimated maximum value, including any estimated residual value;
- (b) where the contract is for an indefinite period, the estimated monthly instalment multiplied by 48; or
- (c) where it is not certain whether the contract is to be a fixed-term contract, subparagraph (b) shall be used.

#### **Article 13.4 : General Principles**

##### *Non-Discrimination*

1. With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the other Party and to the suppliers of the other Party offering the goods or services of either Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers.

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

- (a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or
- (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

##### *Use of Electronic Means*

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

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

#### *Conduct of Procurement*

4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:
- (a) is consistent with this Chapter, using methods such as open tendering, selective tendering and limited tendering;
  - (b) avoids conflicts of interest; and
  - (c) prevents corrupt practices.

#### *Rules of Origin*

5. For the purposes of covered procurement, a Party shall not apply rules of origin to goods or services imported from or supplied from the other Party that are different from the rules of origin the Party applies at the same time in the normal course of trade to imports or supplies of the same goods or services from the same Party.

#### *Offsets*

6. 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*

7. Paragraphs 1 and 2 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, other than measures governing covered procurement.

### **Article 13.5 : Exceptions to the Chapter**

1. Nothing in this Chapter shall be construed to prevent any Party from taking any action or not disclosing any information which 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 Parties where the same conditions prevail, or a disguised restriction on trade between the Parties, nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining 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 or not for profit institutions, or of prison labour.
3. The Parties understand that paragraph 2(b) includes environmental measures necessary to protect human, animal or plant life or health.

### **Article 13.6 : Disclosure of Information**

#### *Provision of Information to Parties*

1. On the 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 that information shall not disclose it to any supplier, except after consultation with, and obtaining agreement of, the Party that provided the information.

#### *Non-Disclosure of Information*

2. Notwithstanding any other provision of this Chapter, a Party, including its procuring entities, shall not provide to any particular supplier information that might prejudice fair competition between suppliers.<sup>1</sup>
3. Nothing in this Chapter shall be construed to require a Party, including its procuring entities, authorities and review bodies, to disclose confidential information where disclosure:

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<sup>1</sup> Nothing in this paragraph shall be construed to require New Zealand to withhold information from disclosure in a manner contrary to the *Official Information Act 1982*, or any successor legislation.

- (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 13.7 : Publication of Information on Procurement Measures**

Each Party shall promptly publish:

- (a) its measures relating to government procurement covered by this Chapter; and
- (b) any modifications to such measures in the same manner as the original publication.

### **Article 13.8 : Qualification of Suppliers**

#### *Registration Systems and Qualification Procedures*

1. A Party, including its procuring entities, may maintain a supplier registration system under which interested suppliers are required to register and provide certain information.
2. Each Party shall ensure that:
  - (a) its procuring entities make efforts to minimise differences in their qualification procedures; and
  - (b) where 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 any registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of the other Party in its procurement.

#### *Selective Tendering*

4. Where a 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 13.11.2(a), (b), (f), (g), (j), and (k) 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 specified in Article 13.11.2(c), (d), (e), (h), and (i) to the qualified suppliers that it notifies as specified in Article 13.12.4(b).

5. A procuring entity shall allow all qualified suppliers to participate in a particular procurement, unless the procuring entity states in the notice of intended procurement any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers.

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

#### *Multi-Use Lists*

7. A procuring entity may 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;
- (b) where published by electronic means, made available continuously; and
- (c) published in the appropriate medium listed in Annex 13-A.

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

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

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

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 period of time.

11. 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, within the time-period provided for in Article 13.12, 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.

#### *Information on Procuring Entity Decisions*

12. 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.

13. 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 the request of the supplier, promptly provide the supplier with a written explanation of the reasons for its decision.

#### **Article 13.9 : Conditions for Participation**

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

2. In establishing the conditions for participation, a procuring entity:

- (a) shall not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of a given Party; and
- (b) may require relevant prior experience where essential to meet the requirements of the procurement.

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

- (a) evaluate the financial capacity and the commercial and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside the territory of the Party of the procuring entity; and
- (b) base its evaluation on the conditions that the procuring entity has specified in advance in notices or tender documentation.

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

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

#### **Article 13.10 : Limited Tendering**

1. Provided that it does not use this provision for the purposes of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles 13.8, 13.9, 13.11, 13.12, 13.14, and 13.15 only under any of the following circumstances:

- (a) where,
  - (i) no tenders were submitted or no suppliers requested participation;
  - (ii) no tenders that conform to the essential requirements of the tender documentation were submitted;
  - (iii) no suppliers satisfied the conditions for participation; or
  - (iv) the tenders submitted have been collusive,

provided that the requirements of the tender documentation are not substantially modified;

- (b) where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons:
  - (i) the requirement is for a work of art;
  - (ii) the protection of patents, copyrights or other exclusive rights; or
  - (iii) due to an absence of competition for technical reasons;
- (c) for additional deliveries by the original supplier of goods or services that were not included in the initial procurement, where 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) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;
- (e) for goods purchased on a commodity market;
- (f) where a procuring entity procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. Original development of a first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs;
- (g) for purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership or bankruptcy, but not for routine purchases from regular suppliers; 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 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 13.11 : Notices**

#### *Notice of Intended Procurement*

1. For each covered procurement, a procuring entity shall publish a notice of intended procurement in the appropriate paper or electronic medium listed in Annex 13-A except in the circumstances described in Article 13.10. Such medium shall be widely disseminated and such notices shall remain readily accessible to the public, at least until expiration of the time-period indicated in the notice. The notices shall, for procuring entities covered under Annex 13-A, be accessible by electronic means free of charge through a single point of access during the entire period established for tendering.

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, where 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) where applicable, the address and the 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 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 13.8, a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, where applicable, any limitation on the number of suppliers that will be permitted to tender.

#### *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, where applicable, the 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 paper or electronic medium listed in Annex 13-A as early as possible in each fiscal year a notice regarding their future procurement plans (hereinafter referred to as "notice of planned procurement"). 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.

## **Article 13.12 : 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 where electronic means are not used.

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

### *Deadlines*

3. 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. Where a state of urgency duly substantiated by the procuring entity renders this time-period impracticable, the time-period may be reduced to not less than 10 days.

4. Except as provided for in paragraphs 5 through 8, a procuring entity shall establish that the final date for the submission of tenders shall be not 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.

5. A procuring entity may reduce the time-period for tendering established in accordance with paragraph 4 to not less than 10 days where:

- (a) the procuring entity has published a notice of planned procurement as described in Article 13.11.4 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 13.11.2 as is available;
- (b) the procuring entity, for recurring contracts, indicates in an initial notice of intended procurement that subsequent notices will provide time-periods for tendering based on this paragraph; or
  - (c) a state of urgency duly substantiated by the procuring entity renders the time-period for tendering established in accordance with paragraph 4 impracticable.
6. A procuring entity may reduce the time-period for tendering established in accordance with paragraph 4 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; or
  - (c) the entity accepts tenders by electronic means.
7. The use of paragraph 6, in conjunction with paragraph 5, shall in no case result in the reduction of the time-period for tendering established in accordance with paragraph 5 to less than 10 days from the date on which the notice of intended procurement is published.
8. Notwithstanding any other provision in this Article, where 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 4 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, where the entity accepts tenders for commercial goods or services by electronic means, it may reduce the time-period established in accordance with paragraph 4 to not less than 10 days.

### **Article 13.13 : 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, 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 standards 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 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. For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment.

#### **Article 13.14 : 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 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 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.

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. 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*

5. Where, 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 re-issues 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, where 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 13.15 : Treatment of Tenders and Awarding of Contracts**

### *Treatment of Tenders*

1. A procuring entity shall receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.
2. A procuring entity shall not penalise any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.
3. Where a procuring entity provides a supplier with an opportunity to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunity to all participating suppliers.

### *Awarding of Contracts*

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

## **Article 13.16 : Post-Award 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 Article 13.6 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. No later than 72 days after the award of each contract covered by this Chapter, a procuring entity shall publish a notice in the appropriate paper or electronic medium listed in Annex 13-A. Where the entity publishes the notice only in an electronic medium, the information shall remain readily accessible for a reasonable period of time. The notice shall include at least the following information:

- (a) a description of the goods or services procured;
- (b) the name and address of the procuring entity;
- (c) the name and address of the successful supplier;
- (d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;
- (e) the date of award; and
- (f) the type of procurement method used, and in cases where limited tendering was used in accordance with Article 13.10, 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 13.10; and
- (b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.

### **Article 13.17 : Domestic Review of Supplier Complaints**

1. Each Party shall ensure that its entities accord impartial and timely consideration to any complaints from suppliers regarding an alleged breach of measures implementing this Chapter arising in the context of a procurement in which they have, or have had, an interest. Where appropriate, a Party may encourage suppliers to seek clarification from its entities with a view to facilitating the resolution of any such complaints.
2. Each Party shall provide suppliers of the other Party with non-discriminatory, timely, transparent and effective access to an administrative or judicial body competent to hear or review complaints of alleged breaches of the procuring Party's laws, regulations, procedures and practices regarding procurement in the context of procurements in which they have, or have had, an interest.
3. Each Party shall make information on complaint mechanisms generally available.
4. 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 13.18 : Use of Electronic Communications in Procurement**

1. The Parties shall seek to provide opportunities for government procurement to be undertaken through the internet.
2. In order to facilitate commercial opportunities for its suppliers under this Chapter, each Party shall maintain a single electronic portal for access to comprehensive information on government procurement supply opportunities in its territory, and information on measures relating to government procurement shall be made available. The contact point or points from whom suppliers can obtain information on government procurement shall either be specified in Annex 13-A, or be set out in the information on the single electronic portal.
3. The Parties shall encourage, to the extent possible, the use of electronic means for the provision of tender documents and receipt of tenders.
4. The Parties shall endeavour to ensure that policies and procedures for the use of electronic means in procurement are adopted that:

- (a) protect documentation from unauthorised and undetected alteration; and
- (b) provide appropriate levels of security for data on, and passing through, the procuring entity's network.

5. Each Party shall encourage its entities to publish as early as possible in the fiscal year information regarding the entities' indicative procurement plans on the electronic portal referred to in paragraph 2.

### **Article 13.19 : Amendments, Modifications and Rectifications of Annex**

1. Where a Party proposes to make minor rectifications or other modifications of a purely formal or minor nature to Annex 13-A, it shall notify the other Party in writing. Such rectifications or modifications shall become effective 30 days from the date of notification, unless there is an objection from the other Party. The other Party shall not be entitled to compensatory adjustments.

2. Where a Party proposes to make a modification to Annex 13-A on the grounds that government control or influence over an entity has been effectively eliminated as a result of corporatisation and commercialisation or privatisation, it shall notify the other Party in writing. The proposed modification shall become effective 30 days from the date of notification, unless there is an objection from the other Party. The other Party shall not be entitled to compensatory adjustments.

3. Where the other Party objects to a proposed modification or rectification, it shall notify the modifying Party of its objection in writing within 30 days of the notification of the proposed modification or rectification and include the reason for its objection.

4. The Parties shall seek to resolve any objection through technical consultations, which shall be without prejudice to the rights and obligations of the Parties under Chapter 19 (Dispute Settlement).

5. Where a Party proposes to make an amendment for reasons other than those stated in paragraphs 1 and 2, it shall notify the other Party in writing and provide appropriate compensatory adjustments in order to maintain a level of coverage comparable to that existing prior to the amendment. The proposed amendment shall become effective in accordance with Article 21.4 (Amendments).

6. The Joint Commission shall by decision update Annex 13-A to reflect any amendment, modification or rectification that has become effective in accordance with paragraphs 1 through 5.