

## CHAPTER 14

### GOVERNMENT PROCUREMENT

#### Article 14.1: Definitions

For the purposes of this Chapter:

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

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

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

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

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

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

**notice of intended procurement** means a notice published by a procuring entity inviting interested suppliers to submit a request for participation, a tender or both;

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

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

**procuring entity** means an entity listed in Annex 14-A;

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

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

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

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

**supplier** means a person that provides or could provide a good or service to a procuring entity; and

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

- (a) sets out the characteristics of:
  - (i) goods to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production; or
  - (ii) services to be procured, or the processes or methods for their provision; or
- (b) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service.

## **Article 14.2: Scope**

### *Application of Chapter*

1. This Chapter applies to any measure adopted or maintained by a Party regarding covered procurement. For purposes of this Chapter, covered procurement means procurement for governmental purposes:

- (a) of goods, services, or any combination thereof in accordance with that Party's Schedule to Annex 14-A;
- (b) 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;
- (c) by a procuring entity;
- (d) by any contractual means, including purchase, rental or lease, with or without an option to buy, and build-operate-transfer contracts and public works concessions contracts;

- (e) for which the value of the contract, as estimated in accordance with Article 14.5, equals or exceeds the relevant threshold specified in that Party's Schedule in Annex 14-A, at the time of publication of a notice of intended procurement; and
- (f) that is not otherwise excluded from coverage under this Agreement.

*Activities Not Covered*

2. Unless otherwise provided in a Party's Schedule to Annex 14-A, this Chapter does not apply to:

- (a) non-contractual agreements or any form of assistance that a Party, including its procuring entities, provides, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, sponsorship arrangements and cooperative agreements;
- (b) government provision of goods or services to persons or to regional or local level governments;
- (c) procurement conducted for the specific purpose of providing foreign assistance, including developmental aid;
- (d) procurement conducted under the particular procedure or condition of an international organisation, or funded by international loans, grants or other assistance, where the applicable procedure or condition would be inconsistent with this Chapter;
- (e) procurement conducted under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project;
- (f) hiring of government employees and related employment measures;
- (g) 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, derivatives and other securities. For greater certainty, this Chapter shall not apply to procurement of banking, financial, fiduciary or specialised services related to the following activities:
  - (i) the incurring of public indebtedness; or
  - (ii) public debt management;
- (h) procurement made by a procuring entity from another government entity of that same Party whether or not covered by this Chapter;

- (i) the acquisition or rental of land, existing buildings or other immovable property or the rights thereon; or
  - (j) procurement of a good or service outside the territory of the Party of the procuring entity, for consumption outside the territory of that Party.
3. Each Party shall ensure that its procuring entities comply with this Chapter in conducting covered procurements.
4. No procuring entity shall prepare or design a procurement, or otherwise structure or divide a procurement into separate procurements in any stage of the procurement, or use a particular method to estimate the value of a procurement, in order to avoid the obligations of this Chapter.
5. Where a procuring entity awards a contract that is not covered under this Chapter, nothing in this Chapter shall be construed to cover any good or service component of the contract.
6. Nothing in this Chapter shall be construed to prevent a Party, including its procuring entities, from developing new procurement policies, procedures or contractual means, provided that they are not inconsistent with this Chapter.

#### *Schedules*

7. Each Party shall specify the following information in its Schedule to Annex 14-A:
- (a) in Section A, the central government entities whose procurement is covered by this Chapter;
  - (b) in Section B, the sub-central government entities whose procurement is covered by this Chapter;
  - (c) in Section C, other entities whose procurement is covered by this Chapter;
  - (d) in Section D, the goods covered by this Chapter;
  - (e) in Section E, the services, other than construction services, covered by this Chapter;
  - (f) in Section F, the construction services covered by this Chapter;
  - (g) in Section G, any General Notes;
  - (h) in Section H, the applicable Threshold Adjustment Formula; and
  - (i) in Section I, the publication information required under Article 14.7.

## **Article 14.3: General Principles**

### *National Treatment and Non-Discrimination*

1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the other Party and any other Party to the Pacific Alliance and to the suppliers of the other Party, treatment no less favourable than the treatment that the Party, including its procuring entities, accords to:

- (a) its domestic goods, services and suppliers; and
- (b) goods, services and suppliers of any other Party to the Pacific Alliance.

2. With respect to any measure regarding covered procurement, no Party, including its procuring entities, shall:

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

3. All orders under contracts awarded for covered procurement shall be subject to paragraphs 1 and 2.

### *Measures Not Specific to Procurement*

4. Paragraphs 1 and 2 shall not apply to:

- (a) 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; or
- (b) measures affecting trade in services other than measures governing covered procurement.

### *Procurement Methods*

5. A procuring entity shall use an open tendering procedure for covered procurement unless Article 14.9 or Article 14.13 applies.

### *Rules of Origin*

6. Each Party shall apply to covered procurement of a good the rules of origin that it applies in the normal course of trade to that good.

#### **Article 14.4: Offsets**

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

#### **Article 14.5: Valuation**

1. 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 avoiding the obligations in this Chapter;
- (b) include the maximum total value of the procurement over its entire duration, taking into account all forms of remuneration, including any premium, fee, commission, interest or other revenue stream that may be provided in the relevant procurement and, where the procurement provides for the possibility of options, the total value of such options; and
- (c) where the procurement is to be conducted in multiple parts, with contracts to be awarded at the same time or over a given period to one or more suppliers, base its calculation of the total maximum value of the procurement over its entire duration.

2. If the total estimated maximum value of a procurement over its entire duration is not known, the procurement shall be deemed as a covered procurement, unless otherwise excluded under this Agreement.

#### **Article 14.6: Technical Specifications**

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

2. In prescribing the technical specifications for the good or service being procured, a procuring entity shall, if appropriate:

- (a) set out the technical specifications in terms of performance and functional requirements, rather than design or descriptive characteristics; and

- (b) base the technical specifications on international standards, if these exist; otherwise, on national technical regulations, recognised national standards or building codes.

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

4. 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.

5. For greater certainty, this Article is not intended to preclude a procuring entity from preparing, adopting or applying technical specifications to promote the conservation of natural resources or the protection of the environment.

6. For greater certainty, a procuring entity may conduct market research in developing specifications for a particular procurement.

7. For greater certainty, this Chapter is not intended to preclude a Party, or its procuring entities, from preparing, adopting or applying technical specifications required to protect sensitive government information, including specifications that may affect or limit the storage, hosting or processing of such information outside the territory of the Party.

#### **Article 14.7: Publication of Procurement Information**

1. Each Party shall promptly publish any measure of general application relating to covered procurement, and any change or addition to this information.

2. Each Party shall list in Section I of its Schedule to Annex 14-A the paper or electronic means through which the Party publishes the information described in paragraph 1 and the notices required by Article 14.8, Article 14.13 and Article 14.15.

3. Each Party shall, on request, respond to an inquiry relating to the information referred to in paragraph 1.

#### **Article 14.8: Notice of Intended Procurement**

1. For each covered procurement, except in the circumstances described in Article 14.9, a procuring entity shall publish a notice of intended procurement through the appropriate paper or

electronic means listed in Section I of its Schedule to Annex 14-A. The notices shall remain readily accessible to the public until at least the expiration of the time period for responding to the notice or the deadline for submission of the tender.

2. The notices shall, if accessible by electronic means, be provided free of charge:
  - (a) for central government entities that are covered under Annex 14-A, through a single point of access; and
  - (b) for sub-central government entities and other entities covered under Annex 14-A, through links in a single electronic portal.
  
3. Unless otherwise provided in this Chapter, each notice of intended procurement shall include at least the following information, unless that information is provided in the tender documentation that is made available free of charge to all interested suppliers at the same time as the notice of intended procurement:
  - (a) a description of the procurement, including, if appropriate, the nature and quantity of the goods or services to be procured and a description of any options, or the estimated quantity if the quantity is not known;
  - (b) the procurement method that will be used;
  - (c) a list and a brief description of any conditions for participation that suppliers must fulfil to participate in the relevant procurement, that may include any related requirements for specific documents or certifications that suppliers must provide;
  - (d) the name of the procuring entity publishing the notice;
  - (e) the address and/or the contact point information where suppliers may obtain all relevant documents relating to the procurement, and the cost and terms of payment to obtain the relevant documents, if any;
  - (f) where applicable, the address and any final date for the submission of requests for participation in the procurement;
  - (g) the address and any final date for the submission of tenders;
  - (h) the time-frame for delivery of goods or services to be procured or the duration of the contract, except when this information is provided in the tender documentation;
  - (i) if, pursuant to Article 14.13, 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

- (j) an indication that the procurement is covered by this Chapter unless that indication is publicly available through information published pursuant to Article 14.7.

4. For greater certainty, paragraph 3 does not preclude a Party from charging a fee for tender documentation if the notice of intended procurement includes all of the information set out in paragraph 3.

#### *Notice of Planned Procurement*

5. Each Party shall encourage their procuring entities to publish in an electronic means listed in Section I of its Schedule to Annex 14-A, as early as possible in each fiscal year, a notice regarding their future procurement plans. Such notices shall include the subject matter of the procurement and the planned date of publication of the notice of intended procurement.

#### **Article 14.9: Limited Tendering**

1. Provided that it does not use this provision for 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.

2. If a procuring entity uses limited tendering, it may choose, according to the nature of the procurement, not to apply Article 14.6, Article 14.8, Article 14.10, Article 14.11, Article 14.12, Article 14.13 or Article 14.14. A procuring entity may use limited tendering, only under the following circumstances:

- (a) if, in response to a prior notice, invitation to participate or invitation to tender:
  - (i) no tenders were submitted or no suppliers requested participation;
  - (ii) no tenders were submitted that conform to the essential requirements in the tender documentation;
  - (iii) no suppliers satisfied the conditions for participation; or
  - (iv) the tenders submitted were collusive. For greater certainty, a Party may provide under its laws and regulations that a declaration that tenders are collusive must be made by a competent authority;

provided that the procuring entity does not substantially modify the requirements set out in the notices or the tender documentation;

- (b) if the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute good or service exists for any of the following reasons:

- (i) the requirement is for a work of art;
  - (ii) the protection of patents, copyrights or other exclusive rights; or
  - (iii) due to an absence of competition for technical reasons;
- (c) for additional deliveries by the original supplier or its authorised agents 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 or due to conditions under original supplier warranties; and
  - (ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;
- (d) for goods purchased on a commodity market;
- (e) if a procuring entity procures a prototype or a first good or service that is intended for limited trial or that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. Original development of a prototype or a first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the prototype or the first good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs. Subsequent procurements of these newly developed goods or services, however, shall be subject to this Chapter;
- (f) if additional construction services that were not included in the initial contract but that were within the objectives of the original tender documentation have, due to unforeseeable circumstances, become necessary to complete the construction services described therein. However, the total value of contracts awarded for additional construction services may not exceed 50 per cent of the value of the initial contract;
- (g) insofar as is 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 by means of open or selective tendering;
- (h) if a contract is awarded to the winner of a design contest, provided that:
- (i) the contest has been organised in a manner that is consistent with this Chapter;

and

- (ii) the participants are judged by an independent jury with a view to award a design contract to the winner; or
- (i) for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals, liquidation, bankruptcy or receivership, but not for routine purchases from regular suppliers.

3. A procuring entity shall prepare a report in writing or maintain a record for each contract awarded in accordance with paragraph 2. Such report or record shall include the name of the procuring entity, the value and kind of goods or services procured, and a statement that indicates the circumstances and conditions described in paragraph 2 that justified the use of limited tendering.

#### **Article 14.10: Time Periods for the Submission of Tenders**

##### *General*

1. A procuring entity shall, consistent with its own reasonable needs, provide sufficient time for a supplier to obtain the tender documentation and to prepare and submit a request for participation and a responsive tender, taking into account factors such as:

- (a) the nature and complexity of the procurement; and
- (b) the time necessary for transmitting tenders by non-electronic means from foreign as well as domestic points if electronic means are not used.

##### *Deadlines*

2. A procuring entity that uses selective tendering shall establish that the final date for the submission of a request for participation shall not, in principle, be less than 25 days from the date of publication of the notice of intended procurement. If a state of urgency duly substantiated by the procuring entity renders this time period impracticable, the time period may be reduced to no less than 10 days.

3. Except as provided in paragraphs 4 and 5, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 40 days from the date on which:

- (a) in the case of open tendering, the notice of intended procurement is published; or
- (b) in the case of selective tendering, the procuring entity notifies the suppliers that they will be invited to submit tenders, whether or not it uses a multi-use list.

4. A procuring entity may reduce the time period for tendering set out in paragraph 3 by five days for each one of the following circumstances:

- (a) the notice of intended procurement is published by electronic means;
- (b) the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and
- (c) the procuring entity accepts tenders by electronic means.

5. A procuring entity may reduce the time period for tendering set out in paragraph 3 to no less than 10 days if:

- (a) the procuring entity has published a notice of planned procurement under Article 14.8 at least 40 days and no more than 12 months in advance of the publication of the notice of intended procurement, and the notice of planned procurement contains:
  - (i) a description of the procurement;
  - (ii) the approximate final dates for the submission of tenders or requests for participation;
  - (iii) the address from which documents relating to the procurement may be obtained; and
  - (iv) as much of the information that is required for the notice of intended procurement as is available;
- (b) a state of urgency duly substantiated by the procuring entity renders impracticable the time period for tendering set out in paragraph 3; or
- (c) the procuring entity procures commercial goods or services.

6. The use of paragraph 4, in conjunction with paragraph 5, shall in no case result in the reduction of the time periods for tendering set out in paragraph 3 to less than 10 days.

7. A procuring entity shall require all interested or participating suppliers to submit requests for participation or tenders in accordance with a common deadline. These time periods, and any extension of these time periods, shall be the same for all interested or participating suppliers.

8. When a procuring entity covered under Section B and C of a Party's Schedule to Annex 14-A has selected all or a limited number of qualified suppliers, the time period for tendering may be fixed by mutual agreement between the procuring entity and the selected suppliers. In the absence of agreement, the period shall not be less than 10 days.

## **Article 14.11: Tender Documentation**

1. A procuring entity shall make available to suppliers tender documentation that includes all information necessary to allow suppliers to prepare and submit responsive tenders.
2. Unless already provided in the notice of intended procurement, that tender documentation shall include at least 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 certification, plans, drawings or instructional materials;
  - (b) any conditions for participation for suppliers, including any financial guarantees, information and tender documents that suppliers are required to submit in relation to those conditions;
  - (c) all criteria to be considered in the awarding of the contract and, except where price is the sole criterion, the relative importance of such criteria;
  - (d) where the procuring entity will hold an electronic auction, the rules, including identification of the elements of the tender related to the evaluation criteria, upon which the auction will be conducted;
  - (e) if there will be a public opening of tenders, the date, time and place for the opening of tenders;
  - (f) any date or time frame for delivery of goods or supply of services, or the duration of the contract; and
  - (g) any other terms or conditions, including terms of payment and the means by which tenders may be submitted.
3. In establishing any date for the delivery of a good or the supply of a service being procured, a procuring entity shall take into account factors such as the complexity of the procurement.
4. When a procuring entity does not publish all tender documents by electronic means, a procuring entity shall make promptly available the tender documentation at the request of any interested supplier.
5. A procuring entity shall promptly reply to any reasonable request for relevant information by an interested or participating supplier, provided that the information does not give that supplier an advantage over other suppliers.

### *Modifications*

6. If, prior to the award of a contract, a procuring entity modifies the evaluation criteria or requirements set out in a notice of intended procurement or tender documentation provided to a participating supplier or amends or re-issues the notice or tender documentation referred to in paragraph 2, it shall publish or provide those modifications or the amended or re-issued notice or tender documentation in writing:

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

### **Article 14.12: Conditions for Participation**

1. A procuring entity shall limit any conditions for participation in a covered procurement to those conditions that ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to fulfil the requirements of that 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 or that the supplier has prior work experience in the territory of that Party; and
- (b) may require relevant prior experience if essential to meet the requirements of the procurement.

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

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

4. If authorised by a Party's measures and there is supporting material, a Party, including its procuring entities, may exclude a supplier on grounds such as:

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

### **Article 14.13: 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. No Party, including its procuring entities, shall:
  - (a) adopt or apply any registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of the other Party in its procurement; or
  - (b) use such registration system or qualification procedure to prevent or delay the inclusion of suppliers of the other Party on a list of suppliers or prevent those suppliers from being considered for a particular procurement.

#### *Selective Tendering*

3. If a Party's measures authorise the use of selective tendering, and if a procuring entity intends to use selective tendering, the procuring entity shall:
  - (a) publish a notice of intended procurement that invites suppliers to submit a request for participation in a covered procurement; and
  - (b) include in the notice of intended procurement the information specified in Article 14.8.3 (a), (c), (d), (e), (f), (i) and (j).
4. The procuring entity shall:

- (a) publish the notice sufficiently in advance of the procurement to allow interested suppliers to request participation in the procurement;
- (b) provide, by the commencement of the time period for tendering, at least the information in Article 14.8.3 (b), (g) and (h) to the qualified suppliers that it notifies as specified in Article 14.10.3 (b); and
- (c) allow all qualified suppliers to submit a tender, unless the procuring entity states in the notice of intended procurement a limitation on the number of suppliers that will be permitted to tender and the criteria or justification for selecting the limited number of suppliers.

5. If the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 3, the procuring entity shall ensure that the tender documentation is made available at the same time to all the qualified suppliers selected in accordance with paragraph 4(c).

#### *Multi-Use Lists*

6. A Party, including its procuring entities, may establish or maintain a multi-use list provided that it publishes annually, or otherwise makes continuously available by electronic means, a notice inviting interested suppliers to apply for inclusion on the list. The notice shall include:

- (a) a description of the goods and services, or categories thereof, for which the list may be used;
- (b) the conditions for participation to be satisfied by suppliers for inclusion on the list and the methods that the procuring entity or other government agency will use to verify a supplier's satisfaction of those conditions;
- (c) the name and address of the procuring entity or other government agency and other information necessary to contact the procuring entity and to obtain all relevant documents relating to the list;
- (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;
- (e) the deadline for submission of applications for inclusion on the list, if applicable; and
- (f) an indication that the list may be used for procurement covered by this Chapter, unless that indication is publicly available through information published pursuant to Article 14.7.2.

7. A Party, including its procuring entities, that establishes or maintains a multi-use list, shall include on the list, within a reasonable period of time, all suppliers that satisfy the conditions for participation set out in the notice referred to in paragraph 6.

8. If a supplier that is not included on a multi-use list submits a request for participation in a procurement based on the multi-use list and submits all required documents, within the time period provided for in Article 14.10.2, a procuring entity shall examine the request. The procuring entity shall not exclude the supplier from consideration in respect of the procurement unless the procuring 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*

9. A procuring entity or other entity of a Party shall promptly inform any supplier that submits a request for participation in a procurement or application for inclusion on a multi-use list of the decision with respect to the request or application.

10. If a procuring entity or other entity of a Party rejects a supplier's request for participation 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 reason for its decision.

### **Article 14.14: Treatment of Tenders and Awarding of Contracts**

#### *Treatment of Tenders*

1. A procuring entity shall receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process and the confidentiality of tenders.

2. If the tender of a supplier is received after the time specified for receiving tenders, the procuring entity shall not penalise that supplier if the delay is due solely to the mishandling on the part of the procuring entity.

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

#### *Awarding of Contracts*

4. A procuring entity shall require that, to be considered for an award, a tender be submitted in writing and shall, at the time of opening:

- (a) comply with the essential requirements set out in the notice and tender documentation;
- and

(b) be submitted by a supplier who satisfies the conditions for participation.

5. Unless a procuring entity determines that it is not in the public interest to award a contract, it shall award the contract to the supplier that the procuring entity has determined to be fully capable of fulfilling the terms of the contract and that, whose tender is consider the most advantageous based solely on the evaluation criteria specified in the notice and tender documentation, or where the price is the sole criterion, the lowest price.

6. A procuring entity shall not use options, cancel a covered procurement, or modify or terminate awarded contracts in order to avoid the obligations of this Chapter.

7. If a procuring entity receives a tender with a price that is abnormally lower than the prices in other tenders submitted, it may verify or obtain assurance that the supplier satisfies the conditions for participation and is capable of fulfilling the terms of the contract at that price.

#### **Article 14.15: Transparency and Post-Award Information**

##### *Information Provided to Suppliers*

1. A procuring entity shall promptly publish or inform suppliers that have submitted a tender of the contract award decision and, on the request of a supplier, shall do so in writing. Subject to Article 14.20, on request, a procuring entity shall provide an unsuccessful supplier with the reasons why the entity did not select that supplier's tender and the relative advantages of the successful supplier's tender.

##### *Publication of Award Information*

2. A procuring entity shall, after the award of a contract for a covered procurement, publish in the appropriate paper or an electronic means listed in Section I of a Party's Schedule to Annex 14-A, a notice containing at least the following information:

- (a) the name and address of the procuring entity;
- (b) a description of the goods or services procured;
- (c) the date of award or, if the procuring entity has already informed suppliers of the date of the award under paragraph 1, the contract date;
- (d) the name of the successful supplier;
- (e) the value of the contract awarded; and
- (f) the procurement method used and, if a procedure was used pursuant to Article 14.9, a

brief description of the circumstances justifying the use of that procedure.

### *Maintenance of Records*

3. A procuring entity shall maintain the documentation, records and reports relating to tendering procedures and contract awards covered under this Chapter, including the records and reports provided for in Article 14.9, for at least three years after the award of a contract.

### **Article 14.16: Ensuring Integrity in Procurement Practices**

Each Party shall ensure that criminal or administrative measures exist to address corruption in its 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 Party has determined to have engaged in fraudulent or other illegal actions in relation to government procurement in the Party's territory. Each Party shall also ensure that it has in place policies and procedures to eliminate to the extent possible or manage any potential conflict of interest on the part of those engaged in or having influence over a procurement.

### **Article 14.17: Domestic Review Procedures**

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

- (a) a breach of this Chapter; or
- (b) when the supplier does not have a right to challenge directly a breach of this Chapter under the laws and regulations 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 procuring entity and the supplier to seek resolution of the complaint through consultations. The procuring entity shall accord impartial and timely consideration to any such complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement or its right to seek corrective measures under the administrative or judicial review procedure.

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

4. Each Party shall 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. When 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. Each Party shall ensure that, if a review body that is not a court, the review body 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) prompt 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 14.18: Use of Electronic Means**

1. The Parties shall seek to provide information related to future opportunities on government procurement through electronic means.
2. The Parties shall encourage, to the extent possible, the use of electronic means for the publication of procurement information, notices and tender documentation and for the receipt of tenders.
3. When conducting covered procurement by electronic means, each Party shall:
  - (a) ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software; and
  - (b) establish and maintain mechanisms that ensure the integrity of information provided by suppliers, including requests for participation and tenders.

### **Article 14.19: Modifications and Rectifications**

1. A Party shall notify any proposed modification or rectification to its Schedule to Annex 14-A by circulating a notice in writing to the other Party through the Other Issues Committee established under Article 22.5(c) (Establishment of Cross-Cutting Committees).<sup>1</sup> A Party shall provide compensatory adjustments for a change in coverage if necessary to maintain a level of coverage comparable to the coverage that existed prior to the modification or rectification. The Party may include the offer of compensatory adjustment in its notice.
2. A Party is not required to provide compensatory adjustments to the other Party if the proposed modification or rectification concerns one of the following:
  - (a) a procuring entity over which the Party has effectively eliminated its control or influence in respect of covered procurement by that procuring entity; or
  - (b) rectifications of a purely formal nature and minor modifications to that Party's Schedule to Annex 14-A, such as:
    - (i) changes in the name of a procuring entity;
    - (ii) the merger of one or more procuring entities listed in its Schedule;

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<sup>1</sup> For transparency purposes the other Parties to the Pacific Alliance shall receive a copy of any proposed modification and rectification of Annex 14-A.

- (iii) the separation of a procuring entity listed in its Schedule into two or more procuring entities that are all added to the procuring entities listed in the same Section of that Party's Schedule to Annex 14-A; or
- (iv) changes in website references;

and no Party objects under paragraph 3 on the basis that the proposed modification or rectification does not concern subparagraph (a) or (b).

3. Any Party whose rights under this Chapter may be affected by a proposed modification or rectification that is notified under paragraph 1 shall notify the other Party of any objection to the proposed modification or rectification within 30 days of the date of circulation of the notice.

4. If a Party objects to a proposed modification or rectification, including a modification or rectification regarding a procuring entity on the basis that government control or influence over the entity's covered procurement has been effectively eliminated, that Party may request additional information, including information on the nature of any government control or influence, with a view to clarifying and reaching agreement on the proposed modification or rectification, including the procuring entity's continued coverage under this Chapter. The modifying Party and the objecting Party shall make every attempt to resolve the objection through consultations.

5. If the modifying Party and the objecting Party resolve the objection through consultations, the modifying Party shall notify the other Party of the resolution.

6. The Commission shall modify Annex 14-A to reflect any agreed modification.

## **Article 14.20: Disclosure of Information**

### *Provision of Information to Parties*

1. Upon request of the other Party, a Party shall promptly provide any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Chapter, including information on the characteristics and relative advantages of the successful tender without disclosing confidential information. The Party that receives the information shall not disclose it to any supplier, except after consulting with, and obtaining the agreement of, the Party that provided the information.

### *Non-Disclosure of Information*

2. Notwithstanding any other provision of this Chapter, a Party shall not, except to the extent required by law or with the written authorisation of the supplier that provided the information, disclose information that would prejudice legitimate commercial interests of a particular supplier or that might prejudice fair competition between suppliers.

3. Nothing in this Chapter shall be construed to require a Party, to disclose confidential information if that disclosure would impede law enforcement, might prejudice fair competition between suppliers, would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or would otherwise be contrary to the public interest.

#### **Article 14.21: Exceptions**

1. Nothing in this Chapter shall be construed to prevent a Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests related 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 international 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, including environmental measures;
- (c) necessary to protect intellectual property; or
- (d) relating to the goods or services of persons with disabilities, of philanthropic or not-for-profit institutions, or of prison labour.

#### **Article 14.22: Facilitation of Participation by SMEs**

1. The Parties recognise the important contribution that SMEs can make to economic growth and employment and the importance of facilitating the participation of SMEs in government procurement.

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

3. If a Party maintains measures that provide preferential treatment to SMEs, the Party shall ensure that the measures, including the criteria for eligibility, are transparent.

4. The Parties may:

- (a) provide information related to their measures used in order to contribute, promote,

- encourage or facilitate SMEs participation in government procurement; and
- (b) cooperate in the elaboration of mechanisms in order to provide information to the SMEs of the means for participating in covered procurement under this Chapter.
5. To facilitate participation of SMEs in covered procurement, each Party may, if appropriate:
- (a) provide comprehensive procurement-related information that includes a definition of SMEs in a single electronic portal;
  - (b) endeavour to make all tender documentation available free of charge;
  - (c) identify SMEs interested in becoming trade partners with other enterprises in the territory of the other Party;
  - (d) conduct procurement by electronic means or through other new information and communication technologies;
  - (e) consider the size, design and structure of the procurement, including the use of subcontracting by SMEs; and
  - (f) undertake any other activity designed to facilitate the participation of SMEs in covered procurements.

#### **Article 14.23: Cooperation**

1. The Parties may develop cooperation activities with a view to achieving better understanding of their respective government procurement systems, as well as better access to their respective markets, in matters such as:
- (a) exchanging experiences and information, such as regulatory frameworks, best practices and the reporting of statistics;
  - (b) facilitating participation by suppliers in covered procurement, in particular, with respect to SMEs;
  - (c) developing and expanding the use of electronic means in government procurement systems;
  - (d) building capability of the suppliers with respect to market access on government procurement through technical assistance; and
  - (e) institutional strengthening for the fulfilment of the provisions of this Chapter, including training for government officials.

2. The Parties shall notify the Other Issues Committee established in Article 22.5(c) (Establishment of Cross-Cutting Committees) the undertaking to carry out any of such activities.

#### **Article 14.24: Administration of this Chapter**

1. Matters relating to administration of this Chapter shall be considered by the Parties through the Other Issues Committee established under Article 22.5(c) (Establishment of Cross-Cutting Committees).

2. The Other Issues Committee shall have the following additional functions under this Chapter:

(a) facilitating:

(i) cooperation between the Parties, as provided for in Article 14.23;

(ii) facilitation of participation by SMEs in covered procurement, as provided for in Article 14.22; and

(iii) consideration of further negotiations; and

(b) identifying and addressing any problems or other issues that may arise.

#### **Article 14.25: Further Negotiations**

On the request of a Party under Article 14.24, the other Party shall consider entering into future negotiations with the aim to expand the coverage under this Chapter, if the other Party provides additional market access to a third party under another international agreement that enters into force after the entry into force of this Agreement.