CHAPTER 11

GOVERNMENT PROCUREMENT

ARTICLE 11.1 General

The Parties recognise the importance of government procurement in trade relations and set as their objective the effective, reciprocal and gradual opening of their government procurement markets, in order to maximise, *inter alia*, competitive opportunities based on principles of equality, transparency, integrity, fair treatment and non-discrimination for the suppliers of the Parties.

ARTICLE 11.2 Definitions

For the purpose of this Chapter:

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;

goods or services means goods or services that a procuring entity needs to carry out its business;

in writing or written means any worded or numbered expression 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 procurement means a notice published by a procuring entity inviting interested suppliers to submit a request for participation, a tender, or both;

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

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

procuring entity means an entity listed in Annex 11-A;

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 provided in this Chapter;

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 to a procuring entity; 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 11.3 Scope

Application of Chapter

- 1. This Chapter applies to any measure regarding covered procurement.
- 2. For the purposes of this Chapter, covered procurement means government procurement:

- (a) of a good, service or any combination thereof as specified in each Party's Schedule to Annex 11-A;
- (b) by a procuring entity;
- (c) by any contractual means, including: purchase; lease; and rental or hire purchase, with or without an option to buy;
- (d) for which the value, as estimated in accordance with paragraph 6, equals or exceeds the relevant threshold specified in a Party's Schedule to Annex 11-A, at the time of publication of a notice of procurement; and
- (e) that is not otherwise excluded from coverage under this Agreement.

Activities Not Covered

- 3. Unless otherwise provided in a Party's Schedule to Annex 11-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 cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;
 - (c) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption, and distribution of public debt, including loans and government bonds, notes, and other securities;
 - (d) public employment contracts;
 - (e) procurement conducted:
 - (i) for the specific purpose of providing international assistance including development aid;
 - (ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or
 - (iii) under the particular procedure or condition of an international organisation, or funded by international grants, loans, or other

assistance where the applicable procedure or condition would be inconsistent with this Chapter.

Schedules

- 4. Each Party shall specify the following information in its Schedule to Annex 11-A:
 - (a) in Section A, the central government entities whose procurement is covered by this Chapter;
 - (b) in Section B, other entities whose procurement is covered by this Chapter;
 - (c) in Section C, the goods covered by this Chapter;
 - (d) in Section D, the services covered by this Chapter;
 - (e) in Section E, any general notes;
 - (f) in Section F, time periods required under Article 11.14;
 - (g) in Section G, the publication of procurement information required under Article 11.6 and Article 11.7(2); and
 - (h) in Section H, the applicable threshold adjustment formula.

Compliance

- 5. Each Party shall ensure that its procuring entities comply with this Chapter in conducting covered procurements.
- 6. A procuring entity shall not prepare 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.
- 7. Nothing in this Chapter shall be construed to prevent a Party, including its procuring entities, from developing new procurement policies, procedures, or templates, provided that they are not inconsistent with this Chapter.

Valuation

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

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

ARTICLE 11.4 Exceptions

- 1. Subject to the requirement that a measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent a Party, including its procuring entities, from adopting or maintaining a measure:
 - (a) necessary to protect public morals, interest, order or safety;
 - (b) necessary to protect human, animal or plant life or health;
 - (c) necessary to protect intellectual property; or
 - (d) relating to the good or service of a person with disabilities, of philanthropic or not-for-profit institutions, or of prison labour.
- 2. 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 relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.
- 3. The Parties understand that subparagraph 1(b) includes environmental measures necessary to protect human, animal or plant life or health.

ARTICLE 11.5 General Principles

National Treatment and Non-Discrimination¹

- 1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the other Party and to the suppliers of the other Party, treatment no less favorable than the treatment that 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 favorably than another locally established supplier on the basis of degree of foreign affiliation to, or ownership by, a person of the other Party; 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 of this Article.

Procurement Methods

4. A procuring entity shall use an open tendering procedure for covered procurement unless Article 11.9 or Article 11.10 applies.

Conduct of Procurement

- 5. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:
 - (a) avoids conflicts of interest; and
 - (b) prevents corrupt practices.

¹ For greater certainty, paragraphs 1, 2, and 3 shall not be applied to the companies classified as SMEs in accordance with UAE legislation, as detailed in paragraph 2.a) of Section E of the UAE Schedule to Annex 11-A.

Rules of Origin

6. 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.

Use of Electronic Means

- 7. The Parties shall provide for covered procurement to be undertaken through electronic means, including for the publication of procurement information, notices and tender documentation, and for the receipt of offers, generally, the full cycle of procure to pay.
- 8. 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 financial systems, information technology systems, and software; and
 - (b) establish and maintain mechanisms that ensure the integrity of information provided by suppliers.

Offsets

9. 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.²

Measures Not Specific to Procurement

10. Paragraphs 1 and 2 shall not apply to: customs duties and charges of any kind imposed on, or in connection with, importation; the method of levying such duties and charges; other import regulations or formalities and measures affecting trade in services other than measures governing covered procurement.

² For greater certainty, this paragraph shall not be applied to the UAE's In-Country Value certification policy, as specified in paragraph 2.b), Section E of the UAE's Schedule to Annex 11-A.

ARTICLE 11.6 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 G of its Schedule to Annex 11-A the electronic means through which the Party publishes the information described in paragraph 1 and the notices required by Article 11.7, Article 11.9, and Article 11.16.
- 3. Each Party shall, on request, provide an explanation in response to an inquiry relating to the information referred to in paragraph 1.

ARTICLE 11.7 Notice of Procurement

- 1. Except in the circumstances described in Article 11.10, and where applicable for each covered procurement, a procuring entity shall publish a notice of procurement through the appropriate paper or electronic means listed in Annex 11-A. The notice 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 offers.
- 2. The notice shall, if accessible by electronic means, be provided free of charge, through a single point of access, set out in Section G in Annex 11-A.
- 3. Unless otherwise provided in this Chapter, each notice of procurement shall include 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 procurement:
 - (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 the cost and terms of payment to obtain the relevant documents, if any;
 - (b) a description of the procurement, including the nature, exact or estimated quantity, and technical specification of the goods or services to be procured;
 - (c) if applicable, the contract terms and duration, service levels required from suppliers, and time frame for delivery of goods or services;
 - (d) the mechanism, criteria and weighting used for the evaluation of requests for participation in the procurement or the submission of tenders;

- (e) the address and final date for the submission of requests for participation in the procurement or the submission on tenders;
- (f) the language or languages in which requests for participation in the procurement or the submission may be submitted, if other than an official language of the Party of the procuring entity; and
- (g) if applicable, a list and a brief description of any conditions for participation of suppliers, that may include any related requirements for specific documents or certifications that suppliers must provide.

Notice of Planned Procurement

4. Each Party shall encourage its procuring entities to publish, as early as possible in each fiscal year, information regarding their indicative procurement plans.

ARTICLE 11.8 Conditions for Participation

- 1. A procuring entity shall limit any conditions for participation in a covered procurement to those conditions that are essential to 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, the commercial and technical abilities, and the regulatory compliance practices of a supplier on the basis of that supplier's business activities both inside and outside the territory of the Party of the procuring entity³ and

³ For greater certainty, it is the responsibility of the supplier to provide accurate information, and the procuring entity may reasonably rely on information provided to it by the supplier.

- (b) base its evaluation solely on the conditions that the procuring entity has specified in advance in notices or tender documentation.
- 4. Where there is supporting justification, 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, actions or omissions, or unethical practices that reflect on the commercial integrity of the supplier; or
 - (f) failure to pay government fees or taxes.

ARTICLE 11.9 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 and documentation.
- 2. A Party, including its procuring entities, shall not:
 - (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 any 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. Where a procuring entity intends to use selective tendering, the entity shall:

- (a) include in the notice of procurement at least the information specified in subparagraphs 3(a), 3(b), 3(e), and 3(g) of Article 11.7 and invite suppliers to submit a request for participation; and
- (b) provide, by the commencement of the time-period for tendering, at least the information in subparagraphs 3(c), 3(d) and 3(f) of Article 11.7 to the qualified suppliers that are invited to submit tenders.
- 4. A procuring entity shall allow all qualified suppliers to participate in a particular procurement, unless the procuring entity states in the notice of procurement any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers.
- 5. Where the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 3, a procuring entity shall ensure that those documents are made available at the same time to all the qualified suppliers invited to submit tenders.

Multi-Use Lists

- 6. A Party, including its procuring entities, may establish or maintain a multi-use list provided that it makes continuously available in the electronic medium listed in Annex 11-A a notice inviting interested suppliers to apply for inclusion on the list.
- 7. The notice provided for in paragraph 6 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; and
 - (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.
- 8. A procuring entity shall allow suppliers to apply at any time for inclusion on a multi-use list and shall include on the list all qualified suppliers within a reasonably short time.

9. Where a supplier that is not included on a multi-use list submits request for participation in a procurement based on a multi-use list and all required documents, within the time-period provided for in Article 11.14, 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, 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

- 10. 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.
- 11. If a procuring entity rejects a supplier's request for participation in a procurement or application for inclusion on a multi-use list, ceases to recognise a supplier as qualified, or removes a supplier from a multi-use list, the procuring 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 11.10 Limited Tendering

- 1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Party or protects domestic suppliers or conflicts with its measures, a procuring entity may use limited tendering and may choose not to apply Articles 11.7 through 11.9, Article 11.11, Article 11.12, Article 11.13, Article 11.14, and Article 11.15 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 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 11.11 Negotiations

- 1. A Party may provide for its procuring entities to conduct negotiations in the context of covered procurement if:
 - (a) the procuring entity has indicated its intent to conduct negotiations in the notice of procurement required under Article 11.7 (Notices of Procurement);
 - (b) it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice of procurement or tender documentation;
 - (c) there is a need to clarify the terms and conditions; or
 - (d) if the tenders exceed the allocated budget.
- 2. A procuring entity shall:
 - (a) ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the notice of procurement or tender documentation; and
 - (b) when negotiations are concluded, provide a common deadline for the remaining participating suppliers to submit any new or revised tenders.

ARTICLE 11.12 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, 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 these exist; 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 procuring 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 procuring entity may conduct market research in developing specifications for a particular procurement.
- 7. 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.
- 8. 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 11.13 Tender Documentation

General

- 1. A procuring entity shall, where applicable, 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 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 on which the auction will be conducted:
 - (f) 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
 - (g) any dates for the delivery of goods or the supply of services.

- 2. 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.
- 3. 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

- 4. Where, prior to the award of a contract, a procuring entity modifies the criteria or requirements set out in the notice of procurement or tender documentation provided to participating suppliers, or amends or reissues a notice or tender documentation, it shall transmit in writing all such modifications or amended or re-issued notice or tender documentation:
 - (a) 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 11.14 Time Periods

- 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 the nature and complexity of the procurement and the time necessary for submitting tenders.
- 2. Notwithstanding Paragraph 1, entities shall provide no less than the minimum time periods set out in Section F of each Party's schedule to Annex 11-A.
- 3. Time periods, and any amendment of time periods, shall be the same for all interested or participating suppliers.

ARTICLE 11.15 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. 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

- 3. To be considered for an award, an offer shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the notice and tender documentation and be submitted by a supplier who satisfies the conditions for participation.
- 4. 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, based solely on the evaluation criteria specified in the notice and tender documentation, has submitted:
 - (a) the most advantageous tender; or
 - (b) if price is the sole criterion, the lowest price.
- 5. 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.
- 6. A procuring entity shall not use options, cancel a procurement, or modify or terminate awarded contracts in a manner that circumvents the obligations under this Chapter.

ARTICLE 11.16 Transparency and Post-Award Information

Information Provided to Suppliers

- 1. A procuring entity shall promptly inform suppliers that have submitted a tender of the contract award decision. The procuring entity may do so in writing or through publication.
- 2. Subject to Article 11.17, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select the unsuccessful supplier's tender.

Publication of Award Information

3. The procuring entity may publish, according to its laws and regulations, the details of the award decision in the electronic medium specified in Section G of Annex 11-A.

Maintenance of Records

4. A procuring entity shall maintain the documentation, records, and reports relating to tendering procedures and contract awards for covered procurement, for at least three years after the award of a contract.

ARTICLE 11.17 Disclosure of Information

Provision of Information to Parties

1. On request of the other Party, a Party shall promptly provide information sufficient to demonstrate whether a procurement was conducted fairly, impartially, and in accordance with this Chapter, including, if applicable, 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, including its procuring entities, 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, including its procuring entities, authorities, and review bodies, to disclose confidential information if that disclosure:
 - (a) would impede law enforcement;
 - (b) might prejudice fair competition between suppliers;
 - (c) would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or
 - (d) would otherwise be contrary to the public interest.

ARTICLE 11.18 Ensuring Integrity in Procurement Practices

- 1. 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.
- 2. 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 11.19 Domestic Review

- 1. Each Party shall maintain, establish, or designate at least one impartial administrative or judicial authority (hereinafter referred to as a "review authority") that is independent of its procuring entities to review, in a non-discriminatory, timely, transparent, and effective manner, a challenge or complaint (hereinafter referred to as a "complaint") by a supplier that there has been:
 - (a) a breach of this Chapter; or
 - (b) if the supplier does not have a right to directly challenge a breach of this Chapter under the law of a Party, a failure of a procuring entity to comply with the Party's measures implementing this Chapter.
- 2. In the event of a complaint by a supplier, arising in the context of covered procurement in which the supplier has, or had, an interest, that there has been a breach or

failure as referred to in paragraph 1, the Party of the procuring entity conducting the procurement shall encourage, if appropriate, the procuring entity and the supplier to seek resolution of the complaint through consultations. The procuring entity shall accord impartial and timely consideration to the 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. Each Party shall make information on its complaint mechanisms generally available.

- 3. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge, from the time when the basis of the challenge became known or reasonably should have become known to the supplier.
- 4. If a body other than the review authority initially reviews a complaint, the Party shall ensure, to the extent applicable, 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 complaint.
- 5. Each Party shall ensure that, if the review authority is not a court, its review procedures are conducted in accordance with the following procedures:
 - (a) a supplier shall be allowed sufficient time to prepare and submit a complaint in writing from the time when the basis of the complaint became known or reasonably should have become known to the supplier;
 - (b) a procuring entity shall respond in writing to a supplier's complaint and provide all relevant documents to the review authority;
 - (c) a supplier that initiates a complaint shall be provided an opportunity to reply to the procuring entity's response before a decision is made on the complaint; and
 - (d) the review authority shall provide its decision on a supplier's complaint in a timely manner, in writing, with an explanation of the basis for the decision.
- 6. Each Party shall adopt or maintain procedures that provide for prompt interim measures, pending the resolution of a complaint, to preserve the supplier's opportunity to participate in the procurement and to ensure that the procuring entities of the Party comply with its measures implementing this Chapter. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether those measures should be applied. Just cause for not acting shall be provided in writing.

ARTICLE 11.20 Modifications and Rectifications of Annex

- 1. A Party shall notify any proposed modification or rectification (hereinafter referred to as "modification") to its Schedule to Annex 11-A by circulating a notice in writing to the other Party through the contact point designated under Article 19.5 (Communications). 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. 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 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 its Schedule to Annex 11-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;
 - (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 the Annex; and
 - (iv) changes in website references,

and the other Party does not object under paragraph 3 on the basis that the proposed modification does not concern subparagraph (a) or (b).

- 3. If a Party considers that its rights under this Chapter are affected by a proposed modification notified under paragraph 1, it shall notify the other Party of any objection to the proposed modification within 45 days of the date of circulation of the notice.
- 4. If a Party objects to a proposed modification, including a modification 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, 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. The Joint Committee shall modify Annex 11-A to reflect any agreed modification.

ARTICLE 11.21 Facilitation of Participation by SMEs

- 1. The Parties recognize 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. If a Party maintains a measure that provides preferential treatment for SMEs, the Party shall ensure that the measure, including the criteria for eligibility, is transparent.
- 3. To facilitate participation by SMEs in covered procurement, each Party shall, to the extent possible and if appropriate:
 - (a) provide comprehensive procurement-related information that includes a definition of SMEs in a single electronic portal;
 - (b) make all tender documentation available free of charge;
 - (c) conduct procurement by electronic means or through other new information and communication technologies; and
 - (d) consider the size, design, and structure of the procurement, including the use of subcontracting by SMEs;
 - (e) seek opportunities to simplify administrative processes; and
 - (f) require prompt payment by procuring entities, including in subcontracting.

ARTICLE 11.22 Financial Obligations

Each Party is solely responsible for any financial expenses to implement this Chapter.

ARTICLE 11.23 Language

To improve access to each Party's procurement market, each Party shall, where possible, use English in its publication of materials or information pursuant to Article 11.6 (Publication of Procurement Information), including in the publications listed in Section G of each Party's schedule to Annex 11-A.