

2. The Committee on Investment, Trade in Services, Electronic Commerce and Government Procurement shall be responsible for the implementation of this Chapter. To that end it shall monitor and regularly review the implementation by the Parties and consider any matter in relation to this Chapter that is referred to it by a Party.

3. The responsibility for Chapter 9 (Government Procurement) is set out in Article 9.23 (Committee on Investment, Services, Electronic Commerce and Government Procurement).

#### CHAPTER 9

#### **Government procurement**

##### Article 9.1

##### **Definitions**

For the purposes of this Chapter:

- (a) "commercial goods or services" means goods or services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes;
- (b) "construction service" means a service that has as its objective the realisation by whatever means of civil or building works based on Division 51 of the United Nations Provisional Central Product Classification (CPC);
- (c) "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;
- (d) "government procurement" means the process by which a procuring entity as defined in subparagraph (l) obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale;
- (e) "in writing" or "written" means any worded or numbered expression that can be read, reproduced and later communicated, and may include electronically transmitted and stored information;
- (f) "limited tendering" means a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice;
- (g) "measure" means any law, regulation, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement;
- (h) "multi-use list" means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once;
- (i) "notice of intended procurement" means a notice published by a procuring entity inviting interested suppliers to submit a request for participation, a tender, or both;

- (j) "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, of domestic suppliers, the licensing and transfer of technology, investment, counter-trade and similar action or requirement;
- (k) "open tendering" means a procurement method whereby all interested suppliers may submit a tender;
- (l) "procuring entity" means an entity covered under Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam);
- (m) "publish" means to disseminate information in paper format or by electronic means that is distributed widely and is readily accessible to the general public;
- (n) "qualified supplier" means a supplier that a procuring entity recognises as having satisfied the conditions for participation;
- (o) "selective tendering" means a procurement method whereby only qualified suppliers are invited by the procuring entity to submit a tender;
- (p) "services" includes construction services, unless otherwise specified;
- (q) "supplier" means a person or group of persons that provides or could provide goods or services to a procuring entity; and
- (r) "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, including quality, performance and safety 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 9.2

#### **Scope and Coverage**

1. This Chapter applies to any measure regarding covered procurement, whether or not it is conducted exclusively or partially by electronic means.
2. For the purposes of this Chapter, "covered procurement" means government procurement:
  - (a) of goods, services, or any combination thereof, as specified in Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam);
  - (b) by any contractual means, including purchase, lease, and rental, with or without an option to buy;

- (c) for which the value, as estimated in accordance with paragraphs 6 and 7, equals or exceeds the relevant threshold specified in Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam), at the time of publication of a notice in accordance with Article 9.6 (Notices); and
- (d) that is not otherwise excluded from coverage pursuant to paragraph 3 or Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam), or by the effect of any other relevant parts of this Agreement.

3. Except where provided otherwise in Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam), 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, including its procuring entities, provides, including cooperative agreements, grants, subsidies, loans, equity infusions, guarantees, fiscal incentives, and contributions in kind;
- (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; and
- (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 organisation or funded by international or foreign grants, loans or other assistance where the recipient Party, including its procuring entities, is bound to apply particular procedures or conditions imposed by the international organisation or other donors for the benefit of their international or foreign grants, loans or other assistance; where the procedures or conditions of the international organisation or donor do not restrict the participation of suppliers, the procurement shall be subject to paragraphs 1 and 2 of Article 9.4 (General Principles); or
  - (iii) 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.

4. Annex 9-A (Coverage of Government Procurement for the Union) and Annex 9-B (Coverage of Government Procurement for Viet Nam) specify in its Sections the following information for each Party:

- (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; and

(h) in Section H, the means for publishing the procurement information.

5. Transitional measures for Viet Nam for the application of this Chapter are set out in Section I (Transitional Measures) of Annex 9-B (Coverage of Government Procurement for Viet Nam).

6. If the domestic legislation of a Party allows a covered procurement to be carried out on behalf of the procuring entity by other entities or persons whose procurement is not covered with respect to the goods and services concerned, the provisions of this Chapter equally apply.

#### Valuation

7. 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 this procurement is awarded to one or more suppliers at the same time or over a given period of time, taking into account all forms of remuneration, including:

(i) premiums, fees, commissions and interest; and

(ii) the total value of any option clause.

8. For recurring contracts that consist, due to an individual requirement of the procurement, in awarding more than one contract, or in awarding contracts in separate parts, the calculation of the estimated maximum total value shall be based on:

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

(b) the estimated value of recurring contracts of the same type of good or service to be awarded during the 12 months following the initial contract award or the procuring entity's fiscal year.

#### Article 9.3

#### Security and General Exceptions

1. Nothing in this Agreement shall be construed as preventing 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.

2. Subject to the requirement that such measures are not applied in a manner which would constitute a disguised restriction on international trade, nothing in this Agreement shall be construed as preventing a Party from imposing or enforcing measures:

- (a) necessary to protect public morals, order or safety;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to protect intellectual property; or
- (d) relating to goods or services of persons with disabilities, philanthropic institutions, non-profit institutions carrying out philanthropic activities, or prison labour.

#### *Article 9.4*

### **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 to the suppliers of the other Party offering the goods or services of both Parties, treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers.
2. With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:
  - (a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or
  - (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

#### **Compliance and Conduct of Procurement**

3. Each Party shall ensure that its procuring entities comply with this Chapter in conducting covered procurements.
4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:
  - (a) is consistent with this Chapter, by using one of the following methods of open tendering, selective tendering or limited tendering; and
  - (b) avoids conflicts of interest and prevents corrupt practices, in accordance with relevant domestic laws and regulations.
5. Nothing in this Chapter shall 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.

#### Use of Electronic Means

6. The Parties shall endeavour to conduct covered procurement by electronic means. This includes the publication of procurement information, notices and tender documentation, the reception of tenders and, where appropriate, the use of electronic auctions.

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

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

#### Rules of Origin

8. A Party shall not apply to covered procurement of goods or services imported or supplied from the other Party rules of origin that are different compared to the rules of origin it applies at the same time in the normal course of trade to imports or supplies of the same goods or services from the same Party.

#### Offsets

9. With regard to covered procurement and subject to Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam), a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset.

#### Measures Not Specific to Procurement

10. Paragraphs 1 and 2 do not apply to:

- (a) customs duties and charges of any kind imposed on, or in connection with, importation;
- (b) the method of levying such duties and charges; and
- (c) other import regulations or formalities and measures affecting trade in services other than measures governing covered procurement.

#### Article 9.5

#### Information on the Procurement System

1. Each Party shall:

- (a) promptly publish any measure of general application, including standard contract terms mandated by law or regulation, regarding covered procurement in officially designated paper or electronic medium; and
- (b) provide upon request of the other Party, to the extent possible, an explanation thereof.

2. Section H (Publication of Procurement Information) of Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam) lists the paper or electronic medium through which the Party publishes the information described in paragraph 1 and the notices required by Article 9.6 (Notices), paragraph 7 of Article 9.8 (Qualification of Suppliers) and paragraph 3 of Article 9.17 (Post-Award Information).

*Article 9.6***Notices**

## Notice of Intended Procurement

1. For each covered procurement, except in the circumstances referred to in Article 9.14 (Limited Tendering), a procuring entity shall publish a notice of intended procurement in the appropriate paper or electronic medium listed in Section H (Publication of Procurement Information) of Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam). A notice published in an electronic medium shall remain available at least until expiration of the time period indicated in the notice. The notices shall:

- (a) for procuring entities covered by Section A (Central Government Entities), be accessible by electronic means free of charge through a single point of access specified in Section H (Publication of Procurement Information); and
- (b) for procuring entities covered by Section B (Sub-Central Government Entities) or C (Other Covered Entities), where accessible by electronic means, be provided, at least, through links in a single gateway electronic site that is accessible free of charge.

The Parties, including their procuring entities covered by Section B (Sub-Central Government Entities) or C (Other Covered Entities), are encouraged to publish their notices by electronic means free of charge through a single point of access.

2. Except as otherwise provided for in this Chapter, each notice of intended procurement shall include:

- (a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, including information on the cost and terms of payment for obtaining those documents, if any;
- (b) a description of the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity;
- (c) if possible, for recurring contracts, an estimate of the timing of subsequent notices of intended procurement;
- (d) where appropriate, a description of any options;
- (e) the time frame for delivery of goods or services or the duration of the contract;
- (f) the procurement method that will be used and, where appropriate, whether it will involve negotiation or electronic auction;
- (g) where applicable, the address and any final date for the submission of requests for participation in the procurement;
- (h) the address and final date for the submission of tenders;

- (i) the language or languages in which tenders or requests for participation may be submitted, if they may be submitted in a language other than the official language at the place of the procuring entity;
- (j) a list and brief description of any conditions for participation of suppliers, including, where appropriate, any requirements for specific documents or certifications to be provided by suppliers in connection therewith, unless such requirements are included in tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement;
- (k) where, pursuant to Article 9.8 (Qualification of Suppliers), a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, where applicable, any limitation on the number of suppliers that will be permitted to tender; and
- (l) an indication that the procurement is covered by this Chapter.

#### Summary Notice

3. For each case of intended procurement, a procuring entity shall publish a summary notice in English that is readily accessible free of charge through an electronic medium listed in Section H (Publication of Procurement Information) of Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam), at the same time as the publication of the notice of intended procurement. The summary notice shall contain at least the following information:

- (a) the subject-matter of the procurement;
- (b) the final date for the submission of tenders or, where applicable, any final date for the submission of requests for participation in the procurement or for inclusion on a multi-use list; and
- (c) the address from which documents relating to the procurement may be requested.

4. The Union shall provide technical and financial assistance to Viet Nam in order to develop, establish and maintain an automatic system for the translation and publication of summary notices in English. This cooperation is addressed in Article 9.21 (Cooperation). The implementation of this paragraph is subject to the realisation of the initiative on technical and financial assistance for the development, establishment and maintenance of an automatic system for the translation and publication of summary notices in English in Viet Nam.

#### Notice of Planned Procurement

5. Procuring entities are encouraged to publish as early as possible in each fiscal year a notice regarding their future procurement plans (hereinafter referred to as "notice of planned procurement"), which should include the subject-matter of the procurement and the planned date of the publication of the notice of intended procurement.

6. A procuring entity covered by Section B (Sub-Central Government Entities) or C (Other Covered Entities) may use a notice of planned procurement as a notice of intended procurement provided that the notice of planned procurement includes as much of the information referred to in paragraph 2 as is available to the procuring entity, and a statement that interested suppliers should express their interest in the procurement to the procuring entity.

*Article 9.7***Conditions for Participation**

1. A procuring entity shall limit any conditions for participation in a covered procurement to those that ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake 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;
  - (b) may require relevant prior experience where essential to meet the requirements of the procurement.
3. In assessing whether a supplier satisfies the conditions for participation, the procuring entity:
  - (a) shall evaluate the financial capacity and the commercial and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside the territory of the Party of the procuring entity; and
  - (b) shall 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 evidence, a Party, including its procuring entities, may exclude a supplier on grounds such as:
  - (a) bankruptcy;
  - (b) false declarations;
  - (c) significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;
  - (d) final judgments by a judicial court in respect of serious crimes or other serious offences;
  - (e) evidence of serious professional misconduct; or
  - (f) failure to pay taxes.

*Article 9.8***Qualification of Suppliers**

## Registration Systems and Qualification Procedures

1. A Party may maintain a supplier registration system under which interested suppliers are required to register and provide certain information.
2. Each Party shall ensure that:
  - (a) its procuring entities make efforts to minimise differences in their qualification procedures; and

- (b) where its procuring entities maintain registration systems, the entities make efforts to minimise differences in their registration systems.

3. A Party shall not adopt or apply any registration system or qualification procedure:

- (a) 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 to prevent such suppliers from being considered for a particular procurement.

#### Selective Tendering

4. Where a procuring entity intends to use selective tendering, the procuring entity shall:

- (a) include in the notice of intended procurement at least the information specified in subparagraphs 2(a), 2(b), 2(f), 2(g), 2(j), 2(k) and 2(l) of Article 9.6 (Notices) and invite suppliers to submit a request for participation; and
- (b) provide, by the commencement of the time period for tendering, at least the information in subparagraphs 2(c), 2(d), 2(e), 2(h) and 2(i) of Article 9.6 (Notices) to the qualified suppliers that it notifies as specified in subparagraph 3(b) of Article 9.12 (Time Periods).

5. The procuring entity shall:

- (a) publish the notice sufficiently in advance of the procurement to allow for interested suppliers to request participation in the procurement; and
- (b) allow all qualified suppliers to submit a tender, unless the procuring entity has stated in the notice of intended procurement a limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers.

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

#### Multi-Use Lists

7. A procuring entity may maintain a multi-use list of suppliers, provided that a notice inviting interested suppliers to apply for inclusion on the list is:

- (a) published annually; and
- (b) where published by electronic means, made available continuously,

in the appropriate medium listed in Section H (Publication of Procurement Information) of Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam).

8. The notice provided for in paragraph 7 shall include:
- (a) a description of the goods or services, or categories thereof, for which the list may be used;
  - (b) the conditions for participation to be satisfied by suppliers for inclusion on the list and the methods that the procuring entity will use to verify that a supplier satisfies the conditions;
  - (c) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the list;
  - (d) the period of validity of the list and the means for its renewal or termination, or where the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list; and
  - (e) an indication that the list may be used for procurement covered by this Chapter.

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

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

10. A procuring entity shall allow all suppliers included in a multi-use list to submit tenders for a relevant procurement.

11. 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.

12. Where a supplier that is not included on a multi-use list submits a request for participation in a procurement based on a multi-use list and all required documents within the time period provided for in paragraph 2 of Article 9.12 (Time Periods), 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 procuring entity has insufficient time to examine the request, unless, in exceptional cases, due to the complexity of the procurement, the procuring entity is not able to complete the examination of the request within the time period allowed for the submission of tenders.

#### Sub-Central Government and other Covered Entities

13. A procuring entity covered by Section B (Sub-Central Government Entities) or C (Other Covered Entities) of Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam) may use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement, provided that:

- (a) the notice is published in accordance with paragraph 7 and includes the information required under paragraph 8, as much of the information required under paragraph 2 of Article 9.6 (Notices) as is available, and a statement that it constitutes a notice of intended procurement or that only the suppliers on the multi-use list will receive further notices of procurement covered by the multi-use list; and

- (b) the procuring entity promptly provides to suppliers that have expressed an interest in a given procurement to the procuring entity sufficient information to permit them to assess their interest in the procurement, including all remaining information required under paragraph 2 of Article 9.6 (Notices), to the extent such information is available.

14. A procuring entity covered by Section B (Sub-Central Government Entities) or C (Other Covered Entities) of Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam) may allow a supplier that has applied for inclusion on a multi-use list in accordance with paragraph 11 to tender in a given procurement where there is sufficient time for the procuring entity to examine whether the supplier satisfies the conditions for participation.

#### Information on Procuring Entity Decisions

15. 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.

16. Where a procuring entity rejects a supplier's request for participation in a procurement or application for inclusion on a multi-use list, ceases to recognise a supplier as qualified, or removes a supplier from a multi-use list, the procuring entity shall promptly inform the supplier and, on request of the supplier, promptly provide the supplier with a written explanation of the reasons for its decision.

#### Article 9.9

#### Technical Specifications

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

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

- (a) set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics; and
- (b) base the technical specification on international standards, where they 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 shall indicate 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 Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.

#### *Article 9.10*

##### **Market Consultations**

1. Before launching a procurement, procuring entities may conduct market consultations with a view to preparing the procurement, notably for the development of technical specifications, provided that, where market research is performed by a supplier in the context of covered procurement, such procurement is subject to the provisions of this Chapter.

2. For that purpose, procuring entities may seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

#### *Article 9.11*

##### **Tender Documentation**

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

1. A procuring entity shall promptly make available or provide upon request to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:

- (a) the procurement, including the nature and 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 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 to be applied 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 any other requirements related to the submission of information by electronic means, provided that there are such requirements;

- (e) where the procuring entity will hold an electronic auction, the rules, including identification of the elements of the tender related to the evaluation criteria, according to which the auction will be conducted;
- (f) where there will be a public opening of tenders, the date, time and place for the opening of tenders and, if the domestic legislation of a Party stipulates that only certain persons are authorised to be present, the indication of those persons;
- (g) any other terms or conditions, including terms of payment and any limitation on the means by which tenders may be submitted, such as whether on paper or by electronic means; and
- (h) any dates for the delivery of goods or the supply of services.

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

3. The evaluation criteria set out in the notice of intended procurement or tender documentation may include, *inter alia*, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery.

4. A procuring entity shall promptly reply to any reasonable request for relevant information by any interested or participating supplier, provided that such information does not give that supplier an advantage over other suppliers.

#### Modifications

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

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

#### Article 9.12

#### Time Periods

##### General

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

- (a) the nature and complexity of the procurement;

- (b) the extent of subcontracting anticipated; and
- (c) the time necessary for transmitting tenders by non-electronic means from foreign as well as domestic points where electronic means are not used.

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

#### Deadlines

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

3. Except as provided for in paragraphs 4, 5 and 7, 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 suppliers that they will be invited to submit tenders, whether or not it uses a multi-use list.

4. A procuring entity may reduce the time period for tendering established in accordance with paragraph 3 to not less than 10 days if:

- (a) the procuring entity has published a notice of planned procurement as described in paragraph 5 of Article 9.6 (Notices) at least 40 days and not more than 12 months in advance of the publication of the notice of intended procurement, and the notice of planned procurement contains:

- (i) a description of the procurement;
- (ii) the approximate final dates for the submission of tenders or requests for participation;
- (iii) a statement that interested suppliers should express their interest in the procurement to the procuring entity;
- (iv) the address from which documents relating to the procurement may be obtained; and
- (v) as much of the information that is required for the notice of intended procurement under paragraph 2 of Article 9.6 (Notices), as is available;

- (b) the procuring entity, for recurring contracts, indicates in an initial notice of intended procurement that subsequent notices will provide time periods for tendering based on this paragraph;

- (c) the procuring entity procures commercial goods or services; or

- (d) a state of urgency, duly substantiated by the procuring entity, renders impracticable the time period for tendering established in accordance with paragraph 3.

5. A procuring entity may reduce the time period for tendering established in accordance with paragraph 3 by five days for each one of the following circumstances:

- (a) the notice of intended procurement is published by electronic means;
- (b) all 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.

6. The application of paragraph 5, in conjunction with paragraph 4, shall in no case result in a reduced time period for tendering established in accordance with paragraph 3 of less than 10 days from the date on which the notice of intended procurement is published.

7. If a procuring entity covered by Section B (Sub-Central Government Entities) or C (Other Covered Entities) of Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam) 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 9.13*

#### **Negotiations**

1. With regard to covered procurement, a Party may provide for its procuring entities to conduct negotiations:
  - (a) if the procuring entity has indicated its intent to conduct negotiations in the notice of intended procurement required under paragraph 2 of Article 9.6 (Notices); or
  - (b) if it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice of intended procurement or tender documentation.
2. A procuring entity shall:
  - (a) ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the notice of intended procurement or tender documentation; and
  - (b) when negotiations are concluded, provide a common deadline for the remaining participating suppliers to submit any new or revised tenders.

*Article 9.14***Limited Tendering**

1. Provided a procuring entity does not use limited tendering for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles 9.6 (Notices), 9.7 (Conditions for Participation), 9.8 (Qualification of Suppliers), 9.10 (Market Consultations), 9.11 (Tender Documentation), 9.12 (Time Periods), 9.13 (Negotiations) and 9.15 (Electronic Auctions) only under any of the following circumstances:

(a) if in response to a notice of intended procurement, 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 of the tender documentation;

(iii) no suppliers satisfied the conditions for participation; or

(iv) the tenders submitted have been collusive,

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

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

(i) the requirement is for a work of art;

(ii) the protection of patents, copyrights or other exclusive rights; or

(iii) an absence of competition for technical reasons;

(c) for additional deliveries by the original supplier of goods or services that were not included in the initial procurement, if a change of supplier for such additional goods or services:

(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement or conditions under original supplier warranties; and

(ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;

(d) 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 an open tendering or selective tendering;

(e) for goods purchased on a commodity market or exchange;

- (f) when 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 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 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) if additional construction services that were not included in the initial contract but were within the objectives of the original tender documentation have, due to unforeseeable circumstances, become necessary to complete the construction services described therein;
  - (h) 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
  - (i) when a contract is awarded to a winner of a design contest provided that:
    - (i) the contest has been organised in a manner that is consistent with the principles of this Chapter, in particular relating to the publication of a notice of intended procurement; and
    - (ii) the contest is judged by an independent jury with a view to a design contract being awarded to a winner.
2. For each contract awarded in accordance with paragraph 1, a procuring entity shall prepare a report in writing, or maintain a record. The report or record 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 9.15*

### **Electronic Auctions**

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

- (a) the automatic evaluation method that is based on the evaluation criteria set out in the tender documentation and that will be used in the automatic ranking or re-ranking during the auction; and
- (b) any other relevant information relating to the conduct of the auction.

#### *Article 9.16*

### **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, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the notices and tender documentation and be submitted by a supplier that 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 capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notices and tender documentation, has submitted:

(a) the most advantageous tender; or

(b) where price is the sole criterion, the lowest price.

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 covered procurement or modify awarded contracts in a manner that circumvents the obligations under this Chapter.

#### *Article 9.17*

#### **Post-Award Information**

##### Information Provided to Suppliers

1. A procuring entity shall promptly inform suppliers that have submitted a tender or application for participation of the procuring entity's contract award decisions and, on the request of a supplier, shall do so in writing.

2. Subject to paragraphs 2 and 3 of Article 9.18 (Disclosure of Information), a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select its tender and, for suppliers meeting the conditions for participation whose tenders pass technical specifications, the relative advantages of the successful supplier's tender.

##### Publication of Award Information

3. Not later than 30 days after the award of each contract covered by this Chapter, a procuring entity shall publish a notice in the appropriate paper or electronic medium listed in Section H (Publication of Procurement Information) of Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam). Where the procuring entity publishes the notice only in an electronic medium, the information shall remain readily accessible for a reasonable period of time. The notice shall include at least the following information:

(a) a description of the goods or services procured;

- (b) the name and address of the procuring entity;
- (c) the name and address of the successful supplier;
- (d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;
- (e) the date of award; and
- (f) the type of procurement method used and, in cases where limited tendering was used in accordance with Article 9.14 (Limited Tendering), a brief description of the circumstances justifying the use of limited tendering.

#### Maintenance of Records

4. Each procuring entity shall maintain:

- (a) the documentation, records and reports relating to tendering procedures and contract awards for covered procurement, including the records and reports required under Article 9.14 (Limited Tendering), for a period of at least three years from the date it awards a contract; and
- (b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.

#### Statistics

5. The Parties shall endeavour to communicate the available statistical data relevant to the procurement covered by this Chapter.

### *Article 9.18*

#### **Disclosure of Information**

##### Provision of Information

1. On request of the other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Chapter, including, where applicable, information on the characteristics and relative advantages of the successful tender. The other Party 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 provide to any supplier information that could prejudice legitimate commercial interests of another supplier or that might prejudice fair competition between suppliers.

3. Nothing in this Chapter shall be construed as requiring a Party, including its procuring entities, authorities and review bodies, to disclose confidential information where disclosure:

- (a) would impede law enforcement;
- (b) might prejudice fair competition between suppliers;

(c) would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or

(d) would otherwise be contrary to the public interest.

#### *Article 9.19*

#### **Domestic Review**

1. Each Party shall maintain, establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to review, in a non-discriminatory, timely, transparent and effective manner, a challenge by a supplier of:

(a) a breach of this Chapter; or

(b) a failure of a procuring entity to comply with a Party's measures implementing this Chapter, where the supplier does not have a right to challenge directly a breach of this Chapter under the domestic law of a Party,

arising in the context of a covered procurement, in which the supplier has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.

2. In case 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, where 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 any such complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement or to its right to seek corrective measures under the administrative or judicial review procedures. Each Party or its procuring entities shall make information on such complaint mechanisms generally available.

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. Where a body other than an authority referred to in paragraph 1 initially reviews a challenge, the Party shall ensure that the supplier may lodge an appeal against the initial decision with an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge.

5. Each Party shall ensure that a review body that is not a court shall have its decision subject to judicial review or have procedures that provide that:

(a) the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body;

(b) the participants in the proceedings (hereinafter referred to as "participants") shall have the right to be heard prior to a decision of the review body being made on the challenge;

- (c) the participants shall have the right to be represented and accompanied;
- (d) the participants shall have access to all proceedings; and
- (e) the review body shall make its decisions on a supplier's challenge in a timely manner, in writing, and shall include an explanation of the grounds for each decision.

6. Each Party shall adopt or maintain procedures that provide for:

- (a) rapid interim measures, pending the resolution of a challenge, 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) corrective action or compensation for the loss or damages suffered, when a review body has determined that there has been a breach or a failure as referred to in paragraph 1. The compensation for the damages suffered may be limited to either the costs reasonably incurred in the preparation of the tender or in bringing the challenge, or both.

#### *Article 9.20*

#### **Modification and Rectification to Coverage**

1. A Party shall notify the other Party in writing of any proposed modification or rectification to its coverage (hereinafter referred to as "modification").

2. For any proposed withdrawal of an entity from its coverage in exercise of its rights on the grounds that government control or influence over it has been effectively eliminated, the Party proposing the modification (hereinafter referred to as "modifying Party") shall include in the notification evidence that such government control or influence has been effectively eliminated.

3. Government control or influence over an entity is deemed to be effectively eliminated when the modifying Party, including for the Union its central government entities and its sub-central government entities, and for Viet Nam its central government entities and sub-central government entities:

- (a) does not own directly or indirectly more than 50 per cent of the entity's subscribed capital or the votes attached to the shares issued by the entity; and
- (b) cannot appoint directly or indirectly more than half of the members of the entity's board of directors or an equivalent body.

4. For any other proposed modification, the modifying Party shall include in the notification information regarding the likely consequences of the change for the mutually agreed coverage provided in this Agreement. Where the modifying Party proposes to make rectifications of a purely formal nature and minor modifications to its coverage not affecting covered procurement, modifications of this kind shall be notified at least every two years.

Proposed modifications of coverage are deemed to constitute rectifications of a purely formal nature and minor modifications to the Party's coverage in the following cases:

- (a) changes in the name of a procuring entity;
- (b) merger of one or more procuring entities listed in Annex 9-A (Coverage of Government Procurement for the Union) or 9-B (Coverage of Government Procurement for Viet Nam); or
- (c) the separation of a procuring entity listed in Annex 9-A (Coverage of Government Procurement for the Union) or 9-B (Coverage of Government Procurement for Viet Nam) into two or more entities that are all added to the procuring entities listed in the same Section of the Annex.

5. The modifying Party may include in its notice an offer of compensatory adjustments for the change to its coverage, if necessary to maintain a level of coverage comparable to that existing prior to the modification. The modifying Party shall not be required to provide compensatory adjustments to the other Party when a proposed modification concerns:

- (a) a procuring entity over which it has effectively eliminated its control or influence in respect of covered procurement by that entity; or
- (b) rectifications of a purely formal nature and minor modifications to Annex 9-A (Coverage of Government Procurement for the Union) or 9-B (Coverage of Government Procurement for Viet Nam).

Notwithstanding subparagraph (a), should the withdrawal by a modifying Party of a significant number of procuring entities from its coverage on the ground that these entities are no longer under government control or influence in accordance with the criteria set out in paragraph 3 result in a significant imbalance of coverages agreed between the Parties, the modifying Party shall accept to enter into consultations with the other Party to discuss, without prejudice, the modalities for redressing such imbalance.

6. The other Party shall notify the modifying Party of any objection to the proposed modification within 45 days of the notification.

7. If the other Party notifies an objection, both Parties shall seek to resolve the issue through consultations. During the consultations, the objecting Party may request further information with a view to clarifying the proposed modification, including the nature of any government control or influence.

8. If the consultations under paragraph 7 do not resolve the issue, the Parties may use the dispute settlement mechanism provided for in Chapter 15 (Dispute Settlement).

9. A proposed modification shall become effective only if:

- (a) the other Party has not submitted to the modifying Party a written objection to the proposed modification within 45 days from the date of the notification of the proposed modifications;

- (b) the Parties have reached an agreement; or
- (c) an arbitration panel has issued a final report in accordance with Article 15.11 (Final Report) concluding that the Parties shall give effect to the proposed modification.

#### *Article 9.21*

#### **Cooperation**

1. The Parties recognise their shared interest in cooperating in the promotion of international liberalisation of government procurement markets with a view to achieving enhanced understanding of their respective government procurement systems and to improving access to their respective markets.
2. Without prejudice to paragraph 4 of Article 9.6 (Notices), the Parties shall endeavour to cooperate in matters such as:
  - (a) exchanging experiences and information, such as regulatory frameworks and best practices;
  - (b) developing and expanding the use of electronic means in government procurement systems;
  - (c) building capability of government officials in best government procurement practices; and
  - (d) institutional strengthening for the fulfilment of the provisions of this Chapter.

#### *Article 9.22*

#### **Future Negotiations**

##### Procurement by Electronic Means

1. The Parties shall review the provisions of Article 9.15 (Electronic Auctions) once Viet Nam's electronic procurement system has been fully developed to take into account possible technological changes and in particular to consider other aspects such as the mathematical formula used for the automatic evaluation method and the possible communication of the results of any initial evaluation to the participants in the auction.
2. The Parties shall conduct further negotiations on the duration of the period for the storage of data relating to procurement by electronic means once Viet Nam's electronic procurement system is operational.

##### Market Access

3. The Parties shall conduct further negotiations on the coverage of additional sub-central government entities no later than 15 years after the date of the entry into force of this Agreement.

*Article 9.23***Committee on Investment, Services, Electronic Commerce and Government Procurement**

The Committee on Investment, Services, Electronic Commerce and Government Procurement established pursuant to Article 17.2 (Specialised Committees) shall be responsible for the implementation of this Chapter. It may, in particular:

- (a) discuss the exchange of statistical data in accordance with paragraph 5 of Article 9.17 (Post-Award Information);
- (b) review pending notifications of modifications to coverage and approve the revised list of procuring entities in Sections A (Central Government Entities) to C (Other Covered Entities) of Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam);
- (c) approve the compensatory adjustments resulting from modifications affecting coverage;
- (d) consider issues regarding government procurement that are referred to it by a Party; and
- (e) discuss any other matters related to the operation of this Chapter.

*CHAPTER 10***Competition policy****Section A****Anti-competitive conduct***Article 10.1***Principles**

The Parties recognise the importance of undistorted competition in their trade and investment relations. The Parties acknowledge that anti-competitive conduct has the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation.

*Article 10.2***Legislative Framework**

1. Each Party shall adopt or maintain comprehensive legislation on competition that proscribes anti-competitive conduct, with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct.
2. The competition law of the Parties shall, in their respective territories, effectively address:
  - (a) agreements between enterprises, decisions by associations of enterprises and concerted practices which have as their object or effect the prevention, restriction or distortion of competition;
  - (b) abuses by one or more enterprises of a dominant position, and concentrations between enterprises which would significantly impede effective competition.