

## **CHAPTER 12**

### **GOVERNMENT PROCUREMENT**

#### **Article 1 Objectives**

The Parties recognise the importance of conducting government procurement in accordance with the fundamental principles of the *APEC Non-Binding Principles on Government Procurement* of transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination, in order to facilitate competitive opportunities for suppliers of the Parties.

#### **Article 2 Scope and Coverage**

1. This Chapter shall apply to government procurement measures regarding procurement, by any contractual means, including purchase, hire purchase, rental or lease, with or without an option to buy, build-operate-transfer contracts and public works concessions contracts:

- (a) by entities listed in Annex I;
- (b) in which the contract has a value not less than the relevant threshold converted into respective currencies as set out in Annex II estimated at the time of, or within a reasonable time prior to, the publication of a notice in accordance with Article 10; and

(c) subject to any other conditions specified in Annex I<sup>5</sup>.

2. This Chapter shall not apply to:

- (a) the purchase or acquisition of goods and services by an entity of a Party from another entity of that Party, except where tenders are called, in which case this Chapter shall apply;
- (b) procurement of goods and services (including construction) outside the Area of the procuring Party for consumption outside the Area of the procuring Party;
- (c) non-contractual agreements or any form of assistance to persons or governmental authorities, including cooperative agreements, sponsorship arrangements, grants, loans, subsidies, equity infusions, guarantees, fiscal incentives and governmental provision of goods and services;
- (d) 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 of a project where that international agreement applies to a Party; or

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<sup>5</sup> For greater certainty, nothing in this Chapter shall have the effect of obliging either Party to permit the supply of services in relation to government procurement covered by this Chapter in a manner that is inconsistent with that Party's Schedules to Annexes I and II to Chapter 13 (Trade in Services) and Annex I to Chapter 14 (Movement of Business Persons).

- (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 conditions would be inconsistent with this Chapter;
- (e) 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;
- (f) hiring of government employees and related employment measures; or
- (g) any procurement by an entity on behalf of an organisation that is not an entity.

3. Entities of each Party shall not prepare, design or otherwise structure or divide, at any stage of the procurement, any procurement in order to avoid the obligations of this Chapter.

4. In calculating the value of contracts for the purposes of implementing this Chapter, entities shall base their valuation on the estimated maximum total value of the procurement over its entire duration, including optional purchases, premiums, fees, commissions, interest or other forms of remuneration provided for in such contracts. For term contracts, the value of contracts may be taken as the estimated value of works in a 12 month period.

### **Article 3 Definitions**

For the purposes of this Chapter:

- (a) **build-operate-transfer contract and public works concession contract** mean any contractual arrangement the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plant, buildings, facilities or other government-owned works and under which, as consideration for a supplier's execution of a contractual arrangement, the entity grants to the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of such works for the duration of the contract;
- (b) **entity** means an entity listed in Annex I;
- (c) **government procurement or procurement** means the process by which entities obtain the use of or acquire goods or services or a combination of both;
- (d) **government procurement measure** means any law, regulation, requirement or procedure of general application relating to government procurement;
- (e) **open tendering** means a procurement method where all interested suppliers may submit a tender;
- (f) **publish** means to disseminate information in an electronic or paper medium that is distributed widely and is readily accessible to the general public;
- (g) **qualified supplier** means a supplier that an entity recognises as having satisfied the conditions for participation;
- (h) **selective tendering** means a procurement method where only suppliers satisfying the conditions for participation are invited by the entity to submit a tender;

- (i) **supplier** means a natural or juridical person of a Party that provides or could provide goods or services to an entity; and
- (j) **technical specification** means a tendering requirement that:
  - (i) sets out the characteristics of:
    - (1) goods to be procured, such as quality, performance, safety and dimensions, or the processes and methods for their production; or
    - (2) services to be procured, or the processes and methods for their provision;
  - (ii) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service; or
  - (iii) sets out conformity assessment procedures prescribed by an entity.

#### **Article 4** **Exceptions to this Chapter**

1. Nothing in this Chapter shall be construed to prevent either Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where the same conditions prevail or a disguised restriction

on trade between the Parties, nothing in this Chapter shall be construed to prevent either Party from adopting or maintaining measures:

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

3. The Parties understand that Paragraph 2(b) includes environmental measures necessary to protect human, animal or plant life or health.

### **Article 5 National Treatment and Non-Discrimination**

1. With respect to any government procurement measure regarding procurement covered by this Chapter, each Party shall grant to goods, services and suppliers of the other Party treatment no less favourable than that accorded by it to domestic goods, services and suppliers.

2. With respect to any government procurement measure regarding procurement covered by this Chapter, neither Party shall allow its entities to:

- (a) treat a locally established supplier less favourably than another locally established supplier on the basis of the 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 goods or services offered by

that supplier are goods or services of the other Party.

3. For the purposes of this Chapter, Article XVI(1) of the *WTO Agreement on Government Procurement*, including its footnote, is incorporated into and made part of this Chapter, *mutatis mutandis*.

4. This Article shall not apply to measures concerning customs duties and charges of any kind imposed on or in connection with importation, the method of levying such customs duties and charges, other import regulations, or to measures affecting trade in services other than government procurement measures specifically governing procurement covered by this Chapter.

#### **Article 6 Rules of Origin**

For procurement covered by this Chapter, each Party shall not apply rules of origin to goods or services imported from or supplied by 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 other Party.

#### **Article 7 Non-Disclosure of Information**

1. The Parties, their entities and review authorities shall not, except to the extent required by law, disclose confidential information that would prejudice legitimate commercial interests of a particular supplier or that might prejudice fair competition between suppliers without the written authorisation of the supplier that provided the information.

2. Nothing in this Chapter shall be construed as requiring either Party, its entities or review authorities to disclose confidential information the disclosure of which would impede

law enforcement or otherwise be contrary to the public interest.

### **Article 8 Publication of Information on Procurement**

Each Party shall promptly publish:

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

### **Article 9 Procurement Procedures**

Except as provided for in Article 15, entities shall award contracts by means of open or selective tendering procedures, in the course of which all interested suppliers or, in the case of selective tendering, suppliers invited to do so by an entity may submit a tender.

### **Article 10 Notice of Intended Procurement**

1. Except as provided for in Article 15, for each procurement covered by this Chapter, entities shall publish in advance a notice of intended procurement inviting interested suppliers to submit a tender or apply to meet conditions for participation in the procurement.

2. The notice of intended procurement shall be published through means that are widely disseminated and afford non-discriminatory access to interested suppliers. Such notices shall remain readily accessible, through a single electronic point of access specified in Annex III, free of charge for the entire period established for tendering.



3. Each notice of intended procurement shall include:
  - (a) a description of the intended procurement;
  - (b) any conditions that suppliers must fulfil to participate in the procurement;
  - (c) the time limits for submission of tenders or applications to participate; and
  - (d) contact details for obtaining all relevant documents.
4. Each notice of intended procurement shall be published sufficiently in advance to provide interested suppliers with a reasonable period of time, in light of the nature, circumstances and complexity of the procurement, to obtain the full tender documentation and to prepare and submit responsive tenders by the closing date, or to apply for participation in the procurement where applicable.
5. The Parties agree that entities shall in no case provide less than ten days between the date on which the notice of intended procurement is published and the final date for the submission of tenders or applications to participate.

### **Article 11 Conditions for Participation**

1. Where an entity requires suppliers to register, qualify, or satisfy any other conditions before being permitted to participate in a procurement, each Party shall ensure that a notice is published inviting suppliers to apply for registration or qualification or to demonstrate satisfaction of other conditions for participation.
2. The notice shall be published sufficiently in advance for interested suppliers to prepare and submit responsive

applications and for the entity to evaluate and make its determinations based on such applications.

3. Any conditions for participation in the procurement, including the legal, commercial, technical and financial capacity of suppliers, as well as the verification of qualifications, shall be limited to those which are essential to ensure the supplier's capability to fulfil the contract in question.

4. The commercial, technical and financial capacity of a supplier shall be judged on the basis of both that supplier's global business activity and its activity in the Area of the procuring entity, taking due account of the legal relationship between the supply organisations.

5. Entities shall consider for a particular procurement those suppliers of the other Party that request to participate in the procurement and that are not yet registered or qualified, provided there is sufficient time to complete the registration or qualification procedures within the time period allowed for the submission of tenders.

6. Nothing in this Article shall preclude an entity from excluding a supplier from a procurement on grounds such as bankruptcy, liquidation or insolvency, false declarations relating to a procurement, or significant deficiency in the performance of any obligation under a prior contract.

## **Article 12**

### **Lists of Registered or Qualified Suppliers**

1. Entities may establish for continuing use a list of suppliers registered or qualified to participate in procurements.

2. Entities shall publish annually or otherwise make available continuously in electronic form a notice inviting interested suppliers to apply for inclusion on the list.

3. The notice shall include:
  - (a) a description of the goods and services for which the list may be used; and
  - (b) the conditions to be satisfied by suppliers for inclusion on the list.
4. Entities shall ensure that suppliers may apply for participation in the list at any time, and that all qualifying suppliers are included within a reasonable period, taking into account the conditions for participation and the need for verification.
5. Where entities require suppliers to qualify for such a list before being permitted to participate in a procurement, and a supplier that has not previously satisfied such requirements or conditions submits an application, the entity shall promptly start the registration or qualification process. The entity shall allow such supplier to participate in the procurement, provided there is sufficient time to complete the registration or procurement procedures within the time period allowed for the submission of tenders.
6. Entities shall notify qualified suppliers of the termination of or their removal from a list and, on request of a supplier, provide the supplier with written reasons for this action within a reasonable time.

### **Article 13**

#### **Technical Specifications**

1. Each Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade between the Parties.
2. Any technical specifications prescribed by an entity shall, where appropriate:

- (a) be specified in terms of performance and functional requirements, rather than design or descriptive characteristics; and
- (b) be based on international standards, where applicable, or otherwise on national technical regulations, recognised national standards, or building codes.

3. Each Party shall ensure that its entities do not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, design or type, specific origin or producer or supplier, unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as “or equivalent” are included in the tender documentation.

4. Each Party shall ensure that its entities do not seek or accept, in a manner that would have the effect of prejudicing fair competition, advice to 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 that procurement.

#### **Article 14 Tender Documentation**

1. Tender documentation provided to suppliers shall contain all information necessary to enable them to prepare and submit responsive tenders, including the essential requirements and evaluation criteria for the award of the procurement contract.

2. Where entities do not offer direct access to the tender documentation by electronic means, entities shall promptly make available the tender documentation at the request of any interested or, as applicable, qualified supplier.

3. Entities shall endeavour to reply promptly to any reasonable request for relevant information or explanation made by a supplier, provided that such information does not give that supplier an advantage over other suppliers. The information or explanation given to a supplier may be provided to all participating suppliers known to the entity, in which case it shall be provided promptly.

4. Where an entity modifies the tender documentation, and that modification could impact on the preparation of tenders, it shall publish or transmit all such modifications in writing:

- (a) to all suppliers who have requested tender documentation at the time the criteria are modified, and in the same manner as the original information was transmitted by the entity; and
- (b) in adequate time to allow such suppliers to modify and resubmit their tenders, as appropriate.

### **Article 15**

#### **Exceptions to Open or Selective Tendering**

1. Provided that the tendering procedure is not used to avoid competition or to protect domestic suppliers, entities may award contracts by means other than open or selective tendering procedures in any of the following circumstances:

- (a) where, in response to a prior notice, invitation to participate, or invitation to tender under open or selective tendering procedures:
  - (i) no tenders were submitted;
  - (ii) no tenders were submitted that conform to the essential requirements in the tender documentation; or

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

provided that the essential requirements of the procurement as set out in the tender documentation have not been substantially modified;

- (b) where, for works of art, or for reasons connected with the protection of exclusive rights, such as patents or copyrights, or where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
- (c) for additional deliveries by the original supplier which are intended either as replacement parts, extensions or continuing services for or upgrades of existing equipment, software, services or installations, where a change of supplier would compel the entity to procure goods or services not meeting requirements of interchangeability with existing equipment, software, services or installations, or conditions under original supplier warranties;
- (d) for goods purchased on a commodity market;
- (e) when an 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. When such contracts have been fulfilled, subsequent procurements of such goods or services shall be subject to this Chapter;
- (f) when additional construction services, which were not included in the initial contract but which were within the objectives of the original tender

documentation, have, due to unforeseeable circumstances, become necessary to complete the construction services described therein, provided that the total value of contracts awarded for additional construction services does not exceed 50 percent of the amount of the main contract;

- (g) in so far as it is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the entity and beyond its control, the goods or services could not be obtained in time by means of an open or selective tendering procedure;
- (h) for purchases made under exceptionally advantageous conditions that only arise in the very short term, including public auction or unusual disposals, such as those resulting from liquidation, bankruptcy or receivership. This subparagraph is not intended to cover routine purchases from regular suppliers;
- (i) in the case of a contract awarded to the winner of a design contest provided that the contest has been organised in a manner which is consistent with the principles of this Chapter and that the contest is judged by an independent jury with a view to a design contract being awarded to the winner; or
- (j) for new construction services consisting of the repetition of similar construction services which conform to a basic project for which an initial contract was awarded, in accordance with the open or selective tendering procedures set out in this Chapter, and for which the entity has indicated in the notice of intended procurement concerning the initial construction service that procedures other than open or selective tendering procedures might

be used in awarding contracts for such new construction services.

2. The Parties shall ensure that where entities resort to a procedure other than open or selective tendering based on the circumstances set forth in Paragraph 1, the entities shall maintain a written record or report setting out the circumstances and specific justifications for resorting to a procedure other than open or selective tendering.

### **Article 16 Awarding of Contracts**

1. The Parties shall ensure that their entities receive, open and evaluate all tenders under procedures that guarantee the fairness and impartiality of the procurement process.

2. To be considered for award of a contract, a tender must, at the time of opening by the entity, conform to the essential requirements of the notice of intended procurement or tender documentation and be submitted by a supplier who complies with the conditions for participation.

3. Unless an entity determines that it is not in the public interest to award a contract, it shall award the contract to the supplier that has been determined to be fully capable of undertaking the contract and has submitted the tender that:

- (a) offers the best value for money;
- (b) offers the lowest price; or
- (c) is the most advantageous

in terms of the essential requirements and evaluation criteria set forth in the tender documentation.



4. An entity shall not cancel a procurement covered by this Chapter, or terminate or modify awarded contracts, in order to circumvent the requirements of this Chapter.

### **Article 17 Post-Award Information**

1. Entities shall promptly inform suppliers that have submitted a tender of the contract award decision.

2. Entities shall, on request from an unsuccessful supplier, promptly explain the reasons for the rejection of its tender or the relative advantages of the tender the entity selected.

3. Entities shall, promptly after the award of a contract for a procurement covered by this Chapter, publish a notice containing at least the following information:

- (a) the name and address of the successful supplier;
- (b) a description of the goods or services supplied; and
- (c) the value of the contract award.

### **Article 18 Ensuring Integrity in Procurement Practices**

Each Party shall ensure that criminal or administrative penalties exist to address corruption in its government procurement, and that its entities have in place policies and procedures to address any potential conflict of interest on the part of those engaged in or having influence over a procurement.

### **Article 19 Domestic Review of Supplier Complaints**

1. Each Party shall ensure that its entities accord impartial and timely consideration to any complaints from suppliers

regarding an alleged breach of measures or government procurement measures implementing this Chapter arising in the context of a procurement in which those suppliers have, or have had, an interest. Where appropriate, a Party may encourage suppliers to seek clarification from its entities with a view to facilitating the resolution of any such complaints.

2. Each Party shall provide suppliers of the other Party with non-discriminatory, timely, transparent and effective access to an administrative or judicial body competent to hear or review complaints of alleged breaches of the procuring Party's measures or government procurement measures implementing this Chapter arising in the context of procurements in which those suppliers have, or have had, an interest.

3. Each Party shall make information on complaint mechanisms generally available.

4. Where an administrative or judicial body may award compensation for any breach of measures or government procurement measures implementing this Chapter, such compensation may be limited to the costs for tender preparation reasonably incurred by the supplier for the purpose of the procurement.

## **Article 20**

### **Use of Electronic Communications in Procurement**

1. The Parties shall encourage their entities to provide opportunities for government procurement to be undertaken through the internet and shall encourage, to the extent possible, the use of electronic means for the provision of tender documentation and receipt of tenders.

2. In order to facilitate commercial opportunities for their suppliers under this Chapter, each Party shall maintain a single electronic point of access to comprehensive information on government procurement supply opportunities

in its Area, including as set out in Paragraph 2 of Article 10, and information on government procurement measures, as set out in Article 8. The contact point or points from whom suppliers can obtain information on government procurement shall either be specified in Annex IV, or be set out in the information on the single electronic point of access.

3. Each Party shall encourage its entities to publish on the internet information regarding the entities' indicative procurement plans as early as possible in the fiscal year.

### **Article 21**

#### **Modifications and Rectifications of Annexes**

1. Each Party may modify its Annexes to this Chapter in conformity with Paragraph 2 of Article 2 (Functions of the Joint Commission) of Chapter 17 (Administrative and Institutional Provisions) provided that it:

- (a) notifies the other Party of the proposed modification; and
- (b) provides the other Party appropriate compensatory adjustments to its coverage in order to maintain a level of coverage comparable to that existing prior to the modification.

2. Notwithstanding Paragraph 1(b), no compensatory adjustments shall be provided to the other Party where the modification by a Party of its Annexes concerns:

- (a) rectifications of a purely formal nature and minor amendments to entity coverage and/or the single electronic point of access and/or contact points, made through an implementing arrangement in accordance with Paragraph 2 of Article 2 (Functions of the Joint Commission) of Chapter 17 (Administrative and Institutional Provisions); or

- (b) one or more entities over which government control or influence has been effectively eliminated as a result of corporatisation and commercialisation or privatisation.