

## COMMUNICATION FROM THE EUROPEAN COMMUNITIES

### Government Procurement in Services

The following communication, dated 19 June 2006, from the delegation of the European Communities is being circulated to the Members of the Working Party on GATS Rules.

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1. In its communications on government procurement in services of July 2002, May 2003, May 2004 and June 2005, the European Communities (hereinafter the EC) submitted proposals for a framework that could be developed under the GATS, including an Annex to the GATS on procedural rules for government procurement and the possibility to make specific commitments in GATS Schedules to open up to international competition government procurement in services. These communications underlined the flexibility of such framework and the benefits that could be drawn from it. The underlying principle would be that each WTO Member would undertake relevant government procurement commitments only in the sectors it wishes to open to international competition in accordance with the procedural rules laid down in the Annex.

2. In its communication submitted in May 2004 (S/WPGR/W/48), the EC gave concrete examples showing that undertaking government procurement commitments under the GATS was feasible. In its communication of June 2005 (S/WPGR/W/52), the EC defined a set of procedural rules to be developed in an Annex to the GATS on government procurement in services.

3. The EC is hereby putting forward a new contribution that aims at proposing the text of this Annex to the GATS on government procurement in services. This contribution further builds upon the WTO Secretariat Note S/WPGR/W/49 on the government procurement provisions contained in economic integration agreements. As Singapore had underlined in its Statement of 24 November 2004, most of the agreements reviewed in that Secretariat Note contain procedural rules typically covering such topics as non-discrimination, valuation of contracts, technical specifications, procurement methods, qualification of suppliers, procedural rules regarding invitations to participate, time limits for tendering and delivery, tender documentation, and award of contracts. These elements provide the structure of an Annex to the GATS, and the EC communication of June 2005 has precised the types of rules that could be developed under the relevant headings.

4. Going one step further, the text of the hereby proposed Annex to the GATS on government procurement borrows as much as possible from the provisions contained in existing economic integration agreements and already in force. Given the need for the proposed provisions to be adapted to the situation of developing countries, as Singapore had emphasized in its communication of November 2004, a specific S&D regime taking into account the specific development, financial and trade needs of developing countries has been set up in Title 5.

## **I. SUMMARY OF THE PROPOSED GATS ANNEX ON GOVERNMENT PROCUREMENT IN SERVICES**

### **TITLE 1: OBJECTIVES**

5. The proposed text indicates that the Annex results from the negotiations mandated by Article XIII:2 of the GATS. It confirms that all the provisions of the GATS apply to government procurement of services, with the exception of Articles II, XVI and XVII (in accordance with Article XIII:1).

### **TITLE 2: DEFINITIONS**

6. This Title defines a number of terms used in the text of this Annex, in particular open, selective and limited tendering procedures.

7. For the sake of clarity, it is precised that the term "procuring entity" refers only to entities listed in the Schedule of specific commitments of each Member, so that the procuring entities encompassed by the commitments of a Member are clearly defined.

### **TITLE 3: SCOPE**

8. The scope of the Annex is defined in accordance with the wording of GATS Article XIII:1. For a purpose of clarity, since a number of provisions of the draft Annex relate to procedural rules affecting individual procurements of services, it is specified that any action by a covered procuring entity relating to government procurement falls under the scope of this Annex

9. As suggested in the latest EC communication, the text includes a provision precising that this Annex covers government procurement of services, defined as government procurement contracts in which services are the primary subject of the contract.

10. The text states that Members have the possibility to negotiate and undertake commitments relating to government procurement of services in their Schedules of specific commitments.

11. The Annex states that, with the exception of the MFN clause, its provisions only apply to sectors in which specific government procurement commitments have been taken under the Schedule, with the limitations set therein. Thus, apart from the MFN treatment, the scope of these provisions is limited to contracts pertaining to the sectors and the procuring entities defined in each Member's schedule.

12. The case where a contract involves several service sectors, that raised discussions in the Working Party, is addressed through a specific provision.

13. A provision also excludes covered procurements intended to enable an activity when this activity becomes exposed to competition in a Member territory.

### **TITLE 4: EXCLUSIONS AND EXCEPTIONS TO THIS ANNEX**

14. Article XIV and XIVbis of the GATS already include a range of exceptions, that do not need to be repeated in the Annex on government procurement. Parties to the GPA have negotiated additional exceptions, in particular in order to protect intellectual property or concerning measures based on social grounds. The proposed text provides for similar exceptions.

**TITLE 5: SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES**

15. It is recalled that the positive list structure of the GATS and the flexibility of the proposed approach, notably the possibility to schedule partial commitments including specific limitations, mean that WTO Members would retain full discretion about the coverage of the commitments they would undertake to open their government procurement markets to international competition. In addition to this "built-in flexibility", this Title provides for two other kinds of flexibilities helping developing countries to open up progressively their government procurement markets in the service sectors they see fit :

16. The first provision is the possibility for developing countries to make use of a price preference programme or an offset for a transitional period, under certain conditions. The second provision allows a developing country Member to apply an implementation period if necessary to bring its domestic regime into conformity with the provisions of this Annex provided it complies with basic principles of national treatment and non discrimination. The use of these special provisions would have to be mentioned in the Schedule of specific commitments of the concerned Members.

**TITLE 6: GENERAL PRINCIPLES**

17. The text provides for National Treatment, subject to the limitations indicated in a Member's schedule.

18. As suggested in the previous communications, the text provides for the application of the MFN treatment to government procurement in services. This provision would apply across the board as suggested through previous discussions held in the Working Party on GATS Rules.

19. This Annex provides for a one-off possibility to schedule MFN exemptions at the time of its entry into force, to take account of the fact that MFN exemptions relating to government procurement were not scheduled at the time of entry into force of the GATS because Article II GATS was not applying to government procurement. The scheduling of MFN exemptions relating to government procurement could follow the usual framework of the GATS lists of MFN exemptions, with an additional list attached to this Annex.

20. In addition, the suggested text includes an exception to the MFN principle to ensure that the more favourable treatment that GPA parties may accord to each others in the framework of the GPA regime is not extended on an MFN basis to non GPA parties.

21. A specific paragraph provides basic principles to ensure a proper use of electronic means, more and more commonly used in procurements.

22. Another general principle provided by the text is the absence of application of rules of origin for services supplied under government procurement different from the rules applied for the same services in the normal course of trade.

23. Like in many economic integration agreements, the suggested Annex includes a provision that prohibits offsets, except under the special and differential treatment for developing countries.

**TITLE 7: THRESHOLDS AND VALUATION RULES**

24. Threshold values would be indicated in the Members' Schedules. Although the present framework is very flexible, the experience pleads for the existence of only two thresholds: one for construction services, and another one for all other services. In addition, the EC reiterates the practical interest of harmonized thresholds amongst Members.

25. The suggested Annex includes provisions common to most of economic integration agreements regarding the valuation of contracts. In particular, Members' procuring entities are not allowed to split or divide government procurement contracts with the intention of avoiding or circumventing the application of specific commitments for procurement above certain thresholds.

#### **TITLE 8: PUBLICATION OF PROCUREMENT INFORMATION**

26. The text requires the publication of any measure of general application and general procedure covering government procurement in services in an official publication to be listed in the Schedule of specific commitments.

#### **TITLE 9: PUBLICATION OF NOTICES**

27. Effective access to government procurement opportunities is closely linked to competitive and transparent procedural rules. This Title covers the publication of a notice of intended procurement and the information it should include.

28. The draft Annex provides the possibility of publishing notices of planned procurement, allowing service suppliers to be informed in advance of future procurements. As an additional flexibility, entities operating in the utilities sectors may use such a notice of planned procurement as a notice of intended procurement, under some conditions.

#### **TITLE 10: INFORMATION ON INTENDED PROCUREMENT**

29. The proposed Annex indicates simple usual rules: the information made available should allow suppliers to submit tenders in a responsive manner. Besides, the procuring entity should reply to requests from suppliers for documentation or information.

30. The suggested text provides for simple and usual rules regarding technical specifications. These should allow tenders to provide a wide range of possible technical solutions. In particular, technical specifications shall be in terms of performance or functional requirements rather than design or descriptive characteristics, and based on recognized standards.

#### **TITLE 11: CONDITIONS FOR PARTICIPATION**

31. This Title provides for a set of common rules regarding non discrimination, transparency, and openness of the qualification process for suppliers.

32. Specific provisions address the case of selective tendering, with procedural rules regarding invitations to participate and examination of requests by suppliers for participation in a procurement.

33. The Annex allows multi-use lists of suppliers, under some conditions relating to applications for qualification and inclusion in the list. Entities operating in the utilities sector are provided with an additional flexibility with the possibility to use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement under a few conditions.

34. Finally, the proposed text is intended to ensure that service suppliers are informed of the outcome of their requests for qualification, or of the termination of their qualification, with appropriate explanations upon request.

**TITLE 12: TIME PERIODS**

35. The text provides for general principles governing the fixing of time periods by Members. In addition, it is suggested to adopt a common range of time periods. Taking into account the information provided by the WTO Secretariat about existing provisions on this matter in plurilateral or bilateral agreements, the text indicates as a general rule a minimum period of 40 days between the date of publication of the notice of intended procurement and the final date for the submission of tenders.

36. When the procuring entity requires suppliers to satisfy qualification requirements in order to participate in the procurement, a minimum period of 25 days is provided between the date of publication of the notice of intended procurement, and the final date for submission of applications to be invited to tender by suppliers. A period of 40 days is provided between the date of issuance of the invitation to tender and the final date for submission of tenders.

37. The text provides that these limits may be reduced in certain specified circumstances, but to no less than 10 days.

**TITLE 13: NEGOTIATION**

38. As it is the case in some agreements, as highlighted by document S/WPGR/W/49, the Annex opens the possibility of conducting negotiations.

**TITLE 14: LIMITED TENDERING**

39. The Annex allows the use of limited tendering, under conditions and circumstances closely circumscribed as it is the case in several economic integration agreements: for example in the absence of suitable response to a prior procurement, situations of extreme urgency brought about by events unforeseeable by the procuring entity, and objective necessity or relevance to contract with a particular supplier.

**TITLE 15: TREATMENT OF TENDERS AND CONTRACT AWARD**

40. The text asserts basic principles relating to the procedures of treatment of tenders and the conditions to be met by the latter to be considered for award.

41. The general rule is that contracts are awarded either to the lowest tender or to the tender determined to be the most advantageous in terms of the specific evaluation criteria set earlier in the procurement notice or tender documentation. A range of possible award criteria is provided in the text.

**TITLE 16: TRANSPARENCY OF PROCUREMENT INFORMATION**

42. The proposed text is intended to ensure that tenderers are promptly informed of the outcome of the award process and have access upon request to explanations relating to the rejection of their tenders. In addition, procuring entities are required to publish a notice of contract award.

**TITLE 17: DOMESTIC REVIEW**

43. Without prejudging the outcome of ongoing discussions on Domestic Regulations, and for the purpose of specifically implementing GATS Article VI:2 for government procurement of services, a range of measures is provided under this Title, relating to challenges of a breach of the Annex by service suppliers. These measures are related to, but not only, the provision of a review procedure,

consultations between a complaining supplier and the concerned procuring entity, designation of an impartial administrative or judicial authority to receive and review a challenge, judicial review of review bodies, procedures for interim measures, or corrective or compensation actions.

## **II. CONCLUSIONS**

44. The EC looks forward to discussing this proposed Annex to the GATS on government procurement in services.

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## ANNEX TO THE GATS ON GOVERNMENT PROCUREMENT

### TITLE 1: OBJECTIVES

1. Pursuant to the mandate given by Article XIII:2 of the Agreement, the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting government procurement. With the exception of Articles II, XVI and XVII of the Agreement, and unless otherwise stated, all provisions of the Agreement are applicable to the matters regulated in this Annex.

### TITLE 2: DEFINITIONS

2. For purposes of this Annex:

- a) **Commercial services** mean services of a type that are generally sold or offered for sale in the commercial market place to, and customarily purchased by, non-governmental buyers for non-governmental purposes;
- b) **Limited tendering procedures** are those procedures where a procuring entity contacts a supplier or suppliers of its choice only under the circumstances specified in Paragraph 50;
- c) **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;
- d) **Notice of intended procurement** means a notice published by a procuring entity inviting interested suppliers to submit request for participation and tenders;
- e) **Procuring entity** means an entity covered under specific commitments on government procurement in the Schedule of each Member;
- f) **Offsets** in government procurement means any condition or undertaking that encourage local development or improve a Member's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade, and similar actions;
- g) **Open tendering procedures** are those procedures whereby any interested supplier may submit a tender;
- h) **Selective tendering procedures** are those procedures whereby, consistent with Paragraphs 37 and 38 and other relevant provisions of this Annex, only suppliers satisfying the conditions for participation may submit a tender.

### **TITLE 3: SCOPE**

3. This Annex applies to laws, regulations, requirements, or any action by a covered procuring entity, concerning the procurement of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.
4. For the purposes of this Annex, covered procurement includes the procurement of goods incidental to the supply of services if the value of these incidental goods does not exceed that of the services themselves, but not goods contracts *per se*.
5. In accordance with GATS Article XVIII, Members may negotiate commitments with respect to measures within the scope of Paragraph 3 and inscribe them in their Schedules.
6. With the exception of Paragraph 16, the provisions of this Annex apply to measures concerning procurement of services only in the sectors where specific commitments on Government Procurement have been undertaken according to a Member's Schedule of specific commitments, under the conditions and limitations set therein.
7. In case a single procurement contract involves more than one service sector, it shall be subject to the provisions of this Annex if all the service sectors concerned are covered by a Member's commitments pursuant to this Annex. In such a case, and where the provisions of this Annex provide for different obligations, it shall be subject to the provisions of the Annex applying to the predominant service sector concerned.
8. Procurements covered under a Member's specific commitments on government procurement and intended to enable an activity by a procuring entity shall not be subject to the provisions of this Annex if, in the Member in which it is performed, the activity is directly exposed to competition on markets. Each Member shall notify the Council for Trade in Services about such activities.

### **TITLE 4: EXCLUSIONS AND EXCEPTIONS TO THIS ANNEX**

9. Nothing in this Annex shall be construed to prevent any Member 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.
10. 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 Members where the same conditions prevail or a disguised restriction on international trade, nothing in this Annex shall be construed to prevent any Member from imposing or enforcing measures:
  - a) necessary to protect intellectual property; or
  - b) relating to services of handicapped persons, philanthropic institutions, or prison labour.

### **TITLE 5: SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES**

11. In the implementation and administration of this Annex, Members shall take special consideration of developing countries' development, financial and trade needs and circumstances. In this context, there shall be appropriate flexibility for individual developing country Members for transitional measures as provided for under Paragraphs 12 and 13.



12. Based on its development needs, a developing country Member may adopt or retain one or more of the following transitional measures for a maximum period of 10 years, in accordance with a phase-out schedule, set out in its Schedule of specific commitments, and in a manner that does not discriminate among the Members:

- a) a price preference programme, provided that the programme:
  - i) provides a preference only for the part of the tender incorporating services originating in the developing country Member applying the preference or services originating in other developing countries Members that have preferential agreements with the developing country Member applying the preference; and
  - ii) is transparent, and the preference and its application in the procurement are clearly described in the notice of intended procurement covered by this Annex;
- b) an offset, provided that any requirement for, or consideration of, the imposition of the offset is clearly stated in the notice of intended procurement and the notice inviting suppliers to apply for participation in procurement covered by this Annex;

13. In order for a developing country Member to bring its measures into conformity with this Annex, it may apply a specified implementation period, which shall be the period necessary for it to adopt measures relating to specific provisions of this Annex, provided that the developing country Member complies with paragraphs 15 and 16.

14. Any developing country Member wishing to apply an implementation period under paragraph 13 shall list in its Schedule of specific commitments the implementation period, and where applicable, specific procedural obligations and any interim measures that it will take with regard to those obligations.

## **TITLE 6: GENERAL PRINCIPLES**

### *National treatment and non discrimination*

15. With respect to all measures within the scope of this Annex and subject to any conditions and qualifications set out in its Schedule of specific commitments, each Member shall accord to services and service suppliers of any other Member treatment no less favourable than that it accords to its own like services and service suppliers.

- 16.
- a) With respect to any measure within the scope of this Annex, each Member shall accord to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
  - b) A Member may maintain a measure inconsistent with a) provided that such a measure is listed at the date of entry into force of the present Annex. The list of such exemptions shall be added to this Annex.
  - c) By way of derogation from a), where a Member which is also a Party to the Agreement on Government Procurement (GPA) grants, as a result of its obligations under the GPA, more favourable treatment to services and service suppliers of another GPA Party than it

does to WTO Members which are not GPA Parties, it shall not be required to grant such treatment to services and service suppliers of any other Member.

*Conduct of Procurement*

17. A procuring entity shall conduct covered procurement in a manner that is consistent with this Annex, using methods such as open tendering, selective tendering and limited tendering.

*Use of electronic means*

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

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

*Rules of origin*

19. For purposes of covered procurement, no Member may apply rules of origin to services supplied by another Member that are different from the rules of origin the Member applies at the same time in the normal course of trade to supplies of the same services from the same Member.

*Offsets*

20. With regard to covered procurement, procuring entities shall not seek, take account of, impose, or enforce offsets, except in the situation and under the conditions mentioned in Paragraph 12.

**TITLE 7: THRESHOLDS AND VALUATION RULES**

*Thresholds*

21. The provisions of this Annex apply to any procurement contract of a value of not less than the relevant threshold indicated in the concerned Member's Schedule of specific commitments on government procurement.

*Valuation*

22. 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 Annex; and

- b) include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including premiums, fees, commissions, interest; and where the procurement provides for the possibility of option clauses, the estimated maximum total value of the procurement, inclusive of optional purchases.

When procurement involves the supply of incidental goods or services in addition to its main object, the valuation of the procurement includes the valuation of these incidental goods or services.

## **TITLE 8: PUBLICATION OF PROCUREMENT INFORMATION**

23. Each Member shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clauses that is mandated by a law or regulation and is incorporated by reference in notices and tender documentation and procedure regarding covered procurement, and any modifications thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public and that is listed in its Schedule of specific commitments.

## **TITLE 9: PUBLICATION OF NOTICES**

### *Notice of intended procurement*

24. For each intended covered procurement, except in the circumstances described in Paragraph 50, a procuring entity shall publish a notice of intended procurement inviting interested suppliers to submit tenders or, where appropriate, request for participation. Each such notice shall be published in the appropriate medium referred to in Paragraph 23, and shall be accessible during the entire period established for tendering for the relevant procurement.

25. Each notice of intended procurement shall include a description of the intended procurement, any conditions that suppliers must fulfil to participate in the procurement, the name of the entity issuing the notice, the address where suppliers may obtain all documents relating to the procurement, the time limits for submission of tenders or, where applicable, any time limits for the submission of requests to participate in the procurement, a list and brief description of any conditions for participation of suppliers, and the dates for delivery of the services to be procured.

### *Notice of planned procurement*

26. Procuring entities are encouraged to publish as early as possible in each fiscal year a notice regarding their future procurement plans. This notice should include the subject-matter of the procurement and the planned date of the publication of the notice of intended procurement.

27. Entities operating in the utilities sector may use a notice of planned procurement as a notice of intended procurement provided that it includes as much of the information in Paragraph 25 as is available.

## **TITLE 10: INFORMATION ON INTENDED PROCUREMENT**

### *Tender documentation*

28. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall provide at least a complete description of the procurement, any conditions

for participation of suppliers, all criteria to be considered in the awarding of the contract, and any other terms or conditions, including terms and conditions of payment.

29. Where procuring entities do not offer free direct access to the entire tender documents and any supporting documents by electronic means, procuring entities shall make promptly available the tender documentation at the request of any supplier of another Member.

30. Procuring entities shall promptly reply to any reasonable request for relevant information relating to the intended procurement, on condition that such information does not give that supplier an advantage over its competitors.

#### *Technical specifications*

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

- a) specify the technical specification in terms of performance and functional requirement rather than design or descriptive characteristics;
- b) base the technical specification on international standards, where such exists; otherwise on national technical regulations, recognized national standards, or building codes.

32. Where design or descriptive characteristics are used in the technical specifications, a procuring entity should, where appropriate, include words such as "or equivalent" in the tender documentation and consider tenders of equivalent services that demonstrably fulfil the requirements of the procurement.

33. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tender documentation.

### **TITLE 11: CONDITIONS FOR PARTICIPATION**

#### *General*

34. Any conditions for participation in procurement shall be non discriminatory and limited to conditions essential to ensure that the potential supplier has the capability to fulfil the requirements of the procurement and the ability to execute the contract in question.

35. Nothing in this Annex shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations or conviction for serious crime such as participation in criminal organisations.

36. Procuring entities shall recognize as qualified suppliers all suppliers who meet the conditions for participation in a particular intended procurement. Procuring entities shall base their qualification decisions solely on the conditions for participation that have been specified in advance in the notice of intended procurement or in the tender documentation.

*Selective tendering*

37. A procuring entity that intends to use selective tendering shall, in the notice of intended procurement, invite suppliers to submit a request for participation and shall give a description of the intended procurement, the qualification requirements, the name and the address of the procuring entity, and the time-limits for the submission of the request to participate.

38. Where a supplier submits a request to participate, and all required documents relating thereto within the time-limit provided for in Paragraph 46, a procuring entity, whether or not it uses a multi-use list, shall examine the request and may not exclude the supplier from consideration in respect of the procurement on the grounds that the procuring entity has insufficient time to examine the application.

*Multi-use lists*

39. 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 published annually, or made available continuously by electronic means in one of the appropriate media listed in the Schedule of specific commitments.

40. The notice referred to in Paragraph 39 shall include at least a description of the services for which the list may be used, the conditions for participation to be satisfied by suppliers, the name and address of the procuring entity, and the period of validity of the list as well as the means for its renewal or termination.

41. Procuring entities maintaining multi-use lists shall ensure that suppliers can apply for qualification at any time, and that all qualified suppliers are included in the lists within a reasonably short time.

42. Entities operating in the utilities sector 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 sets out, in addition to the information required in Paragraph 40, as much of the information required in Paragraph 25 as is available and contains a statement that it constitutes a notice of intended procurement;
- b) the procuring entity promptly provides to suppliers who have expressed an interest in a given procurement sufficient information to permit them to assess their interest in the procurement;
- c) a supplier having applied for inclusion in the multi-use list in accordance with paragraph 41 shall be allowed to tender in a given procurement, only if there is sufficient time to examine whether it satisfies the conditions for participation.

*Information on procuring entities' decisions*

43. A procuring entity shall promptly advise any supplier that requests qualification of its decision as to whether the supplier is qualified. Where a procuring entity rejects a supplier's application to qualify or ceases to recognise a supplier as qualified, the entity shall inform the supplier and, on request of the supplier, promptly provide the supplier with a written explanation of the reasons for its decision.

## **TITLE 12: TIME PERIODS**

44. Time-limits established by the procuring entities during a procurement process shall be sufficiently long to enable suppliers to prepare and submit requests for participation where appropriate, and responsive tenders, in relation to the nature and complexity of the procurement, the extent of subcontracting anticipated, the normal time for transmitting tenders by mail from foreign as well as domestic points, and the possibility for the procuring entities to send notices or give access to tender documentation through electronic means.

45. Except in so far as provided in Paragraph 47, procuring entities shall provide no less than 40 calendar days between the date on which the notice of intended procurement is published and the final date for the submission of tenders.

46. Where a procuring entity requires suppliers to satisfy qualification requirements in order to participate in a procurement, the entity shall provide no less than 25 calendar days between the date on which the notice of intended procurement is published and the final date to submit their application to be invited to tender and no less than 40 calendar days between the date of issuance of the invitation to tender and the final date for submission of tenders.

47. Under the following circumstances, procuring entities may establish a time period for tendering that is shorter than the periods referred to in Paragraphs 45 and 46, provided that such time period is sufficiently long to enable suppliers to prepare and submit responsive tenders and is in no case less than 10 calendar days prior to the final date for the submission of tenders:

- a) where a notice of planned procurement under Paragraph 26 has been published 40 days and not more than 12 months in advance;
- b) in the case where the procuring entity procures commercial services, the procuring entity may reduce the time period referred to in Paragraph 45 to not less than 15 days, provided that it publishes by electronic means, at the same time, both the notice of intended procurement and the tender documentation, and that tenders can be received by electronic means;
- c) where a state of urgency duly substantiated by the procuring entity renders impracticable the periods specified in Paragraphs 45 and 46.

## **TITLE 13: NEGOTIATION**

48. A Member may provide for its procuring entities to conduct negotiations:

- a) in the context of procurements in which they have indicated such intent in the notice of intended procurement; or
- b) where it appears from the evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.

49. A procuring entity shall:

- a) ensure that any elimination of tenderers in negotiations is carried out in accordance with the evaluation criteria set out in the notices or tender documentation; and
- b) when negotiations are concluded, provide a common deadline for the remaining tenderers to submit any new or revised tenders.

**TITLE 14: LIMITED TENDERING**

50. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Members, or that protects domestic suppliers, a procuring entity may use a limited tendering procedure only in the following circumstances and subject to the following conditions, where applicable:

- a) provided that the requirements of the tender documentation are not substantially modified, where no tenders were submitted or no suppliers applied to meet the conditions for participation, or where no tenders that conform to the essential requirements of the tender documentation were submitted or where no suppliers satisfied the conditions for participation;
- b) where the services can be supplied only by a particular supplier and no reasonable alternative or substitute services exist for the following reasons:
  - i) the requirement is for a work of art;
  - ii) the protection of patents, copyrights or other exclusive rights;
  - iii) due to an absence of competition for technical reasons;
- c) for additional deliveries by the original supplier of services that were not included in the initial procurement where :
  - i) a change of supplier for such additional services cannot be made for economic or technical reasons, such as requirements of interchangeability or interoperability with existing equipment, software, services, or installations procured under the initial procurement; and
  - ii) such separation would cause significant inconvenience or substantial duplication of costs to the procuring entity;
- d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the services could not be obtained in time under open or selective tendering procedures;
- e) where a procuring entity procures a prototype or a first service that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. Original development of a first service may include limited supply in order to incorporate the results of field testing and to demonstrate that the service is

suitable for supply in quantity to acceptable quality standards, but does not include quantity supply to establish commercial viability or to recover research and development costs;

- f) for new services consisting of the repetition of similar services which conform to a basic project for which an initial contract was awarded following an open or selective procurement method and for which the procuring entity has indicated in the notice of intended procurement concerning the initial service, that a limited procurement method might be used in awarding contracts for such new services;
- g) in the case of a contract awarded to a winner of a design contest provided that:
  - i) the contest has been organized in a manner that is consistent with the principles of this Annex, notably as regards the publication of a notice of intended procurement; and
  - ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner.

51. Each Member shall ensure that, whenever limited tendering is used, the procuring entity shall maintain a record or prepare a written report providing specific justification for the contract awarded.

#### **TITLE 15: TREATMENT OF TENDERS AND CONTRACT AWARD**

52. Procuring entities shall receive and open bids from suppliers upon procedures and conditions guaranteeing the respect of the principles of transparency and non-discrimination.

53. To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be submitted by a supplier which complies with any conditions for participation.

54. 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 entity has determined to be fully capable of undertaking the contract and whose tender is either the lowest price or the tender that the entity has determined to be the most advantageous solely on the basis of the requirements and evaluation criteria specified in the notices or tender documentation. In the latter case, award criteria shall be linked to the subject matter of the contract in question, and may include amongst others, quality, price, technical merits, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance and delivery period of completion.

55. A procuring entity shall not cancel procurement or modify awarded contracts in a manner that circumvents the obligations of this Annex.

#### **TITLE 16: TRANSPARENCY OF PROCUREMENT INFORMATION**

56. Procuring entities shall promptly inform tenderers of decisions regarding the award of the contract and, on request, in writing. Procuring entities shall, on request, provide any eliminated tenderer of the reasons for the rejection of its tender and of the characteristics and relative advantages of the selected tender.

57. Procuring entities shall promptly publish after the award of the contract a notice in an officially designated publication that may be an electronic or paper medium. Such notice would at



least include a description of the services procured, the name and address of the procuring entity, the name and address of the successful tenderer, the value of the successful tender and the date of award.

#### **TITLE 17: DOMESTIC REVIEW**

58. Each Member shall provide a timely, effective, transparent, and non-discriminatory administrative or judicial review procedure through which a supplier may challenge a breach of this Annex, arising in the context of a covered procurement, in which it has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.

59. In the event of a complaint by a supplier, arising in the context of covered procurement in which the supplier has, or has had, an interest, that there has been a breach of this Annex, each Member shall encourage the procuring entity and 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 prejudicial neither to the supplier's participation in ongoing or future procurement nor to the supplier's rights to seek corrective measures under the administrative or judicial review procedure.

60. 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.

61. Each Member shall establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge of a supplier arising in the context of a covered procurement.

62. Where a body other than an authority referred to in Paragraph 61 initially reviews a challenge, the Member shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity that is the subject of a challenge.

63. A review body that is not a court shall either be subject to judicial review or shall have procedures which provide that:

- a) the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body;
- b) the participants to the proceedings shall have the right to be heard prior to a decision of the review body being made on the challenge;
- c) the participants to the proceedings shall have access to all proceedings;
- d) decisions or recommendations relating to supplier challenges shall be provided, in a timely fashion, in writing, with an explanation of the basis for each decision or recommendation.

64. Each Member shall adopt or maintain procedures that provide for:

- a) rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement

process. However, 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. In such circumstances, just cause for not acting shall be provided in writing; and

- b) corrective action where a review body has determined that there has been a breach of this Annex or compensation for the loss or damages suffered, which may be limited to the costs for the preparation of the tender or the costs relating to the challenge.
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