

Chapter Ten

Government Procurement

Article 1001: Objectives

The Parties shall strive to achieve the liberalization of their measures regarding government procurement, as specified by the obligations in this Chapter, so as to provide balanced, non-discriminatory, predictable and transparent government procurement opportunities for the suppliers of each Party.

Article 1002: Scope and Coverage

1. Subject to Annexes 1002.1 through 1002.7, this Chapter applies to any measure regarding the procurement of goods or services or any combination thereof, by any entity listed in Annex 1002.1 (Federal Government Entities), Annex 1002.3 (Government Enterprises) and, when completed, Annex 1002.2 (State and Provincial Government Entities), where the value of the contract to be awarded is estimated, at the time of publication of a notice in accordance with Article 1010 (Invitation to Participate), to equal or exceed the applicable threshold as set forth in paragraph 3.

2. Where the contract to be awarded by the entity is not covered by this Chapter, this Chapter shall not be construed to cover any good or service component of that contract. However, no Party shall prepare, design or otherwise structure any procurement contract in order to avoid the obligations of this Chapter.

3. Subject to Annex 1002-A, the applicable thresholds in U.S. dollars are:

(a) for entities listed in Annex 1002.1 (Federal Government Entities),

(i) \$50,000 for goods contracts,

(ii) \$50,000 for services contracts, except for construction services contracts, and

(iii) \$6.5 million for construction services contracts; and

(b) for entities listed in Annex 1002.3 (Government Enterprises)

(i) \$250,000 for goods contracts,

(ii) \$250,000 for services contracts, except for construction services contracts, and

(iii) \$8.0 million for construction services contracts.

4. Threshold values are denominated in real terms and therefore shall incorporate the inflation rate of the United States. The United States shall, every two years, calculate and notify to the other Parties the threshold values denominated in nominal terms according to of Annex 1002.8 (1) (Indexation and Conversion of Thresholds).

5. Each Party shall comply with Annex 1002.8 with respect to the calculation and conversion of the value of thresholds into national currencies.

6. For purposes of this Chapter, procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy, in accordance with the thresholds and coverage applicable in this Chapter. Procurement does not include the acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions and sale and distribution services for government debt.

7. As between any Parties who are also party to the GATT Agreement on Government Procurement or any successor agreement to which such Parties are party, this Chapter shall prevail to the extent of any inconsistency between the provisions of such agreement and this Chapter.

Article 1003: Valuation of Contracts

1. Each Party shall ensure that its entities, in determining whether any contract is subject to this Chapter, apply paragraphs 2 through 6 in calculating the value of that contract.

2. An entity, in calculating the value of a contract, shall take into account all forms of remuneration, including premiums, fees, commissions and interest.

3. An entity shall not select a valuation method, or divide procurement requirements into separate contracts, to avoid the application of this Chapter.

4. Where an individual requirement for a procurement results in:

- (a) the award of more than one contract, or
- (b) in contracts being awarded in separate parts,

the basis for valuation shall be either:

(c) the actual value of similar recurring contracts concluded over the previous fiscal year or 12 months adjusted, where possible, for anticipated changes in quantity and value over the subsequent twelve months; or

(d) the estimated value of recurring contracts in the fiscal year or 12 months subsequent to the initial contract.

5. In the case of a contract for lease or rental, with or without an option to buy, or in the case of a contract that does not specify a total price, the basis for valuation shall be:

(a) in the case of a fixed-term contract, where the term is 12 months or less, the total contract value for its duration or, where the term exceeds 12 months, the total contract value including the estimated residual value; or

(b) in the case of a contract for an indefinite period, the estimated monthly installment multiplied by 48.

If the entity is uncertain as to whether a contract is for a fixed or an indefinite term, the entity shall calculate the value of the contract using the method set forth in subparagraph (b).

6. In cases in which tender documentation specifies the need for optional purchases, the basis for valuation shall be the total value of the maximum permissible procurement, inclusive of all possible optional purchases.

Article 1004: National Treatment and Non-discrimination

1. With respect to all measures regarding government procurement covered by this Chapter, each Party shall accord to goods of any other Party, as determined in accordance with the rules of origin referred to in Article 1005(1) (Rules of Origin), to services of any other Party, as determined in accordance with Article 1005(2), and to the suppliers of such goods or services, treatment no less favorable than the most favorable treatment that it accords to:

(a) goods, services and suppliers of that Party; and

(b) goods, services and suppliers of any other Party.

2. With respect to all measures regarding government procurement covered by this Chapter, no Party may:

(a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or

(b) discriminate against a locally established supplier if the goods or services offered by that supplier for the particular procurement are goods or services of any other Party.

3. Paragraph 1 does not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, and other import regulations,

including restrictions and formalities.

4. Each Party reserves the right to deny to an enterprise of any other Party the benefits of this Chapter in accordance with the provisions of Article 1113 (Denial of Benefits), except subparagraph (a).

Article 1005: Rules of Origin

1. No Party shall apply to goods that are imported from any other Party for purposes of government procurement covered by this Chapter, rules of origin that are different from or inconsistent with the rules of origin the Party applies in the normal course of trade, which will be the non-preferential rules set out in Chapter Three (for country of origin marking purposes) at such time as they become the rules of origin applied in the normal course of trade.

2. Notwithstanding any other provision of this Chapter, a Party may deny to an enterprise that is a supplier of services of another Party the benefits of this Chapter if:

(a) nationals of any non-Party own or control that enterprise; and

(b) that enterprise has no substantial business activities in the territory of the Party under whose laws it is constituted.

Article 1006: Prohibition of Offsets

Each Party shall ensure that its entities do not, in the qualification and selection of suppliers, goods or services, or in the evaluation of bids and the award of contracts, consider, seek or impose offsets.

Article 1007: Technical Specifications

1. Each Party shall ensure that its entities do not, with the purpose or the effect of creating unnecessary obstacles to trade, prepare, adopt or apply any technical specification laying down:

(a) the characteristics of the goods or services to be procured such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling;

(b) the processes and methods for their production related to the goods characteristics; or

(c) requirements relating to conformity assessment.

2. Each Party shall ensure that any technical specification

prescribed by its entities is, where appropriate:

(a) specified in terms of performance criteria rather than design or descriptive characteristics; and

(b) based on international standards, national technical regulations, recognized national standards or building codes.

3. Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or service provider 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 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 that procurement.

Article 1008: Tendering Procedures

1. Each Party shall ensure that the tendering procedures of its entities:

(a) are applied in a non-discriminatory manner; and

(b) are consistent with the provisions of this Article and with Articles 1009 (Qualification of Suppliers) through 1016 (Limited Tendering).

2. In this regard, each Party shall ensure that its entities:

(a) do not provide to any supplier information with regard to a specific procurement in a manner that would have the effect of precluding competition; and

(b) provide all suppliers equal access to information with respect to a procurement during the period prior to the issuance of any notice or tender documentation.

Article 1009: Qualification of Suppliers

1. No entity of a Party may, in the process of qualifying suppliers in tendering procedures, discriminate between suppliers of the other Parties or between domestic suppliers and suppliers of the other Parties.

2. The qualification procedures followed by an entity of a Party shall be consistent with the following:

(a) any conditions for participation by suppliers in tendering procedures shall be published sufficiently in advance so as to provide the suppliers adequate time to initiate and, to the extent that it is compatible with efficient operation of the procurement process, to complete the qualification procedures;

(b) any conditions for participation by suppliers in tendering procedures, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of whether a supplier meets those conditions, shall be limited to those that are essential to ensure the fulfillment of the contract in question;

(c) the financial, commercial and technical capacity of a supplier shall be judged both on the basis of that supplier's global business activity and its activity, if any, in the territory of the Party of the procuring entity;

(d) no entity may misuse the process of, including the time required for, qualification in order to exclude suppliers of any other Party from a suppliers' list or from being considered for a particular procurement;

(e) an entity shall recognize as qualified suppliers those suppliers of any other Party that meet the conditions for participation in a particular procurement;

(f) an entity shall consider for a particular procurement those suppliers of any other Party that request to participate in the procurement and that are not yet qualified, provided there is sufficient time to complete the qualification procedure;

(g) an entity that maintains a permanent list of qualified suppliers shall ensure that suppliers may apply for qualification at any time, that all qualified suppliers so requesting are included in the list within a reasonably short period of time and that all qualified suppliers included in the list are notified of the termination of any such list or of their removal from it;

(h) if, after publication of a notice in accordance with Article 1010 (Invitation to Participate), a supplier that is not yet qualified requests to participate in a particular procurement, the entity shall promptly start the qualification procedure;

(i) an entity shall advise any supplier that requests to become a qualified supplier of its decision as to whether that supplier has become qualified; and

(j) where an entity rejects a supplier's application to qualify or ceases to recognize a supplier as qualified, the entity shall, upon request of the supplier, promptly provide pertinent information concerning the entity's reasons for doing so.

3. Each Party shall:

(a) ensure that each of its entities uses a single qualification procedure, except that an entity may use additional qualification procedures where the entity determines the need for a different procedure and is prepared, upon request of any other Party, to demonstrate such need; and

(b) make efforts to minimize differences in the qualification procedures of its entities.

4. Nothing in paragraphs 2 and 3 shall prevent an entity from excluding any supplier on grounds such as bankruptcy or false declarations.

Article 1010: Invitation to Participate

1. An entity shall, in accordance with paragraphs 2, 3 and 5, publish an invitation to participate for all procurements, except as otherwise provided for in Article 1016 (Limited Tendering), in the appropriate publication listed in Annex 1010.1 (Publications).

2. The invitation to participate shall take the form of a notice of proposed procurement, which notice shall contain the following information:

(a) a description of the nature and quantity of the goods or services to be procured, including any options for further procurement and, if possible

(i) an estimate of the timing when such options may be exercised, and

(ii) in the case of recurring contracts, an estimate of the timing of the subsequent tender notices for the goods or services to be procured;

(b) a statement as to whether the procedure is open or selective and whether it will involve negotiation;

(c) any date for starting delivery, or completion of delivery, of goods or services to be procured;

(d) the address to which an application to be invited to tender or to qualify for the suppliers' lists must be submitted, the final date for receiving such an

application and the language or languages in which it may be submitted;

(e) the address to which tenders must be submitted, the final date for receiving tenders and the language or languages in which tenders may be submitted;

(f) the address of the entity that will award the contract and that will provide any information necessary for obtaining specifications and other documents;

(g) a statement of any economic and technical requirements to be met and of any financial guarantees, information and documents required from suppliers;

(h) the amount and terms of payment of any sum payable for the tender documentation; and

(i) a statement as to whether the entity is inviting offers for purchase, lease or rental with or without an option to buy, or more than one of these methods.

3. Notwithstanding paragraph 2, any entity listed in Annex 1002.2 (State and Provincial Government Entities) or Annex 1002.3 (Government Enterprises) may use, as an invitation to participate, a notice of planned procurement, which shall contain as much of the information referred to in paragraph 2 as is available to the entity but which shall include, at a minimum, the following information:

(a) a description of the subject matter of the procurement;

(b) the time limits set for the receipt of tenders or an application to be invited to tender;

(c) the address at which requests for documents relating to the procurement should be made;

(d) a statement that interested suppliers should express their interest in the procurement to the entity; and

(e) the identification of a contact point within the entity from which further information may be obtained.

4. Any entity that uses a notice of planned procurement as an invitation to participate shall subsequently invite suppliers that have expressed an interest in the procurement to confirm their interest on the basis of information provided by the entity, which information shall include at least the information referred to in paragraph 2.

5. Notwithstanding paragraph 2, any entity listed in Annex 1002.2 (State and Provincial Government Entities) or Annex 1002.3 (Government Enterprises) may use, as an invitation to participate, a notice regarding a qualification system. Any entity that uses

such a notice shall, subject to the considerations referred to Article 1015 (8) (Submission, Receipt and Opening of Tenders and Awarding of Contracts), provide in a timely manner information that allows all suppliers that have expressed an interest in participating in the procurement to have a meaningful opportunity to assess their interest. The information shall normally include the information contained in the notices referred to in paragraph 2. Information provided to one interested supplier shall be provided in a non-discriminatory manner to all other interested suppliers.

6. In the case of selective tendering procedures, any entity that maintains a permanent list of qualified suppliers shall publish annually in one of the publications listed in Annex 1010.1 (Publications) a notice containing the following information:

(a) an enumeration of any lists maintained, including their headings, in relation to the goods or services or categories of goods or services to be procured through the lists;

(b) the conditions to be fulfilled by suppliers in view of their inscription on the lists referred to in subparagraph (a) and the methods according to which each of those conditions will be verified by the entity concerned; and

(c) the period of validity of the lists and the formalities for their renewal.

7. If, after publication of an invitation to participate, but before the time set for the opening or receipt of tenders as specified in the notices or the tender documentation, an entity finds that it has become necessary to amend or reissue the notice or tender documentation, the entity shall ensure that the amended or reissued notice or tender documentation is given the same circulation as the original. Any significant information given by an entity to one supplier with respect to a particular procurement shall be given simultaneously to all other suppliers concerned and sufficiently in advance so as to provide all suppliers concerned adequate time to consider such information and to respond to it.

8. An entity shall indicate, in the notices referred to in this Article or in the publication in which the notices appear, that the procurement is covered by this Chapter.

Article 1011: Selective Tendering Procedures

1. To ensure optimum effective competition between the suppliers of all Parties under selective tendering procedures, an entity of a Party shall, for each procurement, invite tenders from the maximum number of domestic suppliers and suppliers of the other Parties, consistent with the efficient operation of the procurement system.

2. Subject to paragraph 3, any entity that maintains a permanent list of qualified suppliers may select suppliers to be invited to tender for a particular procurement from among those listed. In the process of making any selection, the entity shall provide for equitable opportunities for suppliers on the list.

3. Subject to Article 1009 (2)(f) (Qualification of Suppliers), an entity shall allow any supplier that requests to participate in a particular procurement to submit a tender and shall consider the tender. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system.

4. If an entity does not invite or admit a supplier to tender, the entity shall, upon request of the supplier, promptly provide pertinent information concerning its reasons for not doing so.

Article 1012: Time Limits for Tendering and Delivery

1. An entity of a Party shall:

(a) in prescribing any time limit, provide adequate time to allow suppliers of the other Parties to prepare and submit tenders before the closing of the tendering procedures;

(b) in determining any time limit, consistent with its own reasonable needs, take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated, and the time normally required for transmitting tenders by mail from foreign as well as domestic points; and

(c) take due account of publication delays when setting the final date for receipt of tenders or applications to be invited to tender.

2. Subject to paragraph 3, an entity shall provide that:

(a) in open procedures, the period for the receipt of tenders is no less than 40 days from the date of publication of the notice referred to in Article 1010 (Invitation to Participate);

(b) in selective procedures not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender is no less than 25 days from the date of publication of the notice referred to in Article 1010 (Invitation to Participate), and the period for receipt of tenders is no less than 40 days from the date of issuance of the invitation to tender; and

(c) in selective procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders is no less than 40 days from the date of the initial issuance of invitations to tender. If the date of initial issuance of invitations to tender does not coincide with the date of publication of the notice referred to in Article 1010 (Invitation to Participate), there shall not be less than 40 days between those two dates.

3. An entity may reduce the periods referred to in paragraph 2 in accordance with the following:

(a) where a notice referred to Article 1010 (3) or (5) (Invitation to Participate) has been published for a period of no less than 40 days and no more than 12 months, the 40 day limit for receipt of tenders may be reduced to no less than 24 days;

(b) in the case of the second or subsequent publications dealing with recurring contracts within the meaning of Article 1010 (2) (Invitation to Participate), the 40 day limit for receipt of tenders may be reduced to no less than 24 days;

(c) where a state of urgency duly substantiated by the entity renders impracticable the periods in question, the periods may be reduced to no less than 10 days from the date of publication of the notice referred to in Article 1010 (Invitation to Participate); or

(d) where an entity listed in Annex 1002.2 (State and Provincial Government Entities) or Annex 1002.3 (Government Enterprises) is using as an invitation to participate a notice referred to in of Article 1010 (5) (Invitation to Participate), the periods may be fixed by mutual agreement between the entity and all selected suppliers; but in the absence of agreement, the entity may fix periods which shall be sufficiently long to enable responsive bidding and shall not be less than 10 days.

4. An entity shall, in establishing any delivery date for goods or services and consistent with its own reasonable needs, take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated and the time realistically required for production, destocking and transport of goods from the points of supply.

Article 1013: Tender Documentation

1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders, including information

required to be published in the notice of procurement, except for Article 1010 (2)(h) (Invitation to Participate). It must also include the following information:

- (a) the address of the entity to which tenders should be sent;
- (b) the address where requests for supplementary information should be sent;
- (c) the language or languages in which tenders and tendering documents may be submitted;
- (d) the closing date and time for receipt of tenders and the length of time during which any tender should be open for acceptance;
- (e) the persons authorized to be present at the opening of tenders and the date, time and place of the opening;
- (f) a statement of any economic and technical requirement to be met and of any financial guarantee, information and documents required from suppliers;
- (g) a complete description of the goods or services required and any requirements to be fulfilled, including technical specifications, conformity certification and necessary plans, drawings and instructional materials;
- (h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of goods or services of any other Party, customs duties and other import charges, taxes and currency of payment;
- (i) the terms of payment; and
- (j) any other terms or conditions.

2. An entity shall:

- (a) forward tender documentation at the request of any supplier that is participating in open procedures or has requested to participate in selective procedures, and reply promptly to any reasonable request for explanations relating thereto; and
- (b) reply promptly to any reasonable request for relevant information made by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract.

Article 1014: Negotiation Disciplines

1. An entity may conduct negotiations:

(a) in the context of procurements in which the entity has, in the notice referred to in Article 1010 (Invitation to Participate), indicated its intent to negotiate; or

(b) when it appears from the evaluation of the tenders that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.

2. Negotiations shall be used primarily to identify the strengths and weaknesses in the tenders.

3. An entity shall treat all tenders in confidence. In particular, an entity may not provide to any person information intended to assist any supplier to bring its tender up to the level of any other tender.

4. An entity may not, in the course of negotiations, discriminate between different suppliers. In particular, an entity shall:

(a) carry out any elimination of suppliers in accordance with the criteria set forth in the notices and tender documentation;

(b) provide in writing all modifications to the criteria or to the technical requirements to all suppliers remaining in the negotiations;

(c) permit all remaining suppliers to submit new or amended tenders on the basis of the revised criteria or requirements; and

(d) when negotiations are concluded, permit all remaining suppliers to submit final tenders in accordance with a common deadline.

Article 1015: Submission, Receipt and Opening of Tenders and Awarding of Contracts

1. An entity shall use procedures for the submission, receipt and opening of tenders and the awarding of contracts that are consistent with the following:

(a) tenders shall normally be submitted in writing directly or by mail;

(b) if tenders by telex, telegram, telecopy or other means of electronic transmission are permitted, the tender made

thereby must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the supplier and a statement that the supplier agrees to all the terms, conditions and provisions of the invitation to tender;

(c) a tender made by telex, telegram, telecopy or other means of electronic transmission must be confirmed promptly by letter or by the dispatch of a signed copy of the telex, telegram, telecopy or electronic message;

(d) the content of the telex, telegram, telecopy or electronic message shall prevail where there is a difference or conflict between that content and the content of any documentation received after the time limit for submission of tenders;

(e) tenders presented by telephone shall not be permitted;

(f) requests to participate in selective tendering procedures may be submitted by telex, telegram or telecopy and if permitted, may be submitted by other means of electronic transmission; and

(g) the opportunities that may be given to suppliers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice.

In this paragraph, "means of electronic transmission" consists of means capable of producing for the recipient at the destination of the transmission a printed copy of the tender.

2. An entity may not penalize a supplier whose tender is received in the office designated in the tender documentation after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the entity. An entity may also consider, in exceptional circumstances, tenders received after the time specified for receiving tenders if the entity's procedures so provide.

3. All tenders solicited by an entity under open or selective procedures shall be received and opened under procedures and conditions guaranteeing the regularity of the openings. The entity shall retain the information on the opening of tenders and the information shall remain at the disposal of the competent authorities of the respective Party so that it may be used if required under the procedures of Article 1017 (Bid Challenge), Article 1019 (Provision of Information) or Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures).

4. An entity shall award contracts in accordance with the following:

(a) 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 have been submitted by a supplier that complies with the conditions for participation;

(b) if the entity has received a tender that is abnormally lower in price than other tenders submitted, the entity may enquire of the supplier to ensure that it can comply with the conditions of participation and is or will be capable of fulfilling the terms of the contract;

(c) unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest tender or the tender that in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous;

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation; and

(e) option clauses shall not be used in a manner that circumvents the provisions of this Chapter.

5. No entity of a Party shall make it a condition of the awarding of a contract that the supplier has previously been awarded one or more contracts by an entity of that Party, or that the supplier has prior work experience within the territory of that Party.

6. An entity shall:

(a) upon request, promptly inform suppliers participating in tendering procedures of decisions on contract awards and, if so requested, inform them in writing; and

(b) upon request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender and the characteristics and relevant advantages of the tender selected, as well as the name of the winning supplier.

7. An entity shall publish a notice in the appropriate publication listed in Annex 1010.1 (Publications) no later than 72 days after the award of a contract, which notice shall contain the following information:

(a) a description of the nature and quantity of goods or services included in the contract;

(b) the name and address of the entity awarding the contract;

(c) the date of the award;

(d) the name and address of each winning supplier;

(e) the value of the contract, or the highest and lowest tenders considered in the process of awarding the contract; and

(f) the tendering procedure used.

8. Notwithstanding any other provision of this Article, an entity may withhold certain information on the award of a contract, where disclosure of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of a particular person, or might prejudice fair competition between suppliers.

Article 1016: Limited Tendering

1. An entity of a Party may, in the circumstances and subject to the conditions specified in paragraph 2, deviate from the provisions of Articles 1008 (Tendering Procedures) through 1015 (Submission, Receipt and Opening of Tenders and Awarding of Contracts), provided that such limited tendering is not used with a view to avoiding maximum possible competition or in a manner that would constitute a means of discrimination between suppliers of the other Parties or protection of domestic suppliers.

2. An entity may use limited tendering in the following circumstances and subject to the following conditions, as applicable:

(a) in the absence of tenders in response to an open or selective tender, or when the tenders submitted either have resulted from collusion or do not conform to the essential requirements of the tender documentation, or when the tenders submitted come from suppliers who do not comply with the conditions for participation provided for in accordance with this Chapter, on condition that the requirements of the initial procurement are not substantially modified in the contract as awarded;

(b) when, for works of art or for reasons connected with the protection of patents, copyrights or other exclusive rights, proprietary information, confidential consulting services or, when 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) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the goods or services could not be obtained in time by means of open or selective tendering procedures;

(d) for additional deliveries by the original supplier that are intended either as replacement parts or continuing services for existing supplies, services or installations, or as the extension of existing supplies, services or installations, when a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services, including software to the extent that the initial procurement of the software was covered by this Chapter;

(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 goods or services shall be subject to Articles 1008 (Tendering Procedures) through 1015 (Submission, Receipt and Opening of Tenders and Awarding of Contracts). Original development of a first good may include limited production in order to incorporate the results of field testing and to demonstrate that the good is suitable for production in quantity to acceptable quality standards. It does not extend to quantity production to establish commercial viability or to recover research and development costs;

(f) for goods purchased on a commodity market;

(g) for purchases made under exceptionally advantageous conditions that only arise in the very short term. This provision is intended to cover unusual disposals by firms which are not normally suppliers; or disposal of assets of businesses in liquidation or receivership. It is not intended to cover routine purchases from regular suppliers; and

(h) for a contract awarded to the winner of an architectural design contest, on condition that the contest

(i) has been organized in a manner that is consistent with the principles of this Chapter, notably as regards the publication, in the sense of Article 1010 (Invitation to Participate), of an invitation to suitably qualified suppliers to participate in the contest,

(ii) has been organized with a view to awarding the design contract to the winner, and

(iii) is to be judged by an independent jury.

3. An entity shall prepare a report in writing on each contract awarded by it under the provisions of paragraph 2. Each report

shall contain the name of the procuring entity, indicate the value and kind of goods or services procured, the name of the country of origin, and a statement indicating the circumstances and conditions described in paragraph 2 that justified the use of limited tendering. Each report shall remain with the entity concerned at the disposal of the competent authorities of the respective Party, so that it may be used if required under the procedures of Article 1017 (Bid Challenge), Article 1019 (Provision of Information) or Chapter 20 (Institutional Arrangements and Dispute Settlement Procedures).

Article 1017: Bid Challenge

1. In order to promote fair, open and impartial procurement procedures, each Party shall adopt and maintain bid challenge procedures for procurements covered by this Chapter in accordance with the following:

(a) each Party shall allow suppliers of any good or service of another Party to submit bid challenges concerning any aspect of the procurement process, which for purposes of this Article begins after an entity has decided on its procurement requirement, leading up to and including the contract award;

(b) a Party may encourage a supplier to seek a resolution of any complaint with the entity concerned prior to initiating a bid challenge;

(c) each Party shall ensure that its entities accord fair and timely consideration to any complaint regarding procurement covered by this Chapter;

(d) whether or not a supplier has attempted to resolve its complaint with the entity, or upon an unsuccessful attempt at such a resolution, no Party shall prevent the supplier from initiating a bid challenge or seeking any other relief available to such supplier;

(e) a Party may require a supplier to notify the entity upon initiation of a bid challenge;