

Transatlantic Trade and Investment Partnership (TTIP)

Chapter []

Government Procurement

Post Round

RESTREINT EU/EU RESTRICTED

Article X.1: Definitions

For purposes of this Chapter:

[EU: (a) **aggregated procurement** means procurement on the basis of contractual arrangements such as framework agreements or multi-award contracts which are concluded between one or more procuring entities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period;]

[US: (b) **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, a procuring entity grants to the supplier, for a specified period, temporary ownership, or a right to control and operate, and demand payment for the use of such works for the duration of the contract;]

(c) **commercial goods or services** means goods or services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes;

[US/GPA: (d) **Committee** means the Committee on Government Procurement established by Article [X.19];]

(e) **construction service** means a service that has as its objective the realization by whatever means of civil or building works, based on Division 51 of the United Nations Provisional Central Product Classification (CPC);

(f) **days** means calendar days;

(g) **electronic auction** means an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders;

(h) **in writing** or **written** means any worded or numbered expression that can be read, reproduced and later communicated. It may include electronically transmitted and stored information;

[EU:(i) **juridical person of the other Party** means a legal person duly constituted or otherwise organized in accordance with the laws of one of the Member States of the European Union or of the US respectively, and having its registered office, central administration or principle place of business in the territory to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply, or of the US respectively. Should the juridical person have only its registered office or central administration in the territory to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply or of the US, it shall not be considered as a juridical person of the European Union or of the US respectively, unless it engages in

RESTREINT EU/EU RESTRICTED

substantive business operations in the territory to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply or of the US respectively;

A juridical person is:

(i) “owned” by natural or juridical persons of the other Party if more than 50 percent of the equity interest in it is beneficially owned by persons of the other Party;

(ii) “controlled” by natural or juridical persons of the other Party if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;

(iii) “affiliated” with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person].

(j) **limited tendering** means a procurement method whereby the procuring entity contracts a supplier or suppliers of its choice;

[EU: (k) **locally established** means a juridical person established in one Party which is owned or controlled by natural or juridical persons of the other Party;]

(k) **measure** means any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement;

(l) **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;

[EU:(m) **natural person of the other Party** means a national of the US or of one of the Member States of the European Union according to their respective legislation;]

(n) **notice of intended procurement** means a notice published by a procuring entity inviting interested suppliers to submit a request for participation, a tender, or both;

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

(p) **open tendering** means a procurement method whereby all interested suppliers may submit a tender;

(q) [EU: **person** of the other Party means a natural person or a juridical person of the US or of the European Union respectively;] [US: **person** means a natural person or an enterprise;]

(r) **procuring entity** means an entity [EU: covered under Annexes X-1, X-2, X-3 to Appendix I of each Party] [US: listed in Annex X];

[EU: (s) public private partnership;]

RESTREINT EU/EU RESTRICTED

(t) **qualified supplier** means a supplier that a procuring entity recognizes as having satisfied the conditions for participation;

(u) **GPA** refers to the Agreement on Government Procurement text as amended by the Protocol Amending the Agreement on Government Procurement, done at Geneva on 30 March 2012.

(v) **selective tendering** means a procurement method whereby only qualified suppliers are invited by the procuring entity to submit a tender;

(w) **services** includes construction services, unless otherwise specified;

(x) **standard** means a document approved by a recognized body that provides for common and repeated use, rules, guidelines or characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a good, service, process or production method;

(y) **supplier** means a person or group of persons that provides or could provide goods or services; and

(z) **technical specification** means a tendering requirement that:

(i) lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or

(ii) addresses terminology, symbols, packaging, marking or labeling requirements, as they apply to a good or service.

Article X.2: Scope and Coverage

Application of Chapter

1. This Chapter applies to any measure regarding covered procurement, [EU: notwithstanding Article 4(3)] whether or not it is conducted exclusively or partially by electronic means.

2. For the purposes of this Chapter, covered procurement means procurement for governmental purposes:

(a) of goods, services, or any combination thereof:

(i) as specified in each Party's [EU: Annexes X-1 to 7] [US: Schedules to Annex X]; and

(ii) not procured with a view to commercial sale or resale, or of use in the production or supply of goods or services for commercial sale or resale;

RESTREINT EU/EU RESTRICTED

(b) by any contractual means, including purchase, lease, rental, or hire purchase, with or without an option to buy [EU: , and public-private partnership (“PPP”)] [US: , build-operate-transfer contracts, and public works concession contracts];

(c) for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant threshold specified in a Party's [EU: Annexes X-1 to 7] [US: Schedules to Annex X], at the time of publication of a notice in accordance with Article [X.6];

(d) by a procuring entity; and

(e) that is not otherwise excluded from coverage [EU: in paragraph 5 or in a Party's Appendix I] [US: under this Agreement].

[EU: 3. With regard to procurement funded fully or in part by grants of public funds:

(a) the Parties shall not introduce market access restrictions or any form of offsets in the context of procurement which is covered;

(b) the Parties shall ensure that already existing domestic preferences and offsets in the context of procurement funded by grants of public funds, where applicable, are applied in a non-discriminatory manner to each Party and its suppliers and service providers;

(c) the contract will become subject to the provisions of this Chapter where the procurement is above threshold values and carried out by entities subject to public procurement rules (for the EU by entities and activities regulated in EU Public Procurement Directives, Annex [...], and for the US by entities and activities regulated in Procurement Statutes, Annex [...]) irrespective of whether or not the entities are listed in Annexes X-1 to X-3 of this Chapter.

4. Where a public entity (in the EU a contracting authority as defined in the Directives) finances more than 50 percent of the estimated contract value through a grant of public funds to a project undertaken by an entity which is not a procuring entity, the Parties shall ensure through appropriate legal means that the disciplines of this Chapter apply to the contract in question. This provision applies only to procurement of certain specific works and service contracts as specified in Annex [...] when the total estimated value of the contract exceeds the thresholds as specified in Annex [...].]

5. Except where provided otherwise in a Party's [EU: Appendix 1 to Annex X] [US: Schedules to Annex X] to [EU: Annex X], this Chapter does not apply to:

(a) the acquisition or rental of land, existing buildings or other immovable property or the rights thereon;

(b) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives;

(c) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes

RESTREINT EU/EU RESTRICTED

and other securities;

(d) public employment contracts;

(e) procurement conducted:

(i) for the specific purpose of providing international assistance, including development aid;

(ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or

(iii) under the particular procedure or condition of an international organization, or funded by international grants, loans or other assistance where the applicable procedure or condition would be inconsistent with this Chapter.

6. Each Party shall specify the following information in its [EU: Annexes X-1 to 7] [US: Schedules to Annex X]:

(a) in [EU: Annex X-1] [US: Section A], the central government entities whose procurement is covered by this Chapter;

(b) in [EU: Annex X-2] [US: Section B], the subcentral government entities whose procurement is covered by this Chapter;

(c) in [EU: Annex X-3] [US: Section C], all other entities whose procurement is covered by this Chapter;

(d) in [EU: Annex X-4] [US: Section D], the goods covered by this Chapter;

(e) in [EU: Annex X-5] [US: Section E], the services, other than construction services, covered by this Chapter;

(f) in [EU: Annex X-6] [US: Section F], the construction services covered by this Chapter; and

(g) in [EU: Annex X-7] [US: Section G], any General Notes.

[EU/GPA: 7. Where a procuring entity, in the context of covered procurement, requires persons not listed in Annexes X-1 to X-3 to procure in accordance with particular requirements, [...] shall apply *mutatis mutandis* to such requirement. ¹]

¹ [EU: For reasons of clarification, it should be noted that this provision applies also to procurement intended for a covered procuring entity as defined in Annexes X-1 to X-3, for example by entities such as central purchasing bodies, designated purchasing agents or cooperative purchasing organizations, including through multi-use lists or other instruments for aggregated procurement.]

RESTREINT EU/EU RESTRICTED

Valuation

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

(a) neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this [EU/GPA: Agreement] [US: Chapter]; and

(b) include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including:

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

(ii) where the procurement provides for the possibility of options, the total value of such options.

[EU: (iii) in the case of aggregated procurement, the maximum estimated value of all the contracts envisaged on the basis of contractual arrangements.]

9. Where an individual requirement for a procurement results in the award of more than one contract, or in the award of contracts in separate parts (hereinafter referred to as “recurring contracts”), the calculation of the estimated maximum total value shall be based on:

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

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

10. In the case of procurement by lease, rental, or hire purchase of goods or services, or procurement for which a total price is not specified, the basis for valuation shall be:

(a) in the case of a fixed-term contract:

(i) where the term of the contract is 12 months or less, the total estimated maximum value for its duration; or

(ii) where the term of the contract exceeds 12 months, the total estimated maximum value including any estimated residual value;

(b) where the contract is for an indefinite period, the estimated monthly installment multiplied by 48; and

RESTREINT EU/EU RESTRICTED

(c) where it is not certain whether the contract is to be a fixed-term contract, subparagraph (b) shall be used.

Article X.3: [EU/GPA: Security and] General Exceptions

[EU/GPA: 1. Nothing in this Chapter shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition, or war materials, or to procurement indispensable for national security or for national defense 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 **[US: the]** Parties where the same conditions prevail, or a disguised restriction on international trade, nothing in this

[EU/GPA: Agreement] [US: Chapter] shall be construed to prevent any Party from imposing or enforcing measures:

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

[US: 3. The Parties understand that subparagraph 2(b) includes environmental measures necessary to protect human, animal or plant life or health.]

Article X.4: General Principles

[EU: National Treatment and] Nondiscrimination

1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the **[EU: goods, services and suppliers of the other Party, treatment no less favorable than that accorded by the Party or, where applicable, the various jurisdictions within a Party, including their procuring entities, to domestic goods, services and suppliers] [US: goods and services of the other Party and to the suppliers of the other Party offering such goods or services, treatment no less favorable than the treatment the Party, including its procuring entities, accords to its domestic goods, services and suppliers].**

2. With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:

- (a) treat a locally established supplier less favorably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or
- (b) discriminate against a locally established supplier on the basis that the goods or services

RESTREINT EU/EU RESTRICTED

offered by that supplier for a particular procurement are goods or services of the other Party.

[EU: 3. With respect to any measure subject to each Party's law applicable to procurement applied by public entities which qualify either as central government entities or subcentral government entities, other than those specifically covered under Annexes X1-X2, each Party shall accord, within the thresholds, immediately and unconditionally to the goods, services and suppliers of the other Party, treatment no less favorable than that accorded by that Party to domestic goods, services and suppliers.]

Use of Electronic Means

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

(a) ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software; and

(b) maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access.

Conduct of Procurement

5. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

(a) is consistent with this Chapter, using methods such as open tendering, selective tendering, and limited tendering;

(b) avoids conflicts of interest; **[US: and]**

(c) prevents corrupt practices **[EU: ; and]**

(d) avoids practices that unnecessarily restrict competition.]

Rules of Origin

6. For purposes of covered procurement, a Party shall not apply rules of origin to goods or services imported from or supplied from the other Party that are different from the rules of origin the Party applies at the same time in the normal course of trade to imports or supplies of the same goods or services.

Offsets

7. With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose, or enforce any offset.

RESTREINT EU/EU RESTRICTED

Measures Not Specific to Procurement

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

[EU: 9. The Parties agree that where access has been granted for procurement purposes through this Chapter, corresponding commitment is automatically granted in relation to services and investment to ensure there is no impediment or restriction to the supply of the service.]

Article X.5: Information on the Procurement System

1. Each Party shall:

- (a) promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clause mandated by law or regulation and incorporated by reference in notices or tender documentation and procedure regarding covered procurement, and any modifications thereof, [US/GPA: in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public]; and
- (b) provide an explanation thereof to the other Party, on request.

[EU: 2. Each Party shall list in Annex X:

- (a) the electronic or paper media in which the Party publishes the information described in paragraph 1;
- (b) the electronic or paper media in which the Party publishes the notices required by Articles 6, 8 and 15.2.]

[US: 2. Each Party shall list in Annex X the paper or electronic means through which the Party publishes the information described in paragraph 1 and the notices required by Articles X.6, X.8:9 and X.15:2].

[EU: 3. Each Party shall promptly notify the relevant Committee established pursuant to Article (Institutional) of any modification to the Party's information listed in Annex X.]

Article X.6: Notices

Notice of Intended Procurement

[EU: 1. For each covered procurement, a procuring entity shall publish a notice of intended procurement, which shall be directly accessible by electronic means free of charge through a single point of access, except in circumstances described in Article 12 (limited tendering). The notice of intended procurement shall remain readily accessible to the public, at least until the expiration of the time period indicated in the notice. The appropriate electronic medium shall be listed by each Party in Annex X.]

RESTREINT EU/EU RESTRICTED

[US: 1. For each covered procurement, a procuring entity shall publish, in English and the official language of the Party of the procuring entity if different than English, a notice of intended procurement in the appropriate paper or electronic medium listed in Annex X, Section X, except in the circumstances described in Article X.12. Such medium shall be widely disseminated and such notices shall remain readily accessible to the public, at least until expiration of the time period indicated in the notice. The notices shall:

- (a) for procuring entities covered under Section A, be accessible by electronic means free of charge through a single point of access; and
- (b) for procuring entities covered under Section B or C, where accessible by electronic means, be provided at least through links in a gateway electronic site that is accessible free of charge.

Parties, including their procuring entities covered under Section B or C, are encouraged to publish their notices by electronic means free of charge through a single point of access.]

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

- (a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and their cost and terms of payment, if any;
- (b) a description of the procurement, including the nature and quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity;
- (c) for recurring contracts, an estimate, if possible, of the timing of subsequent notices of intended procurement;
- (d) a description of any options;
- (e) the time frame for delivery of goods or services, or the duration of the contract;
- (f) the procurement method that will be used, and whether it will involve negotiation or electronic auction;
- (g) where applicable, the address and any final date for the submission of requests for participation in the procurement;
- (h) the address and final date for the submission of tenders;
- (i) the language or languages in which tenders or requests for participation may be submitted, if they may be submitted in a language other than an official language of the Party of the procuring entity;
- (j) a list and brief description of any conditions for participation of suppliers, including any requirements for specific documents or certifications to be provided by suppliers in

RESTREINT EU/EU RESTRICTED

connection therewith, unless such requirements are included in tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement;

(k) where pursuant to Article X.8 a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, where applicable, any limitation on the number of suppliers that will be permitted to tender; and

(l) an indication that the procurement is covered by this Chapter.

Summary Notice

3. For each case of intended procurement, a procuring entity shall publish a summary notice that is readily accessible at the same time as the publication of the notice of intended procurement, in [EU: one of the WTO languages] [US: English and the official language of the Party of the procuring entity if different than English]. The summary notice shall contain at least the following information:

(a) the subject matter of the procurement;

(b) the final date for the submission of tenders or, where applicable, any final date for the submission or requests for participation in the procurement or for inclusion on a multi-use list; and

(c) the address from which documents relating to the procurement may be requested.

Notice of Planned Procurement

4. Procuring entities are encouraged to publish [EU: by electronic means through the single point of access used for the publication of notices of intended procurement] [US: in English and the official language of the Party of the procuring entity if different than English and in the appropriate paper or electronic medium listed in Annex X] as early as possible in each fiscal year a notice regarding their future procurement plans (hereinafter referred to as “notice of planned procurement”). The notice of planned procurement should include the subject matter of the procurement and the planned date of the publication of the notice of intended procurement.

[EU: Preliminary Market Consultation

6. Before launching a procurement procedure, procuring entities may conduct market consultations with a view to the preparation of the procurement and to inform economic operators of their procurement plans and requirements. For this purpose, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants which may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of nondiscrimination and transparency.

7. Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the

RESTREINT EU/EU RESTRICTED

procuring entity, or has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer. Such measures shall include communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or the tenderer in the preparation of the procurement procedure. The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment.]

Article X.7: Conditions for Participation

1. A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement.

[EU: 2. Suppliers that, under the law of a Party in which they are established, are entitled to provide a service, shall not be rejected solely on the ground that under the law of the Party in which a procurement contract is awarded, they would be required to be either natural or legal persons.]

[US: 2. If the procuring entity of a Party covered under Section A requires a supplier of the other Party to provide a document attesting the supplier's legal or financial capacities issued by a competent authority of a Party or a competent authority recognized by a Party, and if the supplier is ineligible to obtain such a document from the Party of the procuring entity:

(a) the procuring entity shall accept such a document issued by a competent authority of the other Party or by a competent authority recognized by the other Party; or

(b) if the other Party does not issue such a document, or cannot do so within the time period required, the procuring entity shall accept self-certification by the supplier attesting such capacities.]

3. In establishing the conditions for participation, a procuring entity:

(a) shall not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of a given Party [EU: or that the supplier has prior experience in the territory of that Party, nor give this any weight]; and

(b) may require relevant prior experience where essential to meet the requirements of the procurement.

4. In assessing whether a supplier satisfies the conditions for participation, a procuring entity:

(a) shall evaluate the financial capacity and the commercial and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside the territory of the Party of the procuring entity; and

(b) shall base its evaluation on the conditions that the procuring entity has specified in advance in notices or tender documentation.

RESTREINT EU/EU RESTRICTED

5. Where there is supporting evidence, a Party, including its procuring entities, may exclude supplier on grounds such as:

- (a) bankruptcy;
- (b) false declarations;
- (c) significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;
- (d) final judgments in respect of serious crimes or other serious offenses [EU: such as terrorist offenses, money laundering, child labor or human trafficking];
- (e) professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or
- (f) failure to pay taxes.

Article X.8: Qualification of Suppliers

Registration Systems and Qualification Procedures

1. A Party, including its procuring entities, may maintain a supplier registration system under which interested suppliers are required to register and provide certain information.

2. Each Party shall ensure that:

- (a) its procuring entities make efforts to minimize differences in their qualification procedures; and
- (b) where its procuring entities maintain registration systems, the entities make efforts to minimize differences in their registration systems.

3. A Party, including its procuring entities, shall not adopt or apply any registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of another Party in its procurement. [EU: Information on registration systems or lists shall be easily available to interested suppliers.

4. Interested suppliers shall be able to request their registration at any time. They shall be informed within a reasonably short period of time of the decision of the authority competent to decide on their application for registration.

5. All requirements shall be related and proportionate to the subject matter of the contracts, taking into account the need to ensure genuine competition. The criteria have to be identified, and they have to be related to the subject matter and not be nondiscriminatory in nature.]

RESTREINT EU/EU RESTRICTED

Selective Tendering

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

(a) include in the notice of intended procurement at least the information specified in Article X.6:2 (a), (b), (f), (j), (k) and (l) and invite suppliers to submit a request for participation; and

(b) provide, by the commencement of the time period for tendering, at least the information in Article X.6:2 (c), (d), (e), (h) and (i) to the qualified suppliers that it notifies as specified in Article X.10:3 (b).

7. A procuring entity shall allow all qualified suppliers to participate in a particular procurement, unless the procuring entity states in the notice of intended procurement any limitation on the number of suppliers that will be permitted to tender the criteria for selecting the limited number of suppliers. [EU: In any case, the number of suppliers permitted to submit a tender shall be sufficient to ensure competition.]

8. Where the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 6 (a), the procuring entity shall ensure that those documents are made available at the same time to all qualified suppliers selected in accordance with paragraph 7.

Multi-use Lists

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

(a) published annually [US: in English and the official language of the Party of the procuring entity if different than English;] and

(b) where published by electronic means, made available continuously

in the appropriate medium listed in Annex X.

10. The notice provided for in paragraph 9 shall include:

(a) a description of the goods or services, or categories thereof, for which the list may be used;

(b) the conditions for participation to be satisfied by suppliers for inclusion on the list and the methods that the procuring entity will use to verify that a supplier satisfies the conditions;

(c) the name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the list;

(d) the period of validity of the list and the means for its renewal or termination, or where the period of validity is not provided, an indication of the method by which notice will be

RESTREINT EU/EU RESTRICTED

given of the termination of use of the list; and

(e) and indication that the list may be used for procurement covered by this [EU/GPA: Agreement] [US: Chapter].

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

(a) states the period of validity and that further notices will not be published; and

(b) is published by electronic means and is made available continuously during the period of its validity.

12. A procuring entity shall allow suppliers to apply at any time for inclusion on a multi-use list and shall include on the list all qualified suppliers within a reasonably short time. [EU: A procuring entity shall ensure that also the procedure used to select suppliers from a multi-use list for the award of the specific procurement, ensures sound and fair competition.]

13. Where a supplier that is not included on a multi-use list submits a request for participation in a procurement based on a multi-use list and all required documents, within the time period provided for in Article X.10:2, a procuring entity shall examine the request. The procuring entity shall not exclude the supplier from consideration in respect of the procurement on the grounds that the entity has insufficient time to examine the request, unless, in exceptional cases, due to the complexity of the procurement, the entity is not able to complete the examination of the request within the time period allowed for the submission of tenders.

[EU: *Aggregated procurement*

14. The term of contractual arrangements in aggregated procurement, such as framework agreements or multiple award contracts, shall be indicated in the notice for intended procurement. The term should be duly justified by the subject matter of the contract and not be indefinite.

15. The contract award criteria shall be specified in the notice for intended procurement. If all the terms of contract award are not known at that time, the contract award criteria shall be communicated subsequently to all economic operators which are party to the contractual arrangement on the basis of which contracts will be awarded. For every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract. Contracts shall be awarded only between those procuring entities clearly identified for this purpose in the call for competition and those suppliers originally party to the contractual arrangement.]

[EU: *Annexes X-2 and X-3*] [US: *Section B and Section C*] Entities

16. A procuring entity covered under [EU: Annex X-2 or X-3] [US: Section B or C of a Party's Schedule] may use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement, provided that:

RESTREINT EU/EU RESTRICTED

(a) the notice is published in accordance with paragraph 9 and includes the information required under paragraph 10, with as much of the information required under Article X.6:2 as is available, and a statement that it constitutes a notice of intended procurement or that only the suppliers on the multi-use list will receive further notices of procurement covered by the multi-use list; and

(b) the entity promptly provides to suppliers that have expressed an interest in a given procurement to the entity, sufficient information to permit them to assess their interest in the procurement, including all remaining information required in Article X.6:2, to the extent such information is available.

17. A procuring entity covered under [EU: Annex X-2 or X-3] [US: Section B or C of a Party's Schedule] may allow a supplier that has applied for inclusion on a multi-use list in accordance with paragraph 12 to tender in a given procurement, where there is sufficient time for the procuring entity to examine whether the supplier satisfies the conditions for participation.

Information on Procuring Entity Decisions

18. A procuring entity shall promptly inform any supplier that submits a request for participation in a procurement or application for inclusion on a multi-use list of the procuring entity's decision with respect to the request or application.

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

Article X.9: Technical Specifications and Tender Documentation

Technical Specifications

1. A procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade. [EU: Specifications shall promote full and open competition wherever and should not be unduly restrictive and must be sufficiently clear and unambiguous to provide a common basis for competition.]

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

(a) set out the technical specifications in terms of performance and functional requirements, rather than design or descriptive characteristics; and

(b) base the technical specifications on international standards, [EU: and other international reference systems, where such exist, including for commercial information technology and cloud computing services] [US/GPA: where such exist], or otherwise, on national technical regulations, recognized national standards or building codes.

RESTREINT EU/EU RESTRICTED

3. Where design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, where appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfill the requirements of the procurement by including words such as “or equivalent” in the tender documentation.

4. A procuring entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, the entity includes words such as “or equivalent” in the tender documentation.

5. A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adaptation of any technical specifications for a specific procurement from a person that may have commercial interest in the procurement.

6. For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote

[US: (a)] the conservation of natural resources or protect the environment [US: ; or

(b) compliance with laws relating to internationally recognized labor rights, as defined in Chapter X, Article X (Labor Chapter Definitions), in the territory in which the good is produced or the service is performed.]

[EU: 7. When procuring entities formulate technical specifications in terms of performance or functional requirements, including environmental or social characteristics, parameters shall be sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow procuring entities to award the contract.

8. Where the procurement concerned refers to specific environmental or social characteristics, procuring entities may, in the technical specifications, award criteria or contract performance conditions, consider using detailed specifications or, if necessary, parts thereof, as defined by a specific label existing within the EU, and in the US provided that:

(a) those specifications are appropriate to define the characteristics of supplies or services that are the subject matter of the contract;

(b) they are based on objectively verifiable and nondiscriminatory criteria;

(c) each reference to a national or local standard, if any, shall include the words “or equivalent”;

(d) they are accessible to all interested parties.

9. Procuring entities requiring a specific label shall accept all equivalent labels that fulfill the requirements of the label indicated by the procuring entities. For products that do not bear the label, procuring entities shall also accept a technical dossier of the manufacturer or other appropriate means of proof, if the supplier had demonstrably no possibility of obtaining the specific label or

RESTREINT EU/EU RESTRICTED

equivalent label.

Test Reports and Means of Proof

10. The Parties, including their procuring entities, may require that interested suppliers provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the evaluation criteria or any other terms or conditions.

11. Where the Parties, including their procuring entities, require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent conformity assessment bodies shall also be accepted by them.

12. The Parties, including their procuring entities, shall accept other appropriate means of proof than those referred to in paragraph 10 above, such as a technical dossier of the manufacturer where the interested supplier has no access to the certificates or test reports referred to in paragraph 10 above, or no possibility of obtaining them within the relevant time limits, provided the lack of access is not attributable to the supplier concerned.]

Tender Documentation

13. A procuring entity shall make available to suppliers tender documentation that includes all information necessary [EU: and be sufficiently clear and specific to allow tenders to determine the subject matter of the contract, as well as] to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:

- (a) the procurement, including the nature and quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity and any requirements to be fulfilled, including any technical specifications, conformity assessment certification, plans, drawings or instructional materials;
- (b) any conditions for participation of suppliers, including a list of information and documents that suppliers are required to submit in connection with the conditions for participation;
- (c) all evaluation criteria the entity will apply in the awarding of the contract [EU: (including criteria referring to qualitative, environmental and social aspects applied in contract award)], and, except where price is the sole criterion, the relative importance of such criteria;
- (d) where the procuring entity will conduct the procurement by electronic means, any authentication and encryption requirements or other requirements related to the submission of information by electronic means;
- (e) where the procuring entity will hold an electronic auction, the rules, including identification of the elements of the tender related to the evaluation criteria, on which the auction will be conducted;

RESTREINT EU/EU RESTRICTED

(f) where there will be a public opening of tenders, the date, time and place for the opening and, where appropriate, the persons authorized to be present;

(g) any other terms or conditions, including terms of payment and any limitation on the means by which tenders may be submitted, such as whether on paper or by electronic means; and

(h) any dates for the delivery of goods or the supply of services.

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

15. The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery. **[EU: When the procuring entity intends to lay down conditions relating to the performance of the contract, these must be indicated in the tender documentation, unless already indicated in the notice of intended procurement.]**

16. A procuring entity shall promptly:

(a) **[EU: offer unrestricted and full direct access free of charge by electronic means the procurement documents from the date of publication of the notice and] [US/GPA: make available tender documentation to]** ensure that interested suppliers have sufficient time to submit responsive tenders;

(b) provide, on request, the tender documentation to any interested supplier; and

(c) reply to any reasonable request for relevant information by any interested or participating supplier, provided that such information does not give that supplier an advantage over other suppliers.

Modifications

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

(a) to all suppliers that are participating at the time of the modification, amendment or reissuance, where such suppliers are known to the entity, and in all other cases, in the same manner as the original information was made available; and

(b) in adequate time to allow such suppliers to modify and resubmit amended tenders, as appropriate.

RESTREINT EU/EU RESTRICTED

Article X.10: Time Periods

General

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

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

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

Deadlines

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

3. Except as provided for in paragraphs 4, 5, 7 and 8, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 40 days from the date on which:

- (a) in the case of open tendering, the notice of intended procurement is published; or
- (b) in the case of selective tendering, the entity notifies suppliers that they will be invited to submit tenders, whether or not it uses a multi-use list.

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

- (a) the procuring entity has published a notice of planned procurement as described in Article X.6:4 at least 40 days and not more than 12 months in advance of the publication of the notice of intended procurement, and the notice of planned procurement contains:
 - (i) a description of the procurement;
 - (ii) the approximate final dates for the submission of tenders or requests for participation;
 - (iii) a statement that interested suppliers should express their interest in the procurement to the procuring entity;

RESTREINT EU/EU RESTRICTED

(iv) the address from which documents relating to the procurement may be obtained;
and

(v) as much of the information required for the notice of intended procurement under Article X.6:2 as is available;

(b) the procuring entity, [EU: for procurement of a recurring nature] [US/GPA: for recurring contracts], indicates in an initial notice of intended procurement that subsequent notices will provide time periods for tendering based on this paragraph; or

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

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

(a) the notice of intended procurement is published by electronic means;

(b) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and

(c) the entity accepts tenders by electronic means.

6. The use of paragraph 5, in conjunction with paragraph 4, shall in no case result in the reduction of the time period for tendering [EU: set out in] [US/GPA: established in accordance with] paragraph 3 to less than 10 days from the date on which the notice of intended procurement is published.

7. Notwithstanding any other provision in this Article, where a procuring entity purchases commercial goods or services, or any combination thereof, it may reduce the time period for tendering established in accordance with paragraph 3 to not less than 13 days, provided that it publishes by electronic means, at the same time, both the notice of intended procurement and the tender documentation. In addition, where the entity accepts tenders for commercial goods or services by electronic means, it may reduce the time period established in accordance with paragraph 3 to not less than 10 days.

8. Where a procuring entity covered under [EU: Annex X-2 or X-3] [US: Annex X Section B or C] has selected all or a limited number of qualified suppliers, the time period for tendering may be fixed by mutual agreement between the procuring entity and the selected suppliers. In the absence of agreement, the period shall not be less than 10 days.

Article X.11: Negotiation

1. A Party may provide for its procuring entities to conduct negotiations:

(a) where the entity has indicated its intent to conduct negotiations in the notice of intended procurement required under Article X.6:2; or

RESTREINT EU/EU RESTRICTED

(b) where it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice of intended procurement or tender documentation.

2. A procuring entity shall:

(a) ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the notice of intended procurement or tender documentation; and

(b) where negotiations are concluded, provide a common deadline for the remaining participating suppliers to submit any new or revised tenders.

Article X.12: Limited Tendering

1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply [Article X.6 through X.8, X.9 (paragraphs 13 through 17), X.10, X.11, X.13 and X.14] only under any of the following circumstances:

(a) where:

(i) no tenders were submitted or no suppliers requested participation;

(ii) no tenders that conform to the essential requirements of the tender documentation were submitted;

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

(iv) the tenders submitted have been collusive;

provided that the requirements of the tender documentation are not substantially modified:

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

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

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

(iii) due to an absence of competition for technical reasons;

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

RESTREINT EU/EU RESTRICTED

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

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

(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;

(e) for goods purchased on a commodity market;

(f) where a procuring entity procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. Original development of a first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs;

(g) for purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership, or bankruptcy, but not for routine purchases from regular suppliers; or

(h) where a contract is awarded to a winner of a design contest provided that:

(i) the contest has been organized in a manner that is consistent with the principles of this Chapter, in particular relating to the publication of a notice of intended procurement; and

(ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner.

2. A procuring entity shall prepare a report in writing on each contract awarded under paragraph 1. The report shall include the name of the procuring entity, the value and kind of goods or services procured and a statement indicating the circumstances and conditions described in paragraph 1 that justified the use of limited tendering.

Article X.13: Electronic Auctions

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

(a) the automatic evaluation method, including the mathematical formula, that is based on the evaluation criteria set out in the tender documentation and that will be used in the automatic ranking or re-ranking during the auction;

RESTREINT EU/EU RESTRICTED

(b) the results of any initial evaluation of the elements of its tender where the contract is to be awarded on the basis of the most advantageous tender; and

(c) any other relevant information relating to the conduct of the auction.

Article X.14: Treatment of Tenders and Awarding of Contracts

Treatment of Tenders

1. A procuring entity shall receive, open and treat all tenders under processes that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.
2. A procuring entity shall not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.
3. Where a procuring entity provides a supplier with an opportunity to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunity to all participating suppliers.

Awarding of Contracts

4. To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the notices and tender documentation and be from a supplier that satisfies the conditions for participation.
5. Unless a procuring entity determines that it is not in the public interest to award a contract, the entity shall award the contract to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notices and tender documentation, has submitted:
 - (a) the most [EU: economically] advantageous tender; or
 - (b) where price is the sole criterion, the lowest price.
6. Where a procuring entity receives a tender with a price that is abnormally lower than the prices in other tenders submitted, it may verify with the supplier that it satisfies the conditions for participation and is capable of fulfilling the terms of the contract.
7. A procuring entity shall not use options, cancel a procurement, or modify awarded contracts in a manner that circumvents the obligations under this [EU/GPA: Agreement] [US: Chapter].
- [EU: 8. Each Party shall ensure that its procuring entities are aware of the respective merits of choosing the most economically advantageous tender or the lowest price, taking into account the principle of best value for money.
9. The contracting authority shall specify in the procurement documents the relative weighting which is given to each of the criteria chosen to determine the most economically advantageous

RESTREINT EU/EU RESTRICTED

tender, except where this is identified on the basis of price alone.

10. Evaluation criteria can refer to qualitative, environmental and social aspects linked to the subject matter of the public contract in question.

11. Where a procuring entity establishes that a tender is abnormally low because it does not comply with environmental, social and labor law, or because the supplier has obtained subsidies, the tender can be rejected on that ground alone only after consultations with the supplier where the latter is unable to prove, within a sufficient time fixed by the procuring entity, that the evidence supplied does not satisfactorily account for the low level of price proposed or that the subsidy in question was granted in compliance with the disciplines relating to subsidies laid down in this Agreement.

12. Procuring entities may lay down conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract and indicated in the notice of intended procurement or in the tender documentation. These conditions may include economic, innovation-related, environmental or social considerations.

13. After the award decision has been communicated to participating suppliers pursuant to Article X.15:1, a procuring entity shall not conclude the contract before the expiry of a period of time that shall be not less than 10 days from the date the information award decision has reached the participating suppliers or reasonably should have become known to the participating suppliers.

14. In case an interested or participating supplier has submitted a challenge with the competent authority referred to in Article X.17:4 and X.17:6, a procuring entity shall not conclude the contract until that authority has taken a decision or recommendation on the challenge, either with regards to interim measures or corrective action as referred to in Article X.17:8 and X.17:9.]

Article X.15: Transparency of Procurement Information

Information Provided to Suppliers

1. A procuring entity shall promptly inform participating suppliers of the entity's contract award decisions and, on the request of a supplier, shall do so in writing. Subject to paragraphs 2 and 3 of Article X.16, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender.

Publication of Award Information

2. Not later than 72 days after the award of each contract covered by this Chapter, a procuring entity shall publish a notice in [US: English and the official language of the Party of the procuring entity if different than English and in] the appropriate paper or electronic medium listed in Annex X. Where the entity publishes the notice only in an electronic medium, the information shall remain readily accessible for a reasonable period of time. The notice shall include at least the following information:

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

RESTREINT EU/EU RESTRICTED

- (b) the name and address of the procuring entity;
- (c) the name and address of the successful supplier;
- (d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;
- (e) the date of award; and
- (f) the type of procurement method used, and in cases where limited tendering was used in accordance with Article X.12, a description of the circumstances justifying the use of limited tendering.

Maintenance of Documentation, Reports and Electronic Traceability

3. Each procuring entity shall, for a period of at least three years from the date it awards a contract, maintain:

- (a) the documentation and reports of tendering procedures and contract awards relating to covered procurement, including the reports required under Article X.12; and
- (b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.

Collection and Reporting of Statistics

[EU: 4. The Parties shall cooperate on all issues relating to the sharing of data required by the GPA. Each party agrees to communicate to the other Party the available and comparable statistical data relevant to the procurement covered by this Chapter. In this context, the Parties should seek to develop a common method for the collection of statistics and standardization of classification in the statistical data.]

[US: 4. The Parties shall endeavor to cooperate on issues relating to the sharing of data required by the revised GPA. This includes work undertaken in the revised GPA Work Program on the Collection and Reporting of Statistical Data.]

Article X.16: Disclosure of Information

Provision of Information to Parties

1. On request of the other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially, and in accordance with this [EU/GPA: Agreement] [US: Chapter], including information on the characteristics and relative advantages of the successful tender. In cases where release of the information would prejudice competition in future tenders, the Party that receives the information shall not disclose it to any supplier, except after consulting with, and obtaining the agreement of, the Party that provided the information.

RESTREINT EU/EU RESTRICTED

Non-Disclosure of Information

2. Notwithstanding any other provision of this Chapter, a Party, including its procuring entities, shall not provide to any particular supplier information that might prejudice fair competition between suppliers.

[EU/GPA: 3. Nothing in this Chapter shall be construed to require a Party, including its procuring entities, authorities, and review bodies, to disclose confidential information where disclosure:

- (a) would impede law enforcement;
- (b) might prejudice fair competition between suppliers;
- (c) would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or
- (d) would otherwise be contrary to the public interest.]

Article X.17: Domestic Review Procedures

1. Each Party shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge:

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

arising in the context of a covered procurement, in which the supplier has, or has had, an interest [EU: and who has been or risks being harmed by an alleged breach.] The procedural rules for all challenges shall be in writing and made generally available.

[EU: 2. The Parties shall ensure that upon a challenge by a supplier, the review body can examine decisions taken by their respective procuring entities on whether a particular procurement falls under the scope of this Chapter.]

3. In the event of a complaint by a supplier [EU: alleging a breach or a failure as referred to in paragraph 1 and] arising in the context of covered procurement in which the supplier has, or has had, an interest [EU: and who has been harmed by an alleged breach] [US/GPA: and where there has been a breach or a failure as referred to in paragraph 1], the Party of the procuring entity conducting the procurement shall encourage the entity and the supplier to seek resolution of the complaint through consultations. The entity shall accord impartial and timely consideration to any such complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement or its right to seek corrective measures under the administrative or judicial review procedure.

[EU: 4. Parties should make information on the review system available. Each supplier shall be

RESTREINT EU/EU RESTRICTED

communicated the relevant information on the basis of which an appeal can be filed and the instance where it can be filed. Each supplier should also 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.]

[US/GPA: 4. 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.]

5. Each Party 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 by a supplier arising in the context of a covered procurement. [EU: All steps of procedure shall be subject to the domestic review system.

Where an impartial administrative authority is designated by a Party, the Party shall ensure that:

(a) the members are appointed and leave office under the same conditions as members of judicial authorities as regards the authority responsible for their appointment, their period of office, and their removal;

(b) at least the President of this impartial administrative authority has the same legal and professional qualifications as members of judicial authorities.]

6. Where a body other than an authority referred to in paragraph 5 initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge.

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

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

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

(c) the participants shall have the right to be represented and accompanied;

(d) the participants shall have access to all proceedings;

(e) the participants shall have the right to request that the proceedings take place in public and that witnesses may be presented; and

(f) the review body shall make its decisions or recommendations in a timely fashion, in writing, and shall include an explanation of the basis for each decision or recommendation.

RESTREINT EU/EU RESTRICTED

[EU: 8. Each Party shall adopt or maintain procedures that provide for 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. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account. When appropriate, in duly justified cases, such interim measures may not be granted. The reasons for a negative decision shall be provided in writing.]

[US/GPA: 8. Each Party 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. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing; and

(b) where a review body has determined that there has been a breach or a failure as referred to in paragraph 1, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.]

[EU: 9. Where a review body has determined that there has been a breach or a failure as referred to in paragraph 1, each Party shall adopt or maintain procedures that provide for

(a) corrective action consisting of:

(i) either setting aside or ensuring the setting aside of decisions taken unlawfully by a procuring entity, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents, or any other document relating to the tendering procedure, and in the case of Annex X-3's entities, adopting any other measures with the aim of remedying the breach to this Chapter, in particular in order to pay a particular sum as long as the breach has not been remedied;

(ii) where a contract has been concluded by a procuring entity, the contract declared ineffective.

10. Where a contract has already been concluded for cases other than those provided for in paragraph 9, the Parties may provide that measures provided in subparagraphs (i) and (ii) are not available: compensation for the loss or damages suffered.

11. A contract shall be declared ineffective pursuant to paragraph 9 (ii) in any of the following cases:

(a) the procuring entity has awarded the contract pursuant to a limited tendering without this being permissible under the provisions of Article X.12;

(b) where the procuring entity has concluded a contract without observing the mandatory standstill periods referred to in paragraph 9, such a violation has prevented the interested

RESTREINT EU/EU RESTRICTED

supplier from submitting a challenge before the conclusion of the contract, and the review body has found a breach of this Chapter other than such violation of the standstill period.

12. Each Party may provide that the review body may decide that ineffectiveness does not apply if the review authority finds that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

13. Each Party shall ensure that the decisions or recommendations taken by the review bodies can be effectively enforced.]

Article X.18: Modifications and Rectifications to Coverage

[EU: Notification of Proposed Modifications

1. A Party shall notify the other Party of any proposed rectification, transfer of an entity from one Annex to another, withdrawal of an entity, or other modification (referred to in this Article as “modification”) of Annexes X-1 through X-7.

2. For any proposed withdrawal of an entity from Appendix 1 in exercise of its rights on the grounds that government control or influence over it has been effectively eliminated, the Party proposing the modification (“modifying Party”) shall include in the notification evidence that such government control or influence has been effectively eliminated.

3. The other Party shall not be entitled to compensatory adjustments if government control and influence over the entity's covered procurement have been effectively eliminated.

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

Resolution of Objection

5. In case of objection by the other Party (“objecting Party”) to the notification by the modifying Party, the Parties shall seek to resolve the objection through bilateral consultations. In such consultations, the Parties shall consider:

(a) evidence pertaining to the effective elimination of government control or influence over an entity's covered procurement in the case of a notification under paragraph 2;

(b) evidence that the proposed modification does not affect coverage in the case of a notification under paragraph 3; and

(c) any claims, relating to the need for or level of compensatory adjustments, arising from modifications notified according to paragraph 1. The adjustments may consist of either compensatory expansion of coverage by the modifying Party or a withdrawal of equivalent coverage by the objecting Party, with a view to maintaining a balance of rights and

RESTREINT EU/EU RESTRICTED

obligations and a comparable level of mutually agreed coverage provided in this Chapter.

6. Where the objecting Party considers that, after bilateral consultations under paragraph 5:

(a) in the case of paragraph 5 (a), government control or influence over an entity's covered procurement has not been effectively eliminated;

(b) in the case of paragraph 5 (b), a modification does not meet the criteria in paragraph 3 and which affects coverage, and should be subject to compensatory adjustments; and/or

(c) in the case of paragraph 5 (c), compensatory adjustments proposed during the consultation between the Parties is not adequate to maintain a comparable level of mutually agreed coverage,

the Parties may use the dispute settlement mechanism under the Chapter of the Agreement.

Implementation

7. A proposed modification shall become effective only where:

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

(b) the Parties have reached an agreement after due consultations under paragraph 6; or

(c) the objection has been resolved through the dispute settlement mechanism under paragraph 6.]

[US: 1. A Party may make rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to its Schedules in Annex X, provided that it notifies the other Party in writing and the other Party does not object in writing within 30 days of the notification. A Party that makes such a rectification or minor amendment need not provide compensatory adjustments to the other Party.

2. A Party may otherwise modify its coverage under this Chapter provided that the Party:

(a) notifies the other Party in writing and the other Party does not object in writing within 30 days of the notification; and

(b) offers, within 30 days of the notification, acceptable compensatory adjustments to the other Party to maintain a level of coverage comparable to the level of coverage that would exist if the modification is not made.

3. A notification under paragraph 2 shall include:

(a) for any proposed withdrawal of an entity from Annex X on the grounds that government control or influence over the entity's covered procurement has been effectively eliminated,

RESTREINT EU/EU RESTRICTED

evidence that such government control or influence has been effectively eliminated; or

(b) for any other proposed modification, an explanation of the reason for the proposed modification and information on how the proposed modification is likely to affect benefits accruing to the other Party under this Chapter.

4. A Party need not provide compensatory adjustments in those circumstances where the Parties agree that the proposed modification covers a procuring entity over which a Party has effectively eliminated its control or influence. Where a Party objects to the assertion that such government control or influence has been effectively eliminated, the objecting Party may request further information or consultations with a view to clarifying the nature of any government control or influence and reaching agreement on the procuring entity's continued coverage under this Chapter.

5. The Parties shall seek to resolve any objections to a proposed modification through consultations.² In such consultations, the Parties shall consider the proposed modification and, in the case of notification described in paragraph 3 (b), any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a level of mutually agreed coverage comparable to the level that would exist under this Chapter if the modification is not made.

6. The [...] shall modify Annex X to reflect any rectifications or modifications made pursuant to this Article.]

Article X.19: [EU: Responsibilities of the Relevant Committee] [US: Committee on Government Procurement]

[EU: The Relevant Committee established pursuant to Article [...] may:

- (a) adopt modalities of the reporting of statistical data pursuant to Article X.15;
- (b) endorse the compensatory adjustments resulting from modifications affecting coverage;
- (c) revise, when required, indicative criteria that demonstrate the effective elimination of government control or influence over an entity's covered procurement;
- (d) adopt criteria for deciding on the level of compensatory adjustments of coverage;
- (e) make proposals to the FTA Committee in order to adopt adjustments resulting from the modifications occurring in the GPA provisions;
- (f) consider issues regarding government procurement that are referred to it by a Party;
- (g) exchange information relating to government procurement opportunities, including those at subcentral levels, in each Party; and
- (h) discuss any other matters related to the operation of this Chapter.]

² [US: For greater certainty, nothing in this Article shall be construed to affect a Party's rights and obligations under Chapter XX [...].]

RESTREINT EU/EU RESTRICTED

[US: 1. The Parties hereby establish a Committee on Government Procurement comprising representatives of each Party. On request of a Party, the Committee shall meet to address matters related to the implementation and operation of this Chapter, such as:

- (a) issues regarding government procurement that are referred to it by a Party;
- (b) any other matter related to the operation of this Chapter.

2. The Committee on Government Procurement shall be the designated forum for the Dialogue on Regulatory Procurement Issues and the Dialogue on International Procurement Issues established under the 2011 Bilateral Government Procurement Forum.]

Article X.20 Adjustment to GPA provisions

[EU: If the revised GPA text-based provisions are amended or superseded by another agreement, the Parties shall consider amending this Chapter, as appropriate, after due consultations.]

[US: Article X.21: Ensuring Integrity in Procurement Practices

1. Further to [Article X.2 of the Chapter on Anti-Corruption³ - Measures to Combat Corruption], for the entities listed in Section A, each Party shall adopt or maintain procedures to declare ineligible for participation in the Party's procurements a supplier that the Party has determined to have engaged in corruption, fraud, or other illegal acts in relation to procurement.

2. Each Party shall provide to a supplier of the other Party directly affected by a proceeding that applies procedures adopted or maintained under paragraph 1:

- (a) reasonable notice that such a proceeding was initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding was initiated, and a general description of any issues in controversy; and
- (b) reasonable opportunity to present facts and arguments in support of its position.

3. Each Party shall publish the names of the suppliers determined ineligible under paragraph 1.

4. A Party may request the other Party to provide information about a supplier that the other Party has declared ineligible under paragraph 1. The Party receiving the request shall provide information about the supplier, including the reason why the Party declared the supplier ineligible, no later than 45 days after the date it receives the request.]

³ See separate paper explaining the US-proposed Anti-Corruption Chapter.