

24 January 2017

Mr David M. Webb
Editor, Webb-site.com
(via email)

Dear Mr Webb,

Media query on WKCDA appointment of Rocco Design Architects Ltd

Thank you for your email dated 16 January 2017 raising further queries.

My answers to your questions are as follows:

1. Please can you e-mail me a copy of the “WKCDA’s Capital works procurement procedures/guidelines”? If there has been more than one version of this, please send me the original version and the latest version.

Answer: Attached to this letter are copies of the following:

- West Kowloon Cultural District Authority Internal Procedure No. IP/PDD/PRO/2012-001 - Procurement Procedures for Capital Projects – version 0 issued 21 March 2012; and
- West Kowloon Cultural District Authority Internal Procedure No. IP/PDD/PRO/2012-001 - Procurement Procedures for Capital Projects – version 1 issued 31 August 2016.

2. Whatever those procedures or guidelines are, does the WKCDA, being a statutory body, also consider itself bound by Hong Kong’s obligations under the WTO Agreement on Government Procurement, and if not, why not? Hong Kong’s Tender Procedures for Government Procurement are at this link:

http://www.fstb.gov.hk/tb/en/docs/espr_chapter3.pdf

Answer: WKCDA is not named as one of the government entities bound by the WTO-GPA. Despite this, WKCDA conducts its procurement activities in accordance with the WTO-GPA. The procurement of consultancies is specifically excluded from the operation of the WTO-GPA.

3. What is the budgeted amount approved by the board on 10-Jan-2017 for the provision of consultancy services for the design and construction of the project? Will this amount cover anything other than the proposed contract with RDA?

Answer: The budgeted amount is commercially sensitive information. In any event, as the contract is still being negotiated with RDA there is no formal agreement in place yet.

../Page 2

4. Your reply to our first question was vague, merely stating the date to be “in June 2016”. Was there any written agreement with a date on it, and if so, what was that date?

Answer: The commencement date of the agreement with RDA was 20 June 2016 (**RDA Agreement**).

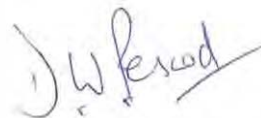
5. If there was no written agreement in June 2016, what form did the appointment of RDA in June 2016 take?

Answer: The RDA Agreement is formed by 3 documents which are read together:

- a. a proposal letter received from RDA in response to an invitation from WKCDA (**offer**);
 - b. a letter of clarification from WKCDA to RDA which was accepted and signed by RDA (**letter of clarification**);
 - c. a letter of acceptance from WKCDA to RDA incorporating the offer and letter of clarification.
6. Are we correct to assume that, as the “lead consultancy agreement” is still under negotiation, there is currently no contractual obligation on WKCDA to use RDA for this consultancy, and therefore the WKCDA board could, if it wishes, open the contract to tender? If not, why not?

Answer: Technically you are correct. However, the Board has considered this matter and decided to award the contract to RDA. While the contract is still being negotiated this is part of the normal process and should not be taken as providing an opportunity for the contract to be put out to tender.

Yours sincerely,



Duncan Pescod
Chief Executive Officer
West Kowloon Cultural District Authority

West Kowloon Cultural District Authority
Internal Procedure No. IP/PDD/PRO/2012-001

Procurement Procedures for Capital Projects
Records of Changes

Version	Date of Issue	Pages of Changes	Major changes from last version
0	21 March 2012	-	-

	Job Title	Date	Name	Signature
Originator	Head, Project Procurement and Contracts	21 March 2012	Johnny TAM	
Controller	Executive Director, Project Delivery	21 March 2012	Dr. M W CHAN	
Approver	The WKCDA Board (Paper 10/2012)	21 March 2012	-	-

CONTENTS

Records of Changes	1
Scope and coverage	3
Classification of information	4
Classification of procurement.....	4
Types of tendering	5
Funding	6
Approval to be sought	6
Proposal to proceed, shortlist and tender invitation	7
Submissions of tenders	11
Tender documents	13
Tenders in foreign currencies	16
Tender deposits / tender bonds	17
Contract deposits / performance bonds.....	17
Retention moneys	19
Liquidated damages	19
Receipt and clarification of tenders.....	19
Tender negotiations.....	21
Tender assessment.....	22
Tender reports.....	24
Cancellation of tender exercise	26
Acceptance of tenders	26
Bid challenges	27
Attachment 1 – An extract of the WTO Agreement of Government Procurement	

SCOPE AND COVERAGE

1 The West Kowloon Cultural District Authority (“Authority”) has been given an upfront endowment of \$21.6b (in 2008 Net Present Value (NPV)), as approved by the Finance Committee of the Legislative Council on 4 July 2008, for developing the West Kowloon Cultural District (WKCD). The one-off upfront endowment is to cover the capital costs of the following component parts of the WKCD project-

- i) Planning, design and construction of 17 core arts and cultural facilities (CACF) (comprising 15 performing arts venues, a cultural institution with museum functions (M+) together with its off-site conservatory laboratory and storage facilities, and an exhibition centre), other arts and cultural facilities (OACF), Retail, Dining and Entertainment (RDE) facilities, transport facilities and 23 ha public open space (which collectively constitute the “Capital Projects”);
- ii) Planning of the WKCD and project management which include consultancies, technical studies and public consultations for the preparation of a development plan for the whole WKCD site, and project management during the planning and construction stage;
- iii) Major repair and renovation of the facilities mentioned in paragraph 1 (i); and
- iv) Collection, exhibition development, conservation laboratory equipment and library setup for the M+.

The purpose of these Procurement Procedures is to ensure the procurement activities in respect of the planning, design and construction of the Capital Projects will be performed in a proper and auditable manner. The requirements set out in these Procurement Procedures for Capital Projects shall be followed for all the procurement activities in respect of the planning, design, construction, project management, major repair and renovation of the Capital Projects. For the avoidance of doubt, the procurement of consultancies and technical studies for the planning of the WKCD shall also be governed by these Procedures. The procurement for non-Capital project related goods and services would be governed by the procurement procedures named as “General Procurement Guidelines” accordingly.

2 Although the Authority has not yet been specified as being subject to the World Trade Organization Government Procurement Agreement (“WTO GPA”), it is recognized that the objective of the GPA of providing open and fair competition is in line with the Authority’s procurement policy and the requirements of WTO GPA are to be followed. An extract of the WTO GPA is included as **Attachment I** to these Procedures. The GPA provisions apply to the procurement of all goods, services and construction works, except the following –

- a. Goods and services other than construction services with values below 400,000 Special Drawing Rights (SDR)(see Note 1 below) (equivalent to \$4 million approximately);
- b. Works-related consultancy agreements; and
- c. Construction works or services at or below 5,000,000 SDR (equivalent to \$50 million approximately).

Note 1: SDR's, are defined and managed by the International Monetary Fund (IMF); SDR's are subject to daily revision and their value against the Hong Kong Dollar can be checked by reference to the IMF website (Google Special Drawing Rights), but as the movements are generally small the above can be taken as sufficiently reliable for most purposes.

No contract shall be sub-divided merely to avoid the application of the GPA.

CLASSIFICATION OF INFORMATION

- 3. Information relating to tenders and contracts should be handled in the following manner —
 - (a) All communications regarding tenders, from the time tenders are received and opened until a decision is made on the acceptance or otherwise of the tenders must be classified as RESTRICTED (TENDER). Correspondence on prequalification and single/restricted tendering should also be classified as RESTRICTED (TENDER).
 - (b) Only officers who are specifically authorized to do so may open and handle communications, documents and correspondence (documentation) relating to tenders and contracts. Authorized officers shall handle such documentation with great care and in strict conformity with the Authority's security requirements for such documentation, distribution of such documentation shall be made on a need-to-know basis.

CLASSIFICATION OF PROCUREMENT

- 4. For the purpose of compliance with these Procedures, procurement is classified as follows -
 - 4.1 Category 1 Procurement – means the procurement in respect of Capital Projects with an estimated works contract value of more than HK\$100 million, or a consultancy services agreement value of more than HK\$50 million.
 - 4.2 Category 2 Procurement - means the procurement in respect of Capital Projects with an estimated works contract value of more than HK\$10 million and up to

HK\$100 million, or a consultancy services agreement value of more than HK\$5 million and up to HK\$50 million.

- 4.3 Category 3 Procurement - means the procurement in respect of Capital Projects with an estimated works contract value of up to HK\$10 million, or a consultancy services agreement value up to HK\$5 million.

No contract shall be sub-divided merely to avoid it being classified in a higher procurement category.

TYPES OF TENDERING

5. Normally open tendering should be used for tenders; where circumstances warrant the adoption of an alternative tendering method, the justification should be specified in the application for approval from the relevant approving authority, as stipulated in these Procedures.
6. The various types of tendering are –

(i) Open tendering

Tender invitations are published on the Authority's website, in selected local publications, and in selected overseas journals as appropriate. Consulates and/or overseas trade commissions may also be notified where appropriate. All interested suppliers / contractors are free to submit tenders.

(ii) Selective tendering

Normally selective tendering is adopted where tenderers are required to meet certain qualification criteria or to pass a technical assessment to ensure suitability. Tender invitations are sent by letters to all suppliers / contractors on the relevant approved lists of qualified suppliers / contractors established and approved for the purpose of selective tendering. Where no such approved list of qualified suppliers / contractors is maintained by the Authority, relevant approved lists maintained by relevant Government Departments may be used. The list of tenderers with the justification for the choice of such a list should be specified in the application for approval from the relevant approving authority as stipulated in these Procedures.

(iii) Prequalified tendering

In circumstances where the prequalification of a list of tenderers financially and technically capable of undertaking a particular project or supplying a particular product is needed, prequalified tendering is to be adopted. A request for approval to conduct prequalification including all relevant supporting information (such as the proposed prequalification criteria, weightings and

marking scheme) should be made from the relevant approving authority stipulated in these Procedures. Invitations to apply for prequalification may take the form of open tendering or selective tendering and the respective procedures will apply. After the prequalified tenderers list has been approved by the approving authority, tender invitations are sent to the prequalified suppliers / contractors.

(iv) Single or Restricted tendering (these fall under “limited tendering” in the WTO GPA)

Tender invitations are sent to only one or a number of suppliers / contractors approved by the relevant approving authority stipulated below. Single or Restricted tendering is only used when circumstances do not permit the use of other types of tendering, for example, on grounds of extreme urgency or security, for proprietary products or for reasons of compatibility.

FUNDING

7. The Budget Owner as defined in the Guidelines on Budgetary Control and Arrangement, or the Subject Officer, as may be assigned by the Budget Owner, shall invite tenders for a works contract / consultancy agreement in respect of the capital projects only after the funding for the respective works contract / consultancy agreement having been approved. For virement of funds between individual work contracts / consultancy agreement, the requirements set out in the latest version of the approved Guidelines on Budgetary Control and Arrangement including its Annex entitled “Virement of Funds for Capital Projects shall be followed.

APPROVAL TO BE SOUGHT

8. Starting from the contract/consultancy inception / initiation and up to the award of the contract/consultancy, various approvals are required. Basically, approvals are required for (a) Proposal to Proceed - the need for and the initiation of a contract / consultancy, (b) Pre-qualification and Tender - the tender actions in respect of selecting a contractor for the contract / a consultant for the consultancy, and (c) Recommendations for Contract Award - the decision to award a contract/consultancy and to enter into contractual relationship with the selected contractor/consultant. The approvals to be sought and the appropriate approving authorities during these phases are summarized in the Table below. The approval is subject to availability of funding within the annual budget approved by the Board. For the avoidance of doubt, the preparation and the approval of the budget for any procurement shall be governed by the current version of the approved “Guidelines on Budgetary Control and Arrangement”. Given the adoption of Single or restricted tendering may be politically sensitive and may arouse public attention, the approving authority for the use of

Single or restricted tendering should be the same as that for “Recommendation for Contract Award.

APPROVALS REQUIRED	APPROVING AUTHORITIES		
	Category 1 Procurement	Category 2 Procurement	Category 3 Procurement
Proposal to Proceed: Prequalification and Tender, (tender list and shortlist, assessment panel, criteria, weightings) (Note 1)	To be approved by the Development Committee on the advice of CEO + ED, PD + ED, F	To be approved by ED, PD + Head, P&C + SM, F	To be approved by ED, PD + Procurement Manager + SM, F
Recommendations for Contract Award	To be endorsed by the Development Committee	To be endorsed by ED, PD + Head, P&C + SM, F	To be endorsed by ED, PD + Head, P&C + SM, F
	To be approved by the Board on the advice of the Development Committee	To be approved by the Development Committee of the Board on the advice of ED, PD + HPC + SM, F	To be approved by CEO + ED, PD + ED, F On the advice of ED, PD + Head, P&C + SM, F

Note 1: The approving authority for using single or restricted tendering should be the same as that for “Recommendation for Contract Award” in respect of category 1, 2 or 3 as appropriate.

PROPOSAL TO PROCEED, SHORTLIST AND TENDER INVITATION

9. Before proceeding with the procurement of a works contract / consultancy agreement in respect of the Capital Projects, the Subject Officer (as assigned by the Budget Owner), who shall be a Manager (Grade 3 or above or its equivalent) shall submit a “Proposal to Proceed”.. The application shall include:
 - i. Justification for the intended Procurement and provide details of the budget provision including whether tenders in foreign currencies would be accepted. If the intended procurement is an unbudgeted item, provide its estimated value.
 - ii. The type of intended Procurement, e.g. fixed price or fluctuating price, remeasurable or lump sum, target cost, fixed fee, or reimbursable, etc.
 - iii. The method of tendering to be adopted, e.g. Open Tendering, Selective Tendering, or Single/Restricted Tendering, and the considerations / justifications for the type of tendering selected. For Selective Tendering, the method of selecting the tenderers shall also state whether a prequalification is required.
 - iv. The membership and responsibilities of the Tender Assessment Panel, the assessment criteria (and weighting scheme if applicable) (which should apply equally to alternative proposals, if it is intended to allow alternative

proposal to be submitted), the award criteria, e.g. the lowest compliant bid, or the most favourable bid after a technical: financial weighted assessment.

As far as selecting the method of tendering as described in paragraph 9(iii) is concerned, there may be circumstances which require the prequalification of a list of tenderers who are financially and technically capable of undertaking a particular project or of supplying a particular product. These include projects of an extremely complex nature, of high value or subject to very rigid completion programmes; projects which call for a high level of co-ordination, technical expertise, or a non-standard form of contract, e.g. Build-Operate-Transfer (BOT) or Design-and-Build contracts; and products which are critical to the user departments. In addition to the information set out in paragraph 9 (i) to (iv) above, additional information to be included for the consideration of the approving authority shall include:

- v. Contract Information and justifications for adopting pre-qualification
- vi. Instructions to Applicants
- vii. Information required from Applicants

10. Procurements will normally be made by Open or Selective Tendering. Restricted or Single Tendering shall only be used in circumstances when Open or Selective Tendering would not be an appropriate or effective means of obtaining the requisite supplies or services. Generally, the criteria for determining when Restricted or Single Tendering can be used include the following:-

- (i) where there is extreme urgency brought about by unforeseeable events and where the delay that would arise as a result of open tendering would have serious and adverse consequence to the Authority;
- (ii) where for reasons connected with the protection of copyright or technical reasons, the products or services can only be supplied by a particular supplier and where no reasonable alternative or substitute exists;
- (iii) where there is no response to an open or selective tender, or when the tenders submitted have been collusive, or not in conformity with the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation, on condition that the requirements of the initial tender are not substantially modified in the contract as awarded;
- (iv) where the equipment or services to be purchased must meet requirements of compatibility or interchangeability with already existing equipment or services;
- (v) where it can be demonstrated that “patent” or “proprietary” items are the only items which can meet the specification;
- (vi) where services are to be provided by utility companies;
- (vii) where maintenance is to be executed on patent or specialized equipment and where the warranty over the equipment gives the supplier of the equipment the exclusive right to carry out the maintenance services; and
- (viii) where lease terms require that work must be executed by a particular firm.

For procurements governed by the WTO GPA, Limited Tendering procedures shall only be used in circumstances prescribed in Article XV of the WTO GPA.

11. Single or restricted tender procedures shall only be initiated with the prior approval of the relevant approving authority. Tenderers shall not be informed that tenders are being invited on a single or restricted basis, and shall be required to submit their tenders in the same manner as open and selective tender procedures. Notice of tender invitation shall be sent by letter to the tenderers. When seeking approval to adopt single or restricted tendering procedures, the following should be covered in the application —
 - (i) background of the work to be carried out or the goods to be procured;
 - (ii) estimated cost;
 - (iii) justification for using Single or Restricted Tendering (why open tenders are not appropriate, with reference to Sub-paragraphs 10(i) to 10(viii) above);
 - (iv) if the reason for proposing single or restricted tendering action is urgency, explain why tender action could not have been initiated earlier and why the additional time required for open tendering would have serious or adverse consequence; and
 - (v) explain the professional capability and experience of the contractor nominated.
12. The Subject Officer shall seek approval from the relevant approving authority of the membership and responsibilities of the Tender Assessment Panel (TAP) and the award criteria. Normally, the Subject Officer shall be the Chairman of the Tender Assessment Panel, and the TAP would comprise members from the representatives of the technical, procurement and contracts and finance teams, supported by legal and external consultants as deemed necessary. The TAP administers the tender process and assesses/evaluates technical and financial submissions proposed by the tenderers, deals with the withdrawal of, or other treatment of, tender qualifications and reports to and makes recommendations to the approving authority including with respect to tender qualifications and as to which of the competing tenders should be successful. The TAP shall also determine and seek approval of the tender evaluation criteria and the weighting to be given to the individual components of the tender evaluation criteria and the “technical/financial” weighting. Furthermore, in appropriate circumstances, the TAP makes recommendations as regards whether alternative offers may be proposed by tenderers and if so under what conditions, such as whether a conforming tender must be submitted before an alternative will be considered.
13. The TAPs shall prepare a detailed Tender Report in accordance with the requirements of Paragraphs 53 & 54 below, to be submitted to the approving authority as stipulated in these Procedures.

14. Tender notices and invitations are to be handled in accordance with the following requirements -
- a. Tender notices and invitations shall be issued in the manner specified in these Procedures according to the types of tendering to be used. Sufficient durations shall be allowed for the applicants / tenderers to prepare their prequalification / tender submissions, provided always that under urgent situations, a shorter duration may be allowed as approved by the relevant approving authority stipulated by these Procedures.
 - b. Except as otherwise specified in these Procedures or as approved by the relevant approving authority, the number of tenderers to be selected for an intended procurement shall not be less than three and will normally be six. However, for consultancies, the number of tenderers should not be less than four. For works contracts, the number of tenderers should normally be from six to eight. Where a prequalification exercise has been conducted, the number of tenderers may range from four to six. If there is sufficient justification, more or fewer tenderers may be selected, subject to approval from the appropriate authority. If the number of tenderers falls below 3 after the issue of tender documents, the relevant approval authority shall be notified and given a recommendation as to how the matter should proceed, the tender shall not proceed until the relevant approving authority has given its directions.
 - c. Open Prequalification shall be undertaken by means of advertising for expressions of interest on the Authority's website, selected local publications and/or selected overseas journals. The advertisement should contain a brief description of the Procurement along with its estimated timescale, cost range, details of any special requirements and closing date. Applicants shall be advised to apply for prequalification and to provide details of their experience, resources and capabilities with respect to the Procurement being considered, so that their suitability for prequalification can be assessed.
 - d. A suitably structured prequalification questionnaire shall be issued to the interested applicants, to be completed and returned as an Application for Prequalification for the subject Procurement. This will be evaluated by the assessment panel and scored accordingly. Scoring will be coordinated by the Leader of the assessment panel, and the appropriate number of top scoring applicants will normally be selected as tenderers.
 - e. Prequalification questionnaires for a specific Procurement should be returned on a common closing date. Nevertheless, unsolicited or late applications for prequalification may be considered on their merit, provided there is sufficient time for processing within the procurement programme. A flexible and equitable approach should be maintained in order to ensure that sufficient applicants and information would be available to be considered. Approval for any change in the closing date is NOT necessary but should be notified to the appropriate approving authority retrospectively.
 - f. Upon completion of a prequalification process, each applicant shall be notified in writing, whether or not he has been successful in prequalifying, for a specific Procurement. All discussions, documents and correspondence

relating to tenderer selection shall be treated as confidential and all communication with prospective tenderers shall be undertaken via the leader of the assessment panel and copied to the Head, Project Procurement and Contracts.

- g. Before requesting approval from the approving authority for the list of tenderers (in particular where the prequalification process has taken a considerable time), the proposed tenderers shall be advised that they are being considered for an intended Procurement and shall be asked to confirm their willingness to submit a bona fide tender. The request shall include details of the scope, extent, value range, contract arrangement, and programme for the Procurement. Proposed tenderers who decline shall be replaced with the next best potential tenderer.
- h. The proposed tenderers shall be approved by the appropriate authority as described in these Procurement Procedures according to the category of the intended procurement.

For procurements governed by the WTO GPA, the criteria in respect of information to be provided in the Tender Notice are set out in paragraph 6 of Article IX of the WTO GPA.

SUBMISSION OF TENDERS

- 15. Selected Tenderers shall be required to comply with the requirements in respect of “Submission of Tenders” as described below. These requirements shall be clearly described in the tender documents.

A) The “Three Envelope System” shall be adopted

- I) In the Three Envelope System, Tenderers are required to place their “Tender Price Documents” and “Technical Submission” in two separate sealed envelopes, and the two envelopes shall then be enclosed in the third sealed envelope before the submission of their Tender.

II) The purpose of this three envelope system is to ensure –

- i) All tender price documents and technical submissions are assessed by the financial assessment team and the technical assessment team independently and separately, and no financial or price related information will be made known to any of the technical assessment team (unless approved by the relevant Approving Authority);
- ii) Both the “Tender Price Documents” and “Technical Submission” submitted by the Tenderer will be submitted and received in one package to eliminate any possible logistical problems.

III) The requirement and the process of this three envelopes system would normally be set out in the “Conditions to Tenderers” as follows-

i) The Tender Price Documents and Technical Submission shall be placed in two separate envelopes as specified below.

ii) In the first sealed envelope clearly marked with the ‘**Tender Reference**’ and the words ‘**Tender Price Documents (RESTRICTED)(TENDER)**’, the following tender price documents shall be deposited (note: the Tender Price Documents listed below would be determined on a contract-specific basis and shall be stated clearly in the Conditions to Tenderers)-

- a. The Form of Tender in hard copy format fully completed, signed, witnessed and dated;
- b. The Bills of Quantities in either hard copy format or electronic format fully priced as to each item, extended, cast and totaled as appropriate;
- c. The Price Fluctuation Factor completed, in hard copy format; and
- d. The Grand Summary of the Bills of Quantities in either hard copy format or electronic format.

iii) In the second sealed envelope clearly marked with the ‘**Tender Reference**’ and the words ‘**Technical Submission (RESTRICTED)(TENDER)**’, the following technical submissions shall be deposited (note: the Technical Documents listed below would be determined on a contract-specific basis and shall be stated clearly in the Conditions to Tenderers)

- a. Technical resources and technical proposals;
- b. Tenderer’s experience and past performance;
- c. Proposed organization chart and CVs of key personnel;
- d. Proposed design consultant, subcontractors and suppliers;
- e. Proposed method statement and construction sequences;
- f. Proposed construction programme; and
- g. Statement of Convictions.

iv) The two envelopes shall then be enclosed in the third sealed envelope addressed, endorsed and deposited as required by the “Letter of Invitation to Tender” or the “Tender Notice”.

B) Tenderers shall be advised in the Conditions of Tender, that their tenders shall be submitted in separate sections as follows:

- i) The Tender Price Documents, comprising the Form of Tender and the Pricing Document, along with any financing proposals, alternative financial offers and any contractual or commercial statements.
 - ii) The Technical Submission, comprising all technical details, including where appropriate any alternative technical proposals.
 - iii) Hard copies of the Tender Price Documents and the Technical Submission shall be contained in two separate sealed envelopes, affixed with the address label supplied by the Authority, and shall be placed in the third sealed envelope.
- C) All tender submissions shall be deposited in the Authority's Tender Box on or before the designated closing time. The submission time and the tender opening shall be recorded by the designated officer and witnessed by a second officer.
- D) **Under no circumstance shall late tenders be opened or accepted without the express written approval of the approving authority.** Nevertheless, a tenderer shall not be penalized if a tender is received in the office designated in the tender documents after the time specified because of delay due solely to the mishandling on the part of the Authority's staff.
- E) Any prescribed time-limits for submission of tenders shall be adequate to allow the tenderers to prepare and submit tenders before closing of the tendering procedures. In determining any such limit, the needs, complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders by mail from foreign as well as domestic points are factors to be taken into account. For procurements governed by the WTO GPA, the requirements in respect of time-limits for tendering and delivery are set out in Article XI of the WTO GPA (and in brief, not less than 40 days for open tendering and not less than 25 days for selective tendering).

TENDER DOCUMENTS

16. The form and content of a tender document package will depend upon the type and value of the intended Procurement to be made but the tender documents should normally consist of:
- (I) General Contract Documents, comprising:
 - (i) Standard terms and conditions, e.g. Conditions of Contract, Terms of Agreement, Terms of Purchase;
 - (ii) General Specifications;
 - (iii) Materials and Workmanship Specifications;
 - (iv) Form of Tender (unless a bespoke FoT is used).

Where Standard Forms are used for these documents it will normally be sufficient to include them by reference, but with a statement to say that hard or soft copies will be made available on request by tenderers.

(II) Particular Contract Documents, comprising:

- (i) Particular Specifications or Services Specifications
- (ii) Drawings
- (iii) The Pricing Document, e.g. the Bill of Quantities, Schedule of Prices or Schedule of Fees
- (iv) The Form of Tender (Where a bespoke FoT is used)
- (v) Special Conditions of Tender
- (vi) Special Conditions of Contract

(III) Other Contract Documents, incorporated into the Contract by reference e.g.:

- (i) The Drawing & CADD Manual
- (ii) The Design Standards Manual
- (iii) The Health & Safety Manual
- (iv) Other reference documents (e.g. special insurance policies)

(IV) Non Contract Documents, comprising:

- (i) Instructions to Tenderers (General and Particular if necessary).
- (ii) The tender invitation letter
- (iii) Other documents such as schedules of rates/prices which may be used for tender/claims evaluation but which it is not intended to be incorporated into the contract

For procurements governed by the WTO GPA, the requirements in respect of tender documentation are set out in paragraph 2 of Article XII of the WTO GPA.

17. The Subject Officer responsible for the procurement shall ensure that tender specifications which define the requirements of the contract are drawn up in a manner which meets the Authority's procurement policy of maintaining open and fair competition. Tender specifications shall not be prepared, adopted or applied with a view to or with the effect of creating obstacles to international trade or to competition amongst the potential tenderers.
18. When inviting tenders under whichever type of procedures, the tender specifications should be written in easily comprehensible general terms based on the functional and

performance characteristics of the products required, and not around the technical data of a certain model of the goods or equipment to be purchased. There shall be no requirement for or reference to a particular trade mark or name, patent, design or type, specific origin, producer or service provider, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and words such as “or equivalent” are included in the tender documents. Where standards are referred to, where practicable, international standards should be used. For procurements governed by the WTO GPA, the requirements in respect of tender specification are set out in Article VI of the WTO GPA.

19. The Subject Officer shall be responsible for establishing the design and/or performance criteria and other technical requirements, coordinating programming information, accurate pricing documents and cost estimates to ensure that the tender documents truly reflect the scope and requirements of the intended Procurement. Where the intended Procurement is designed and administered by external consultant(s), the Subject Officer shall be responsible to ensure that the respective consultant(s) are adhering to the requirements set out in these Procurement Procedures.
20. The Subject Officer shall be responsible for reviewing the draft tender documents during preparation to ensure that their requirements are properly reflected in the documents, and ensuring, with the support of the General Counsel, that the appropriate Conditions of Contract are adopted.
21. Before issuing a tender invitation, the Subject Officer shall obtain written confirmation from the Executive Director, Project Delivery that the tender scope and content have been approved for issue and shall copy this confirmation to the Head, Project Procurement and Contracts.
22. Where non-standard terms and conditions are to be included in the tender documents, legal clearance from the General Counsel shall be obtained (Note, this shall include in all cases, Instructions to Tenderers (General and Particular if necessary), the tender invitation letter (and other documents such as schedules of rates/prices which may be used for tender/claims evaluation but which it is not intended to incorporate into the contract) the Consultancy Brief, the Particular Specification or Services Specification, The Pricing Document, e.g. the Bill of Quantities, Schedule of Prices or Schedule of Fees, The Form of Tender, Special Conditions of Tender and the Special Conditions of Contract, together with any other non-standard forms and documents.) The Subject Officer shall copy the legal clearance to the Head, Project Procurement and Contracts.
23. Normally, the estimated contract value should not be disclosed to the tenderers as it may affect the tenderers in the preparation of their tender proposals, which may undermine the position of the Authority. If however, the estimated contract value has already been disclosed to the public prior to the issue of tenders, in all fairness, all the tenderers should be informed of the estimated contract value.

TENDERS IN FOREIGN CURRENCIES

24. In general, contract sums should be quoted and paid in Hong Kong dollars. Where the contents of the works included in the tender contain substantial value of equipment or items manufactured / imported from foreign countries, in order to avoid tenderers putting in an unreasonable amount of allowance in their quotations to cover exchange risks for the contract period, provided it is agreed by the Executive Director, Project Delivery and Executive Director, Finance, tenderers may be allowed to quote in foreign currencies subject to the following conditions —
- (i) the goods or equipment offered are manufactured outside Hong Kong and form a significant part of the contract;
 - (ii) the foreign currency quoted must be the currency of the country supplying the goods or equipment, and more than one currency may be quoted if items from more than one foreign country are involved;
 - (iii) tenders likely to cost HK\$10 million or more cannot be quoted in a foreign currency, other than US dollars, without the prior approval of the Executive Director, Finance, and prior arrangement having been lined up with the Treasurer, who must be satisfied that a refusal to allow tenderers to quote in a foreign currency other than US dollars will significantly reduce the degree of competition in tendering to the detriment of the public interest;
 - (iv) local materials and labour should be priced in Hong Kong dollars, which generally should include materials manufactured outside Hong Kong but which require a substantial amount of further processing in the Hong Kong Special Administrative Region; and
 - (v) services provided by personnel based outside Hong Kong and salaried in a foreign currency may be quoted in that foreign currency.
25. If ED, PD and ED, F approve the invitation of tenders in foreign currencies, for tender comparison purposes quotations in foreign currencies must be converted to Hong Kong dollars. The conversion is to be based on the selling rate of the relevant currency quoted by the Hong Kong Association of Banks at the close of business on the day before the tender closing date. The Approving Authority, in considering recommendations for the award of contracts, will also take into consideration any significant fluctuations in exchange rates after the tender closing date. The Subject Officer should state in tender reports the converted tendered sums based on the exchange rates on the tender closing date and at the date of reporting and should indicate whether the ranking of the tender sums has changed as a result of currency fluctuations between the two dates.

TENDER DEPOSITS/TENDER BONDS

26. A tender deposit / bond is not normally required. Where a tender deposit/ bond is required, the tender documents shall specify the amount of the deposit/ bond and the methods of payment (whether by cheque, cashier order and/or presentation of original receipts along with the tender) and refund. Tender deposits will be refunded to unsuccessful tenderers without interest. If a tender bond is required, the bondsman (i.e. the bank or insurance company issuing the bond) shall be approved by the Authority. In the case of a bank, the bank shall either be incorporated in Hong Kong or shall be a registered branch in Hong Kong, not a representative office. In the case of an insurance company the Company shall be recognized by the Hong Kong Insurance Commissioner and shall have a Branch office in Hong Kong. Both banks and insurance companies shall be required to have their address for the service of process in Hong Kong. If a tenderer proposes a bank or insurance company that does not meet the above criteria to be the bondsman, advice must be sought from the Finance and Legal departments as regards its acceptability and the need for additional provisions in the Bond (e.g. choice of law clause, jurisdiction clause, appointment of local agent for service of process clause and immunity waiver clause) and if required, the wording of such provisions.

CONTRACT DEPOSITS/PERFORMANCE BONDS

27. Depending on the potential risks arising from the contract and the terms of the Conditions of Contract adopted, successful tenderers may be required to pay a contract deposit (in the form of cash) or submit a performance bond to the Authority within a specified period (usually 14 days after the date of the Letter of Acceptance, rather than at the time of tender submission) as security for the due and faithful performance of the contract. A performance bond may be in the form of a guarantee arranged by a bank, insurance company, or the parent company (which has been assessed to be financially capable) of the tenderer.
28. Unless otherwise approved by the ED, PD and ED, F, the requirements in respect of the contract deposit, performance bond or guarantee should follow the guidelines below -
- a) A bond is required for any Works or Supply Contract of HK\$10M or more (i.e. Category 1 and Category 2 procurements for Works Contracts). A bond is not required for Works or Supply contracts of less than HK\$10M (i.e. Category 3 procurements for Works Contracts), A bond is not required for any consultancy agreements, unless considered necessary by the Finance Department with regard to the financial capability of the tenderers. The amount of cash security or bond required is shown as follows-

	Estimated Value of Contract	Amount of cash security or bond, calculated at % of the Contract Price
Category 1 procurement – Works contracts	Over \$100M	5%
Category 2 procurement – Works contracts	Over \$10M and up to \$100M	10%
Category 3 procurement – Works contracts	Up to \$10M	Not required
All consultancy agreements	Any value	Not required

- b) If a bond is required, the bondsman (i.e. the bank or insurance company issuing the bond) shall be approved by the Authority. In the case of a bank, the bank shall either be incorporated in Hong Kong or shall be a registered branch in Hong Kong, not a representative office. In the case of an insurance company the Company shall be recognized by the Hong Kong Insurance Commissioner and shall have a Branch office in Hong Kong. Both banks and insurance companies shall be required to have their address for the service of process in Hong Kong. If a tenderer proposes a bank or insurance company that does not meet the above criteria to be the bondsman, advice must be sought from the Finance and Legal departments as regards its acceptability and the need for additional provisions in the Bond (e.g. choice of law clause, jurisdiction clause, appointment of local agent for service of process clause and immunity waiver clause) and if required, the wording of such provisions.
- c) Guarantees are required for all Category 1 and Category 2 procurements. These should be in the form of a Parent Company Guarantee where the contractor is a subsidiary of another company and a Joint and Several Guarantee where the contractor is a partnership or joint venture, in which case a Parent Company Guarantee is also required from each participant who is a subsidiary of another company. Guarantees are not required for Category 3 procurements except for those companies the financial capability of which, as assessed by the Financial Department, is inadequate or there is some reservation on their technical performance.
- d) Professional Indemnity Insurance (PII) is normally required for engineering and architectural design consultancies and for Category 1 and Category 2 procurements. Category 3 procurements do not normally require PII except where a substantial design element is included.
29. Unless otherwise provided in the contract terms that contract deposits and performance bonds are released in stages, contract deposits shall not be refunded until the contract has been completed according to the terms of the contract. Likewise, performance bonds must be maintained in force until the contractor has duly performed all his obligations under the contract.

RETENTION MONEYS

30. To the extent as provided under the terms of the Conditions of Contract, to protect the interest of the Authority, the payment schedule for the contractor shall preserve a right for the Authority to hold back a certain sum as retention money. Unless it is provided in the contract terms that retention moneys shall be released in stages (which is usual in civil engineering contracts), retention moneys will not be released to the contractor until the Final Certificate is issued indicating that the Authority is satisfied that the works under the contract are complete. The amounts of retention money required are as follows-

	Estimated Value of Contract	Retention to be deducted from interim payments at the rate of	Cap on retention money, as a % of the Contract Price
Category 1 procurement – Works contracts	Over \$100M	10%	5%
Category 2 procurement – Works contracts	Over \$10M and up to \$100M	10%	5%
Category 3 procurement – Works contracts	Up to \$10M	10%	5%
All consultancy agreements	Any value	Not required	Not required

LIQUIDATED DAMAGES

31. For works contracts, the assessment of liquidated damages shall follow the guidelines or practice notes as approved by the Development Committee of the Authority. In the absence of the Authority's own guidelines, where applicable, guidelines in the relevant Development Bureau Technical Circular(s) (Works) may be followed.

RECEIPT AND CLARIFICATION OF TENDERS

32. After the tenders envelopes have been opened and authenticated by the tender opening team (who shall be different and separate from the Technical and Financial TAPs(collectively called TAP)), one copy of the duplicates of the technical and financial proposals received will be kept by the tender opening team for record. The originals and the remaining duplicates of the technical proposals will be sent to the Technical TAP and the originals and the remaining duplicates of the financial proposals will be sent to the Financial TAP respectively for assessment.
33. After receipt of the original tenders from the tender opening team, the Technical TAP should check that the tenders contain, inter alia, the names and residential addresses of all partners (if the tender is submitted by a partnership) or offices (if the tender is

submitted by an unincorporated body) and the number of the business registration certificate.

34. Where certain tender information is found missing or where a tender contains some technical ambiguities, qualifications or counter-proposals, the TAP will need to consider carefully whether to seek the missing information or clarification from the relevant tenderer. In general, the TAP shall keep such post-tender closing contacts with tenderers to the minimum. They shall record clearly and in full all such contacts. Most importantly, they must ensure that such contacts will not give a tenderer any advantage or perceived advantage over other tenderers. The opportunities that may be given to tenderers to correct unintentional errors of form (for instance, clerical errors) shall not be permitted to give rise to any discriminatory practice.
35. If tender briefing/presentation is considered necessary, to ensure consistency and fairness in providing supplementary information to prospective tenderers, Subject Officer shall ensure that equal opportunity is allowed for all prospective tenderers to attend the briefing/presentation. Similarly, in handling tender enquiries, all prospective bidders shall have equal access to information relating to the tender exercises, including questions and answers raised by all bidders on the tender documents.
36. Where the provision of certain information is specified as an “essential requirement” in the tender document and where such information is missing in a tender, the tender shall be considered as non-conforming. TAP shall not approach the concerned tenderer for the missing information of this nature.
37. Where the missing information relates to factual information which does not materially affect compliance with the essential requirements specified in the tender document, and where there is no room for manipulation by a tenderer by virtue of late submission of such information, TAP may approach the concerned tenderers for such missing information.
38. In approaching a tenderer for clarification, TAP must NOT provide any information that may assist the tenderer to improve his tender to the level of tenders from other tenderers.
39. In case of special circumstances requiring different consideration, TAP shall seek the advice of the General Counsel and/or the relevant Executive Directors.
40. Under no circumstance shall any amendment to the tender sum in the course of the tenderer’s providing technical clarifications be acceptable to the Authority. If a clarification or correction in respect of arithmetical error results in an adjustment of the tender sum, the TAP shall ask the tenderer to confirm whether he is prepared to abide by the adjusted tender sum. If the tenderer refuses to so abide, the TAP shall consult the General Counsel on how to deal with the tender. Under no circumstances may the TAP assume a tender has been rejected as a qualified bid (expressly or

otherwise) without the approval of the relevant approving authority for contract award.

TENDER NEGOTIATIONS

41. In general, it is the Authority's policy to procure goods, works or services on the basis of competitive tendering, with the contract being awarded to the tenderer that conforms with the tender specifications and offers the most advantageous terms to the Authority. Because circumstances can always arise which would mean it would be in the Authority's best interest to negotiate with a tenderer or tenderers Subject Officers shall ensure that tender documents contain terms that provide that the Authority shall not be bound to accept the offer with the lowest price, or with the highest technical score, or with the highest combined scores under the technical and fee proposals. The tender documents shall also contain terms that shall enable the Authority to reserve its right to negotiate with any tenderer about any terms and conditions, including but not limited to the tender price or in the case of consultancies, the fee proposals, prior to award of contract, and reserve its right to award the contract to the tenderer whose tender is considered most advantageous overall to the Authority.
42. The approving authority for the contract award shall be the authority to approve the undertaking of tender negotiations. The approving authority shall be notified after the conclusion of the tender negotiations.
43. Normally, negotiations may be necessitated in the following circumstances —
 - (i) when a single tender has been invited with the prior approval of the appropriate approving authority; or
 - (ii) when only one tender or very few tenders have been received in response to an open tender invitation and when the concerned Subject Officer considers the tenders received may not be sufficiently competitive, whether in terms of price or other key quality attributes; or
 - (iii) when the tender price to be recommended is too high in comparison with the price of similar procurement in the past or in relation to other market information; or
 - (iv) when the tender to be recommended contains counter-proposals or qualifications to the tender terms which are disadvantageous to the Authority but are not sufficiently substantial or do not cause substantial deviation from the essential requirements contained in the invitation to tender to render the recommended tender non-conforming.

Negotiations under the above circumstance shall normally be conducted only with the single conforming tenderer or with the conforming tenderer whose tender has been found to be clearly the most advantageous. In the latter case, if the negotiation team fails to achieve the targets via the negotiations with this conforming tenderer, further negotiations would be carried out with the next conforming tender whose tender is found to be the second most advantageous to the Authority. Where no one tender is

clearly more advantageous or where the most advantageous tender cannot be determined until the counter-proposals have been resolved or withdrawn, it may be necessary to hold negotiations also with the other conforming tenders. For procurements governed by the WTO GPA, the requirements in respect of tender negotiation are set out in Article XIV of the WTO GPA.

44. For the avoidance of doubt, price may be the subject of negotiations as it is an essential element in determining the strength and weakness of a tender. Before negotiations are initiated, however, the Subject Officer shall take a view as to whether any reduction of price that may be achieved would exceed the cost of undertaking the negotiations, or would adversely affect the quality of services to be procured.
45. The justifications, recommended negotiation strategy, membership, terms of reference of the negotiation team and the targeted achievements of the negotiation shall be approved by the relevant approving authority. The Chairman of the negotiation team shall be at executive director level, unless otherwise approved by the relevant approving authority. In all cases, only officers with no real or potential conflict of interest shall lead or participate in negotiations.

TENDER ASSESSMENT

46. The TAP shall carry out the tender assessment strictly in accordance with the assessment criteria approved by the relevant authority. Technical and financial assessments shall be conducted separately and independently by the Technical and Financial TAPs and no communication shall be allowed between the Technical and Financial TAPs unless prior approval has been given by the relevant authority. The Technical TAP shall normally consist of not less than three persons. Technical TAP may, as appropriate, consist of representatives from external consultants to assist the assessment on technical submissions. To safeguard the integrity of procurement exercises, the Financial TAP should comprise only Authority's officials in the assessment of financial submissions. Only properly qualified persons shall be appointed to assess technical submissions in their tender exercises. Where practicable, assessment is to be made without the TAP (except the Chairman and the secretary) knowing the identity of the tenderers. All persons including Board members, all staff of the Authority or its consultants involved in the assessment of the tender submissions shall declare any conflicts of interest.
47. The TAP shall also examine tenders against the technical specifications, terms and conditions laid down in the tender documents to determine whether they are fully conforming. In recommending a tender for acceptance, the TAP should also take into account the following in the evaluation, as appropriate —
 - (i) technical and financial capability of the tenderers and their previous experience in similar projects. Reference from the clients of the previous projects should be obtained if necessary;

- (ii) resources to be provided (including amount, qualification and experience of key personnel, supervisors, tradesmen/skilled labourers, and sub-contractors/sub-consultants);
- (iii) capability and reliability in respect of timely delivery or completion;
- (iv) safety and health, programming, quality, and environmental aspects;
- (v) compatibility with existing or planned procurement;
- (vi) after sale support and service including maintenance and spare parts provision, warranty and/or guarantees;
- (vii) running and maintenance costs (if applicable);
- (viii) fair market prices;
- (ix) life-cycle costs;
- (x) net present values; and,
- (xi) the relative value to the Authority of financial offers made with the tender, e.g. export credit insurances/finances, contractor direct finance etc.

Where applicable, relevant requirements as regards information to be provided in technical submissions shall be stated clearly in the tender documents.

- 48. Where prior approval has been given for the use of a marking scheme based on a technical/fee weighting in the evaluation of tenders, assessment panels shall assess the tenders according to the criteria previously endorsed by the relevant approving authority. Normally, the tender which attains the highest overall score should be recommended.
- 49. In normal circumstances, TAP shall determine the ranking of the tenders received according to the original tender prices or the adjusted tender prices, or the overall scores they have attained when a marking scheme is used in tender evaluation. Where price negotiations are undertaken as approved by the relevant approving authority, TAP shall use the negotiated prices to determine the ranking of the tenders or their price scores.
- 50. Tender negotiations may be used to seek resolution of any qualification or counterproposal put forward by a tenderer. If the qualification seeks to reduce the tenderer's risk or to construct payment terms which are more to his advantage, the negotiation team should seek a corresponding adjustment in the tender price before formally recommending the tender for acceptance.
- 51. In recommending the acceptance of a tender to the relevant approving authority, TAP shall have value for money in mind. If the tendered sums are very close or if the contract to be awarded involves payments over a number of years, e.g. interim payments to the contractor, the TAP shall compare the tenders by discounting future payments to obtain the present value. In assessing the present values of tenders, departments may approach the Senior Manager, Finance and the Treasurer for advice.

52. If none of the tenders received is fully conforming to the specifications, terms and conditions laid down, Subject Officer shall consider, with approval from the relevant approving authority, cancelling the tender exercise and re-tendering with revised specifications, terms and conditions, where applicable. If, exceptionally, TAP wish to recommend a non-conforming tender, they shall state clearly in the tender report any deviation of the recommended tender from the specifications and terms and the reasons for so recommending.

TENDER REPORTS

53. TAP shall prepare a tender report containing a clear recommendation. Initial tender assessment reports shall be prepared by the Subject Officer, who is normally the Chairman of the TAP. The draft tender report shall be presented to and agreed by the Executive Director, Project Delivery, Head, Project Procurement and Contracts and General Counsel before the finalized tender report is submitted to the relevant approving authority for consideration. Tender reports in respect of Category 1 and Category 2 procurements must be signed by the Subject Officer, reviewed by both the Head of User Department concerned and the Head of Procurement and Contracts, and endorsed by Executive Director, Project Delivery and signed off by General Counsel or his delegate. Tender reports for Category 3 procurements should be signed, reviewed and endorsed by officers of appropriate rank and General Counsel or his delegate.
54. Final tender reports shall be signed off by the Chairman of the TAP before it is to be reviewed, endorsed and submitted to the relevant approving authority for consideration. A typical tender report should comprise the following -
- A) Purpose
 - (i) A brief statement describing the purpose of the paper.
 - B) Background
 - (i) A summary of the Procurement describing its scope.
 - (ii) Its estimated value (or in-house cost for maintenance contracts) and its budget provision.
 - (iii) Details of any Options, if any, to be included along with their estimated value and budget provision.
 - (iv) The list of tenderers invited to bid, tender invitation date, tender closing date, tender validity period and proposed award date.
 - (v) The type of contract being adopted, with reasons, e.g. fixed price lump sum, remeasurable, target cost, or reimbursable, etc.
 - (vi) The method of tendering being adopted, with reasons, e.g. Selective Tendering, Pre-qualification or Single/Restricted Tendering.

- C) Contract Details
 - (i) The terms and conditions to be adopted.
 - (ii) The requirement for bonds, guarantees and professional indemnity insurance.
 - (iii) Commencement and Completion and rates of liquidated damages.
 - (i) Payment Schedule.
 - (ii) Interfacing contracts.
 - (iii) Other relevant details

- D) Tenderer Selection
 - (i) The criteria for selection, with a summary of the relevant results, a table of the prequalification criteria with TAP's scores. Where Single/Restricted tendering is adopted, details of the special circumstances that justify Single/Restricted Tendering.
 - (ii) The proposed tenderers' confirmation in writing that they are willing to tender.

- E) Financial Capability Assessment

Results of the financial capability assessment, which shall be required for all Category 1 and 2 procurements.

- F) Tender Assessment
 - (i) The basis of assessment, e.g. lowest compliant bid or technical/financial weighted assessment. Detailed justification shall be provided if a combined weighting assessment method is recommended.
 - (ii) Details of the scoring system to be used for the technical assessment of the tenders.
 - (iii) The membership of the TAP during the tender assessment stage.
 - (iv) Findings of the technical and financial assessment.
 - (v) Tender qualifications remaining after requirement to withdraw qualifications has been sent to tenderers.
 - (vi) Alternative offer, if applicable
 - (vii) Tender negotiations, if applicable

- G) Recommendations
 - (i) The tenderer to be recommended for contract award.
 - (ii) The reserved tenderer to be used for the replacement of the selected tenderer who may subsequently decide to quit.
 - (iii) Confirmation that the selected tenderer and the reserved tenderer have agreed and signed Letters of Clarification (where applicable).

CANCELLATION OF TENDER EXERCISE

55. Unless it is in the Authority's interest not to do so, a procuring department should award a contract to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, in terms of the specific evaluation criteria set forth in the tender documentation is determined to be the most advantageous to the Authority. That will normally be the lowest tender or the most favourable bid after a technical/financial weighted assessment, but the Authority shall retain the right to award the contract to any tender that it may deem in its sole discretion to be the most advantageous to it, regardless of whether or not it is the lowest.
56. Approval of the cancellation of a tender exercise is not required when no tender has been received at the close of tenders.
57. Other than cancellation due to no tender having been received as described above, if a procuring department proposes to cancel a tender exercise once tenders have been invited, or not to award a contract following a tender evaluation, it shall first obtain the approval of the approving authority which approved the "Proposal to Proceed". The Subject Officer shall provide detailed justifications for cancelling a tender exercise and state whether and when a further tender exercise will be conducted.

ACCEPTANCE OF TENDERS

58. After a decision has been made on the acceptance of a tender by the relevant approving authority, the Subject Officer with the assistance of the TAP secretary shall forthwith notify the respective persons in the relevant departments (including the user department, the finance department and the audit department).
59. The user department will then send a letter to the successful tenderer accepting his tender (where applicable, as clarified by the Letter of Clarification) ("Letter of Acceptance" or "LoA") and, where necessary, inviting him to sign the contract on a specified date. In notifying unsuccessful tenderers of the outcome of their tenders, normally no reasons are given for the failure of their tenders. However, upon written request from any of the unsuccessful tenderers, a debriefing may be given to all unsuccessful tenderers if the user department considers appropriate to do so.
60. User Departments should forward the original Contract Documents or Agreements to Legal department for safe keeping, and shall maintain a record of all contracts awarded. In respect of procurements covered by WTO GPA, separate (or additional) records should be maintained in respect of each contract awarded under single or restricted tendering (referred to as limited tendering in the WTO GPA and for which they have been given authority to adopt) for the purpose of meeting the specific statistical reporting requirements of the WTO Committee on Authority Procurement on limited tendering.

61. The Authorized Signatories in respect of letters of clarification, letters of acceptance and formal agreements are as follows-

DOCUMENTS	AUTHORIZED SIGNATORIES		
	Category 1	Category 2	Category 3
Letters of Clarification	Signed by Executive Director	Signed by Heads of Section	Signed by Heads of Section
Letters of Acceptance	Signed by CEO	Signed by Executive Director	Signed by Heads of Section
Formal Agreement	Signed by CEO	Signed by CEO	Signed by Executive Director

62. The requirement for a formal agreement to be executed under seal is as follows –

- (i) Formal Agreements to be executed under seal are required for all Category 1 Procurements where the provision exists in the contract documents. A Formal Agreement under seal may also be required for a Category 2 Procurement dependent upon the nature of the Works e.g. a procurement with a significant design element. This requirement is to be verified by the appropriate approvals authority during the tenderer selection and tender assessment stages.
- (ii) Formal Agreement with “Execution under Seal” is not required for Category 3 Procurements, except for cases where there is likely to be extensive use of custom made components or the contract is design build.

BID CHALLENGES

63. Subject Officer shall ensure that all the activities throughout the procurement are fair, open and transparent. In the event of a complaint or challenge by a tenderer, it shall be handled with great care and in a timely, equitable, non-prejudicial and non-discriminatory manner. For procurements governed by the WTO GPA, the requirements in respect of bid challenges are set out in Article XX of the WTO GPA.

Attachment I – An extract of the WTO Agreement of Government Procurement

AGREEMENT ON GOVERNMENT PROCUREMENT

Parties to this Agreement (hereinafter referred to as "Parties"),

Recognizing the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade;

Recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers;

Recognizing that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement;

Recognizing the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintain the balance of rights and obligations at the highest possible level;

Recognizing the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries;

Desiring, in accordance with paragraph 6(b) of Article IX of the Agreement on Government Procurement done on 12 April 1979, as amended on 2 February 1987, to broaden and improve the Agreement on the basis of mutual reciprocity and to expand the coverage of the Agreement to include service contracts;

Desiring to encourage acceptance of and accession to this Agreement by governments not party to it;

Having undertaken further negotiations in pursuance of these objectives;

Hereby *agree* as follows:

*Article I**Scope and Coverage*

1. This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I.¹
2. This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.
3. Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply *mutatis mutandis* to such requirements.
4. This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.

*Article II**Valuation of Contracts*

1. The following provisions shall apply in determining the value of contracts² for purposes of implementing this Agreement.
2. Valuation shall take into account all forms of remuneration, including any premiums, fees, commissions and interest receivable.
3. The selection of the valuation method by the entity shall not be used, nor shall any procurement requirement be divided, with the intention of avoiding the application of this Agreement.
4. If an individual requirement for a procurement results in the award of more than one contract, or in contracts being awarded in separate parts, the basis for valuation shall be either:
 - (a) 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 12 months; or
 - (b) the estimated value of recurring contracts in the fiscal year or 12 months subsequent to the initial contract.

¹For each Party, Appendix I is divided into five Annexes:

- Annex 1 contains central government entities.
- Annex 2 contains sub-central government entities.
- Annex 3 contains all other entities that procure in accordance with the provisions of this Agreement.
- Annex 4 specifies services, whether listed positively or negatively, covered by this Agreement.
- Annex 5 specifies covered construction services.

Relevant thresholds are specified in each Party's Annexes.

²This Agreement shall apply to any procurement contract for which the contract value is estimated to equal or exceed the threshold at the time of publication of the notice in accordance with Article IX.

5. In cases of contracts for the lease, rental or hire purchase of products or services, or in the case of contracts which do not specify a total price, the basis for valuation shall be:

- (a) in the case of fixed-term contracts, where their term is 12 months or less, the total contract value for their duration, or, where their term exceeds 12 months, their total value including the estimated residual value;
- (b) in the case of contracts for an indefinite period, the monthly instalment multiplied by 48.

If there is any doubt, the second basis for valuation, namely (b), is to be used.

6. In cases where an intended procurement specifies the need for option clauses, the basis for valuation shall be the total value of the maximum permissible procurement, inclusive of optional purchases.

Article III

National Treatment and Non-discrimination

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:

- (a) that accorded to domestic products, services and suppliers; and
- (b) that accorded to products, services and suppliers of any other Party.

2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:

- (a) that its entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership; and
- (b) that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV.

3. The provisions of 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 and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement.

Article IV

Rules of Origin

1. A Party shall not apply rules of origin to products or services imported or supplied for purposes

of government procurement covered by this Agreement from other Parties, which are different from the rules of origin applied in the normal course of trade and at the time of the transaction in question to imports or supplies of the same products or services from the same Parties.

2. Following the conclusion of the work programme for the harmonization of rules of origin for goods to be undertaken under the Agreement on Rules of Origin in Annex 1A of the Agreement Establishing the World Trade Organization (hereinafter referred to as "WTO Agreement") and negotiations regarding trade in services, Parties shall take the results of that work programme and those negotiations into account in amending paragraph 1 as appropriate.

Article V

Special and Differential Treatment for Developing Countries

Objectives

1. Parties shall, in the implementation and administration of this Agreement, through the provisions set out in this Article, duly take into account the development, financial and trade needs of developing countries, in particular least-developed countries, in their need to:

- (a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;
- (b) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy;
- (c) support industrial units so long as they are wholly or substantially dependent on government procurement; and
- (d) encourage their economic development through regional or global arrangements among developing countries presented to the Ministerial Conference of the World Trade Organization (hereinafter referred to as the "WTO") and not disapproved by it.

2. Consistently with the provisions of this Agreement, each Party shall, in the preparation and application of laws, regulations and procedures affecting government procurement, facilitate increased imports from developing countries, bearing in mind the special problems of least-developed countries and of those countries at low stages of economic development.

Coverage

3. With a view to ensuring that developing countries are able to adhere to this Agreement on terms consistent with their development, financial and trade needs, the objectives listed in paragraph 1 shall be duly taken into account in the course of negotiations with respect to the procurement of developing countries to be covered by the provisions of this Agreement. Developed countries, in the preparation of their coverage lists under the provisions of this Agreement, shall endeavour to include entities procuring products and services of export interest to developing countries.

Agreed Exclusions

4. A developing country may negotiate with other participants in negotiations under this Agreement mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case. In such negotiations, the considerations mentioned in subparagraphs 1(a) through 1(c) shall be duly taken into account. A developing country participating in regional or global arrangements among developing countries referred to in subparagraph 1(d) may also negotiate exclusions to its lists, having regard to the particular circumstances of each case, taking into account, *inter alia*, the provisions on government procurement provided for in the regional or global arrangements concerned and, in particular, products or services which may be subject to common industrial development programmes.

5. After entry into force of this Agreement, a developing country Party may modify its coverage lists in accordance with the provisions for modification of such lists contained in paragraph 6 of Article XXIV, having regard to its development, financial and trade needs, or may request the Committee on Government Procurement (hereinafter referred to as "the Committee") to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraphs 1(a) through 1(c). After entry into force of this Agreement, a developing country Party may also request the Committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraph 1(d). Each request to the Committee by a developing country Party relating to modification of a list shall be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter.

6. Paragraphs 4 and 5 shall apply *mutatis mutandis* to developing countries acceding to this Agreement after its entry into force.

7. Such agreed exclusions as mentioned in paragraphs 4, 5 and 6 shall be subject to review in accordance with the provisions of paragraph 14 below.

Technical Assistance for Developing Country Parties

8. Each developed country Party shall, upon request, provide all technical assistance which it may deem appropriate to developing country Parties in resolving their problems in the field of government procurement.

9. This assistance, which shall be provided on the basis of non-discrimination among developing country Parties, shall relate, *inter alia*, to:

- the solution of particular technical problems relating to the award of a specific contract; and
- any other problem which the Party making the request and another Party agree to deal with in the context of this assistance.

10. Technical assistance referred to in paragraphs 8 and 9 would include translation of qualification documentation and tenders made by suppliers of developing country Parties into an official language of the WTO designated by the entity, unless developed country Parties deem translation to be burdensome, and in that case explanation shall be given to developing country Parties upon their request addressed either to the developed country Parties or to their entities.

Information Centres

11. Developed country Parties shall establish, individually or jointly, information centres to respond to reasonable requests from developing country Parties for information relating to, *inter alia*, laws, regulations, procedures and practices regarding government procurement, notices about intended procurements which have been published, addresses of the entities covered by this Agreement, and the nature and volume of products or services procured or to be procured, including available information about future tenders. The Committee may also set up an information centre.

Special Treatment for Least-Developed Countries

12. Having regard to paragraph 6 of the Decision of the CONTRACTING PARTIES to GATT 1947 of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (BISD 26S/203-205), special treatment shall be granted to least-developed country Parties and to the suppliers in those Parties with respect to products or services originating in those Parties, in the context of any general or specific measures in favour of developing country Parties. A Party may also grant the benefits of this Agreement to suppliers in least-developed countries which are not Parties, with respect to products or services originating in those countries.

13. Each developed country Party shall, upon request, provide assistance which it may deem appropriate to potential tenderers in least-developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers in least-developed countries, and likewise assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.

Review

14. The Committee shall review annually the operation and effectiveness of this Article and, after each three years of its operation on the basis of reports to be submitted by Parties, shall carry out a major review in order to evaluate its effects. As part of the three-yearly reviews and with a view to achieving the maximum implementation of the provisions of this Agreement, including in particular Article III, and having regard to the development, financial and trade situation of the developing countries concerned, the Committee shall examine whether exclusions provided for in accordance with the provisions of paragraphs 4 through 6 of this Article shall be modified or extended.

15. In the course of further rounds of negotiations in accordance with the provisions of paragraph 7 of Article XXIV, each developing country Party shall give consideration to the possibility of enlarging its coverage lists, having regard to its economic, financial and trade situation.

*Article VI**Technical Specifications*

1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

2. Technical specifications prescribed by procuring entities shall, where appropriate:

- (a) be in terms of performance rather than design or descriptive characteristics; and

- (b) be based on international standards, where such exist; otherwise, on national technical regulations³, recognized national standards⁴, or building codes.

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

4. Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.

Article VII

Tendering Procedures

1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.

2. Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.

3. For the purposes of this Agreement:

- (a) Open tendering procedures are those procedures under which all interested suppliers may submit a tender.
- (b) Selective tendering procedures are those procedures under which, consistent with paragraph 3 of Article X and other relevant provisions of this Agreement, those suppliers invited to do so by the entity may submit a tender.
- (c) Limited tendering procedures are those procedures where the entity contacts suppliers individually, only under the conditions specified in Article XV.

Article VIII

Qualification of Suppliers

In the process of qualifying suppliers, entities shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties. Qualification procedures shall be consistent with the following:

- (a) any conditions for participation in tendering procedures shall be published in adequate

³For the purpose of this Agreement, a technical regulation is a document which lays down characteristics of a product or a service or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method.

⁴For the purpose of this Agreement, a standard is a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products 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 labelling requirements as they apply to a product, service, process or production method.

time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures;

- (b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, shall be no less favourable to suppliers of other Parties than to domestic suppliers and shall not discriminate among suppliers of other Parties. The financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier's global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations;
- (c) the process of, and the time required for, qualifying suppliers shall not be used in order to keep suppliers of other Parties off a suppliers' list or from being considered for a particular intended procurement. Entities shall recognize as qualified suppliers such domestic suppliers or suppliers of other Parties who meet the conditions for participation in a particular intended procurement. Suppliers requesting to participate in a particular intended procurement who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure;
- (d) entities maintaining permanent lists of qualified suppliers shall ensure that suppliers may apply for qualification at any time; and that all qualified suppliers so requesting are included in the lists within a reasonably short time;
- (e) if, after publication of the notice under paragraph 1 of Article IX, a supplier not yet qualified requests to participate in an intended procurement, the entity shall promptly start procedures for qualification;
- (f) any supplier having requested to become a qualified supplier shall be advised by the entities concerned of the decision in this regard. Qualified suppliers included on permanent lists by entities shall also be notified of the termination of any such lists or of their removal from them;
- (g) each Party shall ensure that:
 - (i) each entity and its constituent parts follow a single qualification procedure, except in cases of duly substantiated need for a different procedure; and
 - (ii) efforts be made to minimize differences in qualification procedures between entities.
- (h) nothing in subparagraphs (a) through (g) shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

Article IX

Invitation to Participate Regarding Intended Procurement

1. In accordance with paragraphs 2 and 3, entities shall publish an invitation to participate for all cases of intended procurement, except as otherwise provided for in Article XV (limited tendering). The notice shall be published in the appropriate publication listed in Appendix II.

2. The invitation to participate may take the form of a notice of proposed procurement, as provided for in paragraph 6.

3. Entities in Annexes 2 and 3 may use a notice of planned procurement, as provided for in paragraph 7, or a notice regarding a qualification system, as provided for in paragraph 9, as an invitation to participate.

4. Entities which use a notice of planned procurement as an invitation to participate shall subsequently invite all suppliers who have expressed an interest to confirm their interest on the basis of information which shall include at least the information referred to in paragraph 6.

5. Entities which use a notice regarding a qualification system as an invitation to participate shall provide, subject to the considerations referred to in paragraph 4 of Article XVIII and in a timely manner, information which allows all those who have expressed an interest to have a meaningful opportunity to assess their interest in participating in the procurement. This information shall include the information contained in the notices referred to in paragraphs 6 and 8, to the extent such information is available. Information provided to one interested supplier shall be provided in a non-discriminatory manner to the other interested suppliers.

6. Each notice of proposed procurement, referred to in paragraph 2, shall contain the following information:

- (a) the nature and quantity, including any options for further procurement and, if possible, an estimate of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent tender notices for the products or services to be procured;
- (b) whether the procedure is open or selective or will involve negotiation;
- (c) any date for starting delivery or completion of delivery of goods or services;
- (d) the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted;
- (e) the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents;
- (f) any economic and technical requirements, financial guarantees and information required from suppliers;
- (g) the amount and terms of payment of any sum payable for the tender documentation; and
- (h) whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.

7. Each notice of planned procurement referred to in paragraph 3 shall contain as much of the information referred to in paragraph 6 as is available. It shall in any case include the information referred to in paragraph 8 and:

- (a) a statement that interested suppliers should express their interest in the procurement to the entity;
- (b) a contact point with the entity from which further information may be obtained.

8. For each case of intended procurement, the entity shall publish a summary notice in one of the official languages of the WTO. The notice shall contain at least the following information:

- (a) the subject matter of the contract;
- (b) the time-limits set for the submission of tenders or an application to be invited to tender; and
- (c) the addresses from which documents relating to the contracts may be requested.

9. In the case of selective tendering procedures, entities maintaining permanent lists of qualified suppliers shall publish annually in one of the publications listed in Appendix III a notice of the following:

- (a) the enumeration of the lists maintained, including their headings, in relation to the products or services or categories of products or services to be procured through the lists;
- (b) the conditions to be fulfilled by suppliers with a view to their inscription on those lists 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.

When such a notice is used as an invitation to participate in accordance with paragraph 3, the notice shall, in addition, include the following information:

- (d) the nature of the products or services concerned;
- (e) a statement that the notice constitutes an invitation to participate.

However, when the duration of the qualification system is three years or less, and if the duration of the system is made clear in the notice and it is also made clear that further notices will not be published, it shall be sufficient to publish the notice once only, at the beginning of the system. Such a system shall not be used in a manner which circumvents the provisions of this Agreement.

10. If, after publication of an invitation to participate in any case of intended procurement, but before the time set for opening or receipt of tenders as specified in the notices or the tender documentation, it becomes necessary to amend or re-issue the notice, the amendment or the re-issued notice shall be given the same circulation as the original documents upon which the amendment is based. Any significant information given to one supplier with respect to a particular intended procurement shall be given simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.

11. Entities shall make clear, in the notices referred to in this Article or in the publication in which the notices appear, that the procurement is covered by the Agreement.

*Article X**Selection Procedures*

1. To ensure optimum effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement system. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.
2. Entities maintaining permanent lists of qualified suppliers may select suppliers to be invited to tender from among those listed. Any selection shall allow for equitable opportunities for suppliers on the lists.
3. Suppliers requesting to participate in a particular intended procurement shall be permitted to submit a tender and be considered, provided, in the case of those not yet qualified, there is sufficient time to complete the qualification procedure under Articles VIII and IX. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system.
4. Requests to participate in selective tendering procedures may be submitted by telex, telegram or facsimile.

*Article XI**Time-limits for Tendering and Delivery**General*

1. (a) Any prescribed time-limit shall be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time-limit, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders by mail from foreign as well as domestic points.
- (b) Each Party shall ensure that its entities shall take due account of publication delays when setting the final date for receipt of tenders or of applications to be invited to tender.

Deadlines

2. Except in so far as provided in paragraph 3,
 - (a) in open procedures, the period for the receipt of tenders shall not be less than 40 days from the date of publication referred to in paragraph 1 of Article IX;
 - (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 shall not be less than 25 days from the date of publication referred to in paragraph 1 of Article IX; the period for receipt of tenders shall in no case be less than 40 days from the date of issuance of the invitation to tender;

- (c) in selective procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders shall not be less than 40 days from the date of the initial issuance of invitations to tender, whether or not the date of initial issuance of invitations to tender coincides with the date of the publication referred to in paragraph 1 of Article IX.
3. The periods referred to in paragraph 2 may be reduced in the circumstances set out below:
- (a) if a separate notice has been published 40 days and not more than 12 months in advance and the notice contains at least:
- (i) as much of the information referred to in paragraph 6 of Article IX as is available;
 - (ii) the information referred to in paragraph 8 of Article IX;
 - (iii) a statement that interested suppliers should express their interest in the procurement to the entity; and
 - (iv) a contact point with the entity from which further information may be obtained,
- the 40-day limit for receipt of tenders may be replaced by a period sufficiently long to enable responsive tendering, which, as a general rule, shall not be less than 24 days, but in any case not less than 10 days;
- (b) in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 6 of Article IX, the 40-day limit for receipt of tenders may be reduced to not less than 24 days;
- (c) where a state of urgency duly substantiated by the entity renders impracticable the periods in question, the periods specified in paragraph 2 may be reduced but shall in no case be less than 10 days from the date of the publication referred to in paragraph 1 of Article IX; or
- (d) the period referred to in paragraph 2(c) may, for procurements by entities listed in Annexes 2 and 3, be fixed by mutual agreement between the entity and the selected suppliers. In the absence of agreement, the entity may fix periods which shall be sufficiently long to enable responsive tendering and shall in any case not be less than 10 days.
4. Consistent with the entity's own reasonable needs, any delivery date shall take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the points of supply or for supply of services.

Article XII

Tender Documentation

1. If, in tendering procedures, an entity allows tenders to be submitted in several languages, one of those languages shall be one of the official languages of the WTO.
2. Tender documentation provided to suppliers shall contain all information necessary to permit

them to submit responsive tenders, including information required to be published in the notice of intended procurement, except for paragraph 6(g) of Article IX, and the following:

- (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 must 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 this opening;
- (f) any economic and technical requirement, financial guarantees and information or documents required from suppliers;
- (g) a complete description of the products or services required or of any requirements including technical specifications, conformity certification to be fulfilled, 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 products or services of other Parties, customs duties and other import charges, taxes and currency of payment;
- (i) the terms of payment;
- (j) any other terms or conditions;
- (k) in accordance with Article XVII the terms and conditions, if any, under which tenders from countries not Parties to this Agreement, but which apply the procedures of that Article, will be entertained.

Forwarding of Tender Documentation by the Entities

- 3.
- (a) In open procedures, entities shall forward the tender documentation at the request of any supplier participating in the procedure, and shall reply promptly to any reasonable request for explanations relating thereto.
 - (b) In selective procedures, entities shall forward the tender documentation at the request of any supplier requesting to participate, and shall reply promptly to any reasonable request for explanations relating thereto.
 - (c) Entities shall reply promptly to any reasonable request for relevant information submitted 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 XIII**Submission, Receipt and Opening of Tenders and Awarding of Contracts*

1. The submission, receipt and opening of tenders and awarding of contracts shall be consistent with the following:
 - (a) tenders shall normally be submitted in writing directly or by mail. If tenders by telex, telegram or facsimile 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 tenderer and a statement that the tenderer agrees to all the terms, conditions and provisions of the invitation to tender. The tender must be confirmed promptly by letter or by the despatch of a signed copy of the telex, telegram or facsimile. Tenders presented by telephone shall not be permitted. The content of the telex, telegram or facsimile shall prevail where there is a difference or conflict between that content and any documentation received after the time-limit; and
 - (b) the opportunities that may be given to tenderers 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.

Receipt of Tenders

2. A supplier shall not be penalized if a tender is received in the office designated in the tender documentation after the time specified because of delay due solely to mishandling on the part of the entity. Tenders may also be considered in other exceptional circumstances if the procedures of the entity concerned so provide.

Opening of Tenders

3. All tenders solicited under open or selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings. The receipt and opening of tenders shall also be consistent with the national treatment and non-discrimination provisions of this Agreement. Information on the opening of tenders shall remain with the entity concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles XVIII, XIX, XX and XXI.

Award of Contracts

4.
 - (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 be from a supplier which complies with the conditions for participation. If an entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract.
 - (b) Unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.
 - (c) Awards shall be made in accordance with the criteria and essential requirements

specified in the tender documentation.

Option Clauses

5. Option clauses shall not be used in a manner which circumvents the provisions of the Agreement.

Article XIV

Negotiation

1. A Party may provide for entities to conduct negotiations:
 - (a) in the context of procurements in which they have indicated such intent, namely in the notice referred to in paragraph 2 of Article IX (the invitation to suppliers to participate in the procedure for the proposed procurement); or
 - (b) when it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.
2. Negotiations shall primarily be used to identify the strengths and weaknesses in tenders.
3. Entities shall treat tenders in confidence. In particular, they shall not provide information intended to assist particular participants to bring their tenders up to the level of other participants.
4. Entities shall not, in the course of negotiations, discriminate between different suppliers. In particular, they shall ensure that:
 - (a) any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation;
 - (b) all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations;
 - (c) all remaining participants are afforded an opportunity to submit new or amended submissions on the basis of the revised requirements; and
 - (d) when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline.

Article XV

Limited Tendering

1. The provisions of Articles VII through XIV governing open and selective tendering procedures need not apply in the following conditions, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers:
 - (a) in the absence of tenders in response to an open or selective tender, or when the tenders submitted have been collusive, or not in conformity with the essential requirements in

the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Agreement, on condition, however, that the requirements of the initial tender are not substantially modified in the contract as awarded;

- (b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products 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 products or services could not be obtained in time by means of open or selective tendering procedures;
- (d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies, or installations, or as the extension of existing supplies, services, or installations where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services⁵;
- (e) when an entity procures prototypes or a first product or service which are 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 products or services shall be subject to Articles VII through XIV⁶;
- (f) when additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the construction services described therein, and the entity needs to award contracts for the additional construction services to the contractor carrying out the construction services concerned since the separation of the additional construction services from the initial contract would be difficult for technical or economic reasons and cause significant inconvenience to the entity. However, the total value of contracts awarded for the additional construction services may not exceed 50 per cent of the amount of the main contract;
- (g) for new construction services consisting of the repetition of similar construction services which conform to a basic project for which an initial contract was awarded in accordance with Articles VII through XIV and for which the entity has indicated in the notice of intended procurement concerning the initial construction service, that limited tendering procedures might be used in awarding contracts for such new construction services;
- (h) for products purchased on a commodity market;
- (i) for purchases made under exceptionally advantageous conditions which only arise in

⁵It is the understanding that "existing equipment" includes software to the extent that the initial procurement of the software was covered by the Agreement.

⁶Original development of a first product or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards. It does not extend to quantity production or supply to establish commercial viability or to recover research and development costs.

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;

- (j) in the case of contracts awarded to the winner of a design contest provided that the contest has been organized in a manner which is consistent with the principles of this Agreement, notably as regards the publication, in the sense of Article IX, of an invitation to suitably qualified suppliers, to participate in such a contest which shall be judged by an independent jury with a view to design contracts being awarded to the winners.

2. Entities shall prepare a report in writing on each contract awarded under the provisions of paragraph 1. Each report shall contain the name of the procuring entity, value and kind of goods or services procured, country of origin, and a statement of the conditions in this Article which prevailed. This report shall remain with the entities concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles XVIII, XIX, XX and XXII.

Article XVI

Offsets

1. Entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets.⁷

2. Nevertheless, having regard to general policy considerations, including those relating to development, a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the country's Appendix I and may include precise limitations on the imposition of offsets in any contract subject to this Agreement. The existence of such conditions shall be notified to the Committee and included in the notice of intended procurement and other documentation.

Article XVII

Transparency

1. Each Party shall encourage entities to indicate the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures, under which tenders will be entertained from suppliers situated in countries not Parties to this Agreement but which, with a view to creating transparency in their own contract awards, nevertheless:

- (a) specify their contracts in accordance with Article VI (technical specifications);
- (b) publish the procurement notices referred to in Article IX, including, in the version of the notice referred to in paragraph 8 of Article IX (summary of the notice of intended procurement) which is published in an official language of the WTO, an indication of the terms and conditions under which tenders shall be entertained from suppliers

⁷Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.

situated in countries Parties to this Agreement;

- (c) are willing to ensure that their procurement regulations shall not normally change during a procurement and, in the event that such change proves unavoidable, to ensure the availability of a satisfactory means of redress.

2. Governments not Parties to the Agreement which comply with the conditions specified in paragraphs 1(a) through 1(c), shall be entitled if they so inform the Parties to participate in the Committee as observers.

Article XVIII

Information and Review as Regards Obligations of Entities

1. Entities shall publish a notice in the appropriate publication listed in Appendix II not later than 72 days after the award of each contract under Articles XIII through XV. These notices shall contain:

- (a) the nature and quantity of products or services in the contract award;
- (b) the name and address of the entity awarding the contract;
- (c) the date of award;
- (d) the name and address of winning tenderer;
- (e) the value of the winning award or the highest and lowest offer taken into account in the award of the contract;
- (f) where appropriate, means of identifying the notice issued under paragraph 1 of Article IX or justification according to Article XV for the use of such procedure; and
- (g) the type of procedure used.

2. Each entity shall, on request from a supplier of a Party, promptly provide:

- (a) an explanation of its procurement practices and procedures;
- (b) pertinent information concerning the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end and why it was not selected; and
- (c) to an unsuccessful tenderer, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer.

3. Entities shall promptly inform participating suppliers of decisions on contract awards and, upon request, in writing.

4. However, entities may decide that certain information on the contract award, contained in paragraphs 1 and 2(c), be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers.

*Article XLX**Information and Review as Regards Obligations of Parties*

1. Each Party shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement covered by this Agreement, in the appropriate publications listed in Appendix IV and in such a manner as to enable other Parties and suppliers to become acquainted with them. Each Party shall be prepared, upon request, to explain to any other Party its government procurement procedures.
2. The government of an unsuccessful tenderer which is a Party to this Agreement may seek, without prejudice to the provisions under Article XXII, such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the government of the unsuccessful tenderer provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer.
3. Available information concerning procurement by covered entities and their individual contract awards shall be provided, upon request, to any other Party.
4. Confidential information provided to any Party which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers shall not be revealed without formal authorization from the party providing the information.
5. Each Party shall collect and provide to the Committee on an annual basis statistics on its procurements covered by this Agreement. Such reports shall contain the following information with respect to contracts awarded by all procurement entities covered under this Agreement:
 - (a) for entities in Annex 1, statistics on the estimated value of contracts awarded, both above and below the threshold value, on a global basis and broken down by entities; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value on a global basis and broken down by categories of entities;
 - (b) for entities in Annex 1, statistics on the number and total value of contracts awarded above the threshold value, broken down by entities and categories of products and services according to uniform classification systems; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value broken down by categories of entities and categories of products and services;
 - (c) for entities in Annex 1, statistics, broken down by entity and by categories of products and services, on the number and total value of contracts awarded under each of the cases of Article XV; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded above the threshold value under each of the cases of Article XV; and
 - (d) for entities in Annex 1, statistics, broken down by entities, on the number and total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded under derogations to the Agreement contained in the

relevant Annexes.

To the extent that such information is available, each Party shall provide statistics on the country of origin of products and services purchased by its entities. With a view to ensuring that such statistics are comparable, the Committee shall provide guidance on methods to be used. With a view to ensuring effective monitoring of procurement covered by this Agreement, the Committee may decide unanimously to modify the requirements of subparagraphs (a) through (d) as regards the nature and the extent of statistical information to be provided and the breakdowns and classifications to be used.

Article XX

Challenge Procedures

Consultations

1. In the event of a complaint by a supplier that there has been a breach of this Agreement in the context of a procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

Challenge

2. Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.

3. Each Party shall provide its challenge procedures in writing and make them generally available.

4. Each Party shall ensure that documentation relating to all aspects of the process concerning procurements covered by this Agreement shall be retained for three years.

5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6. Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that:

- (a) participants can be heard before an opinion is given or a decision is reached;
- (b) participants can be represented and accompanied;
- (c) participants shall have access to all proceedings;
- (d) proceedings can take place in public;
- (e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;
- (f) witnesses can be presented;

- (g) documents are disclosed to the review body.
7. Challenge procedures shall provide for:
- (a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;
 - (b) an assessment and a possibility for a decision on the justification of the challenge;
 - (c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.
8. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.

Article XXI

Institutions

1. A Committee on Government Procurement composed of representatives from each of the Parties shall be established. This Committee shall elect its own Chairman and Vice-Chairman and shall meet as necessary but not less than once a year for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.
2. The Committee may establish working parties or other subsidiary bodies which shall carry out such functions as may be given to them by the Committee.

Article XXII

Consultations and Dispute Settlement

1. The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement (hereinafter referred to as the "Dispute Settlement Understanding") shall be applicable except as otherwise specifically provided below.
2. If any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded as the result of the failure of another Party or Parties to carry out its obligations under this Agreement, or the application by another Party or Parties of any measure, whether or not it conflicts with the provisions of this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter, make written representations or proposals to the other Party or Parties which it considers to be concerned. Such action shall be promptly notified to the Dispute Settlement Body established under the Dispute Settlement Understanding (hereinafter referred to as "DSB"), as specified below. Any Party thus approached shall give sympathetic consideration to the representations or proposals made to it.
3. The DSB shall have the authority to establish panels, adopt panel and Appellate Body reports,

make recommendations or give rulings on the matter, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under this Agreement or consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible, provided that only Members of the WTO Party to this Agreement shall participate in decisions or actions taken by the DSB with respect to disputes under this Agreement.

4. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days of the establishment of the panel:

"To examine, in the light of the relevant provisions of this Agreement and of (name of any other covered Agreement cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in this Agreement."

In the case of a dispute in which provisions both of this Agreement and of one or more other Agreements listed in Appendix 1 of the Dispute Settlement Understanding are invoked by one of the parties to the dispute, paragraph 3 shall apply only to those parts of the panel report concerning the interpretation and application of this Agreement.

5. Panels established by the DSB to examine disputes under this Agreement shall include persons qualified in the area of government procurement.

6. Every effort shall be made to accelerate the proceedings to the greatest extent possible. Notwithstanding the provisions of paragraphs 8 and 9 of Article 12 of the Dispute Settlement Understanding, the panel shall attempt to provide its final report to the parties to the dispute not later than four months, and in case of delay not later than seven months, after the date on which the composition and terms of reference of the panel are agreed. Consequently, every effort shall be made to reduce also the periods foreseen in paragraph 1 of Article 20 and paragraph 4 of Article 21 of the Dispute Settlement Understanding by two months. Moreover, notwithstanding the provisions of paragraph 5 of Article 21 of the Dispute Settlement Understanding, the panel shall attempt to issue its decision, in case of a disagreement as to the existence or consistency with a covered Agreement of measures taken to comply with the recommendations and rulings, within 60 days.

7. Notwithstanding paragraph 2 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in the said Appendix 1.

Article XXIII

Exceptions to the Agreement

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

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals,

order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.

Article XXIV

Final Provisions

1. *Acceptance and Entry into Force*

This Agreement shall enter into force on 1 January 1996 for those governments⁸ whose agreed coverage is contained in Annexes 1 through 5 of Appendix I of this Agreement and which have, by signature, accepted the Agreement on 15 April 1994 or have, by that date, signed the Agreement subject to ratification and subsequently ratified the Agreement before 1 January 1996.

2. *Accession*

Any government which is a Member of the WTO, or prior to the date of entry into force of the WTO Agreement which is a contracting party to GATT 1947, and which is not a Party to this Agreement may accede to this Agreement on terms to be agreed between that government and the Parties. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession which states the terms so agreed. The Agreement shall enter into force for an acceding government on the 30th day following the date of its accession to the Agreement.

3. *Transitional Arrangements*

- (a) Hong Kong and Korea may delay application of the provisions of this Agreement, except Articles XXI and XXII, to a date not later than 1 January 1997. The commencement date of their application of the provisions, if prior to 1 January 1997, shall be notified to the Director-General of the WTO 30 days in advance.
- (b) During the period between the date of entry into force of this Agreement and the date of its application by Hong Kong, the rights and obligations between Hong Kong and all other Parties to this Agreement which were on 15 April 1994 Parties to the Agreement on Government Procurement done at Geneva on 12 April 1979 as amended on 2 February 1987 (the "1988 Agreement") shall be governed by the substantive⁹ provisions of the 1988 Agreement, including its Annexes as modified or rectified, which provisions are incorporated herein by reference for that purpose and shall remain in force until 31 December 1996.
- (c) Between Parties to this Agreement which are also Parties to the 1988 Agreement, the rights and obligations of this Agreement shall supersede those under the 1988 Agreement.
- (d) Article XXII shall not enter into force until the date of entry into force of the WTO Agreement. Until such time, the provisions of Article VII of the 1988 Agreement shall apply to consultations and dispute settlement under this Agreement, which provisions are hereby incorporated in the Agreement by reference for that purpose. These

⁸For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Communities.

⁹All provisions of the 1988 Agreement except the Preamble, Article VII and Article IX other than paragraphs 5(a) and (b) and paragraph 10.

provisions shall be applied under the auspices of the Committee under this Agreement.

- (e) Prior to the date of entry into force of the WTO Agreement, references to WTO bodies shall be construed as referring to the corresponding GATT body and references to the Director-General of the WTO and to the WTO Secretariat shall be construed as references to, respectively, the Director-General to the CONTRACTING PARTIES to GATT 1947 and to the GATT Secretariat.

4. *Reservations*

Reservations may not be entered in respect of any of the provisions of this Agreement.

5. *National Legislation*

- (a) Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities contained in its lists annexed hereto, with the provisions of this Agreement.
- (b) Each Party shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

6. *Rectifications or Modifications*

- (a) Rectifications, transfers of an entity from one Annex to another or, in exceptional cases, other modifications relating to Appendices I through IV shall be notified to the Committee, along with information as to the likely consequences of the change for the mutually agreed coverage provided in this Agreement. If the rectifications, transfers or other modifications are of a purely formal or minor nature, they shall become effective provided there is no objection within 30 days. In other cases, the Chairman of the Committee shall promptly convene a meeting of the Committee. The Committee shall consider the proposal and any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement prior to such notification. In the event of agreement not being reached, the matter may be pursued in accordance with the provisions contained in Article XXII.
- (b) Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. Such modification shall become effective the day after the end of the following meeting of the Committee, provided that the meeting is no sooner than 30 days from the date of notification and no objection has been made. In the event of an objection, the matter may be pursued in accordance with the procedures on consultations and dispute settlement contained in Article XXII. In considering the proposed modification to Appendix I and any consequential compensatory adjustment, allowance shall be made for the market-opening effects of the removal of government control or influence.

7. *Reviews, Negotiations and Future Work*

- (a) The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the General Council of the WTO of developments during the periods covered by

such reviews.

- (b) Not later than the end of the third year from the date of entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving this Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to developing countries.
- (c) Parties shall seek to avoid introducing or prolonging discriminatory measures and practices which distort open procurement and shall, in the context of negotiations under subparagraph (b), seek to eliminate those which remain on the date of entry into force of this Agreement.

8. *Information Technology*

With a view to ensuring that the Agreement does not constitute an unnecessary obstacle to technical progress, Parties shall consult regularly in the Committee regarding developments in the use of information technology in government procurement and shall, if necessary, negotiate modifications to the Agreement. These consultations shall in particular aim to ensure that the use of information technology promotes the aims of open, non-discriminatory and efficient government procurement through transparent procedures, that contracts covered under the Agreement are clearly identified and that all available information relating to a particular contract can be identified. When a Party intends to innovate, it shall endeavour to take into account the views expressed by other Parties regarding any potential problems.

9. *Amendments*

Parties may amend this Agreement having regard, *inter alia*, to the experience gained in its implementation. Such an amendment, once the Parties have concurred in accordance with the procedures established by the Committee, shall not enter into force for any Party until it has been accepted by such Party.

10. *Withdrawal*

- (a) Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date on which written notice of withdrawal is received by the Director-General of the WTO. Any Party may upon such notification request an immediate meeting of the Committee.
- (b) If a Party to this Agreement does not become a Member of the WTO within one year of the date of entry into force of the WTO Agreement or ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect from the same date.

11. *Non-application of this Agreement between Particular Parties*

This Agreement shall not apply as between any two Parties if either of the Parties, at the time either accepts or accedes to this Agreement, does not consent to such application.

12. *Notes, Appendices and Annexes*

The Notes, Appendices and Annexes to this Agreement constitute an integral part thereof.

13. *Secretariat*

This Agreement shall be serviced by the WTO Secretariat.

14. *Deposit*

This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party a certified true copy of this Agreement, of each rectification or modification thereto pursuant to paragraph 6 and of each amendment thereto pursuant to paragraph 9, and a notification of each acceptance thereof or accession thereto pursuant to paragraphs 1 and 2 and of each withdrawal therefrom pursuant to paragraph 10 of this Article.

15. *Registration*

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four in a single copy, in the English, French and Spanish languages, each text being authentic, except as otherwise specified with respect to the Appendices hereto.

NOTES

The terms "country" or "countries" as used in this Agreement, including the Appendices, are to be understood to include any separate customs territory Party to this Agreement.

In the case of a separate customs territory Party to this Agreement, where an expression in this Agreement is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.

Article 1, paragraph 1

Having regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by Parties.

West Kowloon Cultural District Authority
Internal Procedure No. IP/PDD/PRO/2012-001

Procurement Procedures for Capital Projects
Records of Changes

Version	Date of Issue	Pages of Changes	Major changes from last version
0	21 March 2012	-	-
1	31 August 2016	Page No. 7, 15, 16, 17, 20, 24 & 27 and Revised Attachment 1 (29 pages)	(a) Changes to this Procedures following re-organisation of the Project Delivery Department

	Job Title	Date	Name	Signature
Originator	Head, Project Procurement and Contracts	31 August 2016	Johnny TAM	
Controller	Director, Project Control	31 August 2016	Jeremy STOWE	
Approver	The WKCDA Board (Paper 35/2016)	22 July 2016	-	-

CONTENTS

Records of Changes	1
Scope and coverage	3
Classification of information	4
Classification of procurement.....	4
Types of tendering	5
Funding	6
Approval to be sought	6
Proposal to proceed, shortlist and tender invitation	7
Submissions of tenders	11
Tender documents	13
Tenders in foreign currencies	16
Tender deposits / tender bonds	17
Contract deposits / performance bonds.....	17
Retention moneys	19
Liquidated damages	19
Receipt and clarification of tenders.....	19
Tender negotiations.....	21
Tender assessment.....	22
Tender reports.....	24
Cancellation of tender exercise	26
Acceptance of tenders	26
Bid challenges	27
Attachment 1 – An extract of the WTO Agreement of Government Procurement	

SCOPE AND COVERAGE

- 1 The West Kowloon Cultural District Authority (“Authority”) has been given an upfront endowment of \$21.6b (in 2008 Net Present Value (NPV)), as approved by the Finance Committee of the Legislative Council on 4 July 2008, for developing the West Kowloon Cultural District (WKCD). The one-off upfront endowment is to cover the capital costs of the following component parts of the WKCD project-
 - i) Planning, design and construction of 17 core arts and cultural facilities (CACF) (comprising 15 performing arts venues, a cultural institution with museum functions (M+) together with its off-site conservatory laboratory and storage facilities, and an exhibition centre), other arts and cultural facilities (OACF), Retail, Dining and Entertainment (RDE) facilities, transport facilities and 23 ha public open space (which collectively constitute the “Capital Projects”);
 - ii) Planning of the WKCD and project management which include consultancies, technical studies and public consultations for the preparation of a development plan for the whole WKCD site, and project management during the planning and construction stage;
 - iii) Major repair and renovation of the facilities mentioned in paragraph 1 (i); and
 - iv) Collection, exhibition development, conservation laboratory equipment and library setup for the M+.

The purpose of these Procurement Procedures is to ensure the procurement activities in respect of the planning, design and construction of the Capital Projects will be performed in a proper and auditable manner. The requirements set out in these Procurement Procedures for Capital Projects shall be followed for all the procurement activities in respect of the planning, design, construction, project management, major repair and renovation of the Capital Projects. For the avoidance of doubt, the procurement of consultancies and technical studies for the planning of the WKCD shall also be governed by these Procedures. The procurement for non-Capital project related goods and services would be governed by the procurement procedures named as “General Procurement Guidelines” accordingly.

- 2 Although the Authority has not yet been specified as being subject to the World Trade Organization Government Procurement Agreement (“WTO GPA”), it is recognized that the objective of the GPA of providing open and fair competition is in line with the Authority’s procurement policy and the requirements of WTO GPA are to be followed. An extract of the WTO GPA is included as **Attachment I** to these Procedures. The GPA provisions apply to the procurement of all goods, services and construction works, except the following –

- a. Goods and services other than construction services with values below 400,000 Special Drawing Rights (SDR)(see Note 1 below) (equivalent to \$4 million approximately);
- b. Works-related consultancy agreements; and
- c. Construction works or services at or below 5,000,000 SDR (equivalent to \$50 million approximately).

Note 1: SDR's, are defined and managed by the International Monetary Fund (IMF); SDR's are subject to daily revision and their value against the Hong Kong Dollar can be checked by reference to the IMF website (Google Special Drawing Rights), but as the movements are generally small the above can be taken as sufficiently reliable for most purposes.

No contract shall be sub-divided merely to avoid the application of the GPA.

CLASSIFICATION OF INFORMATION

3. Information relating to tenders and contracts should be handled in the following manner —
 - (a) All communications regarding tenders, from the time tenders are received and opened until a decision is made on the acceptance or otherwise of the tenders must be classified as RESTRICTED (TENDER). Correspondence on prequalification and single/restricted tendering should also be classified as RESTRICTED (TENDER).
 - (b) Only officers who are specifically authorized to do so may open and handle communications, documents and correspondence (documentation) relating to tenders and contracts. Authorized officers shall handle such documentation with great care and in strict conformity with the Authority's security requirements for such documentation, distribution of such documentation shall be made on a need-to-know basis.

CLASSIFICATION OF PROCUREMENT

4. For the purpose of compliance with these Procedures, procurement is classified as follows -
 - 4.1 Category 1 Procurement – means the procurement in respect of Capital Projects with an estimated works contract value of more than HK\$100 million, or a consultancy services agreement value of more than HK\$50 million.
 - 4.2 Category 2 Procurement - means the procurement in respect of Capital Projects with an estimated works contract value of more than HK\$10 million and up to

HK\$100 million, or a consultancy services agreement value of more than HK\$5 million and up to HK\$50 million.

- 4.3 Category 3 Procurement - means the procurement in respect of Capital Projects with an estimated works contract value of up to HK\$10 million, or a consultancy services agreement value up to HK\$5 million.

No contract shall be sub-divided merely to avoid it being classified in a higher procurement category.

TYPES OF TENDERING

5. Normally open tendering should be used for tenders; where circumstances warrant the adoption of an alternative tendering method, the justification should be specified in the application for approval from the relevant approving authority, as stipulated in these Procedures.
6. The various types of tendering are –

(i) Open tendering

Tender invitations are published on the Authority's website, in selected local publications, and in selected overseas journals as appropriate. Consulates and/or overseas trade commissions may also be notified where appropriate. All interested suppliers / contractors are free to submit tenders.

(ii) Selective tendering

Normally selective tendering is adopted where tenderers are required to meet certain qualification criteria or to pass a technical assessment to ensure suitability. Tender invitations are sent by letters to all suppliers / contractors on the relevant approved lists of qualified suppliers / contractors established and approved for the purpose of selective tendering. Where no such approved list of qualified suppliers / contractors is maintained by the Authority, relevant approved lists maintained by relevant Government Departments may be used. The list of tenderers with the justification for the choice of such a list should be specified in the application for approval from the relevant approving authority as stipulated in these Procedures.

(iii) Prequalified tendering

In circumstances where the prequalification of a list of tenderers financially and technically capable of undertaking a particular project or supplying a particular product is needed, prequalified tendering is to be adopted. A request for approval to conduct prequalification including all relevant supporting information (such as the proposed prequalification criteria, weightings and

marking scheme) should be made from the relevant approving authority stipulated in these Procedures. Invitations to apply for prequalification may take the form of open tendering or selective tendering and the respective procedures will apply. After the prequalified tenderers list has been approved by the approving authority, tender invitations are sent to the prequalified suppliers / contractors.

(iv) Single or Restricted tendering (these fall under “limited tendering” in the WTO GPA)

Tender invitations are sent to only one or a number of suppliers / contractors approved by the relevant approving authority stipulated below. Single or Restricted tendering is only used when circumstances do not permit the use of other types of tendering, for example, on grounds of extreme urgency or security, for proprietary products or for reasons of compatibility.

FUNDING

7. The Budget Owner as defined in the Guidelines on Budgetary Control and Arrangement, or the Subject Officer, as may be assigned by the Budget Owner, shall invite tenders for a works contract / consultancy agreement in respect of the capital projects only after the funding for the respective works contract / consultancy agreement having been approved. For virement of funds between individual work contracts / consultancy agreement, the requirements set out in the latest version of the approved Guidelines on Budgetary Control and Arrangement including its Annex entitled “Virement of Funds for Capital Projects shall be followed.

APPROVAL TO BE SOUGHT

8. Starting from the contract/consultancy inception / initiation and up to the award of the contract/consultancy, various approvals are required. Basically, approvals are required for (a) Proposal to Proceed - the need for and the initiation of a contract / consultancy, (b) Pre-qualification and Tender - the tender actions in respect of selecting a contractor for the contract / a consultant for the consultancy, and (c) Recommendations for Contract Award - the decision to award a contract/consultancy and to enter into contractual relationship with the selected contractor/consultant. The approvals to be sought and the appropriate approving authorities during these phases are summarized in the Table below. The approval is subject to availability of funding within the annual budget approved by the Board. For the avoidance of doubt, the preparation and the approval of the budget for any procurement shall be governed by the current version of the approved “Guidelines on Budgetary Control and Arrangement”. Given the adoption of Single or restricted tendering may be politically sensitive and may arouse public attention, the approving authority for the use of

Single or restricted tendering should be the same as that for “Recommendation for Contract Award.

APPROVALS REQUIRED	APPROVING AUTHORITIES		
	Category 1 Procurement	Category 2 Procurement	Category 3 Procurement
Proposal to Proceed Prequalification and Tender, (tender list and shortlist, assessment panel, criteria, weightings) (Note 1)	To be approved by the Development Committee on the advice of CEO + DPC + ED, F	To be approved by DPC + Head, P&C + SM, F	To be approved by DPC + Procurement Manager + SM, F
Recommendations for Contract Award	To be endorsed by the Development Committee	To be endorsed by DPC + Head, P&C + SM, F	To be endorsed by DPC + Head, P&C + SM, F
	To be approved by the Board on the advice of the Development Committee	To be approved by the Development Committee of the Board on the advice of DPC + HPC + SM, F	To be approved by CEO + DPC + ED, F On the advice of DPC + Head, P&C + SM, F

Note 1: The approving authority for using single or restricted tendering should be the same as that for “Recommendation for Contract Award” in respect of category 1, 2 or 3 as appropriate.

PROPOSAL TO PROCEED, SHORTLIST AND TENDER INVITATION

9. Before proceeding with the procurement of a works contract / consultancy agreement in respect of the Capital Projects, the Subject Officer (as assigned by the Budget Owner), who shall be a Manager (Grade 3 or above or its equivalent) shall submit a “Proposal to Proceed”.. The application shall include:
- i. Justification for the intended Procurement and provide details of the budget provision including whether tenders in foreign currencies would be accepted. If the intended procurement is an unbudgeted item, provide its estimated value.
 - ii. The type of intended Procurement, e.g. fixed price or fluctuating price, remeasurable or lump sum, target cost, fixed fee, or reimbursable, etc.
 - iii. The method of tendering to be adopted, e.g. Open Tendering, Selective Tendering, or Single/Restricted Tendering, and the considerations / justifications for the type of tendering selected. For Selective Tendering, the method of selecting the tenderers shall also state whether a prequalification is required.
 - iv. The membership and responsibilities of the Tender Assessment Panel, the assessment criteria (and weighting scheme if applicable) (which should apply equally to alternative proposals, if it is intended to allow alternative

proposal to be submitted), the award criteria, e.g. the lowest compliant bid, or the most favourable bid after a technical: financial weighted assessment.

As far as selecting the method of tendering as described in paragraph 9(iii) is concerned, there may be circumstances which require the prequalification of a list of tenderers who are financially and technically capable of undertaking a particular project or of supplying a particular product. These include projects of an extremely complex nature, of high value or subject to very rigid completion programmes; projects which call for a high level of co-ordination, technical expertise, or a non-standard form of contract, e.g. Build-Operate-Transfer (BOT) or Design-and-Build contracts; and products which are critical to the user departments. In addition to the information set out in paragraph 9 (i) to (iv) above, additional information to be included for the consideration of the approving authority shall include:

- v. Contract Information and justifications for adopting pre-qualification
- vi. Instructions to Applicants
- vii. Information required from Applicants

10. Procurements will normally be made by Open or Selective Tendering. Restricted or Single Tendering shall only be used in circumstances when Open or Selective Tendering would not be an appropriate or effective means of obtaining the requisite supplies or services. Generally, the criteria for determining when Restricted or Single Tendering can be used include the following:-

- (i) where there is extreme urgency brought about by unforeseeable events and where the delay that would arise as a result of open tendering would have serious and adverse consequence to the Authority;
- (ii) where for reasons connected with the protection of copyright or technical reasons, the products or services can only be supplied by a particular supplier and where no reasonable alternative or substitute exists;
- (iii) where there is no response to an open or selective tender, or when the tenders submitted have been collusive, or not in conformity with the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation, on condition that the requirements of the initial tender are not substantially modified in the contract as awarded;
- (iv) where the equipment or services to be purchased must meet requirements of compatibility or interchangeability with already existing equipment or services;
- (v) where it can be demonstrated that “patent” or “proprietary” items are the only items which can meet the specification;
- (vi) where services are to be provided by utility companies;
- (vii) where maintenance is to be executed on patent or specialized equipment and where the warranty over the equipment gives the supplier of the equipment the exclusive right to carry out the maintenance services; and
- (viii) where lease terms require that work must be executed by a particular firm.

For procurements governed by the WTO GPA, Limited Tendering procedures shall only be used in circumstances prescribed in Article XV of the WTO GPA.

11. Single or restricted tender procedures shall only be initiated with the prior approval of the relevant approving authority. Tenderers shall not be informed that tenders are being invited on a single or restricted basis, and shall be required to submit their tenders in the same manner as open and selective tender procedures. Notice of tender invitation shall be sent by letter to the tenderers. When seeking approval to adopt single or restricted tendering procedures, the following should be covered in the application —
 - (i) background of the work to be carried out or the goods to be procured;
 - (ii) estimated cost;
 - (iii) justification for using Single or Restricted Tendering (why open tenders are not appropriate, with reference to Sub-paragraphs 10(i) to 10(viii) above);
 - (iv) if the reason for proposing single or restricted tendering action is urgency, explain why tender action could not have been initiated earlier and why the additional time required for open tendering would have serious or adverse consequence; and
 - (v) explain the professional capability and experience of the contractor nominated.
12. The Subject Officer shall seek approval from the relevant approving authority of the membership and responsibilities of the Tender Assessment Panel (TAP) and the award criteria. Normally, the Subject Officer shall be the Chairman of the Tender Assessment Panel, and the TAP would comprise members from the representatives of the technical, procurement and contracts and finance teams, supported by legal and external consultants as deemed necessary. The TAP administers the tender process and assesses/evaluates technical and financial submissions proposed by the tenderers, deals with the withdrawal of, or other treatment of, tender qualifications and reports to and makes recommendations to the approving authority including with respect to tender qualifications and as to which of the competing tenders should be successful. The TAP shall also determine and seek approval of the tender evaluation criteria and the weighting to be given to the individual components of the tender evaluation criteria and the “technical/financial” weighting. Furthermore, in appropriate circumstances, the TAP makes recommendations as regards whether alternative offers may be proposed by tenderers and if so under what conditions, such as whether a conforming tender must be submitted before an alternative will be considered.
13. The TAPs shall prepare a detailed Tender Report in accordance with the requirements of Paragraphs 53 & 54 below, to be submitted to the approving authority as stipulated in these Procedures.

14. Tender notices and invitations are to be handled in accordance with the following requirements -
- a. Tender notices and invitations shall be issued in the manner specified in these Procedures according to the types of tendering to be used. Sufficient durations shall be allowed for the applicants / tenderers to prepare their prequalification / tender submissions, provided always that under urgent situations, a shorter duration may be allowed as approved by the relevant approving authority stipulated by these Procedures.
 - b. Except as otherwise specified in these Procedures or as approved by the relevant approving authority, the number of tenderers to be selected for an intended procurement shall not be less than three and will normally be six. However, for consultancies, the number of tenderers should not be less than four. For works contracts, the number of tenderers should normally be from six to eight. Where a prequalification exercise has been conducted, the number of tenderers may range from four to six. If there is sufficient justification, more or fewer tenderers may be selected, subject to approval from the appropriate authority. If the number of tenderers falls below 3 after the issue of tender documents, the relevant approval authority shall be notified and given a recommendation as to how the matter should proceed, the tender shall not proceed until the relevant approving authority has given its directions.
 - c. Open Prequalification shall be undertaken by means of advertising for expressions of interest on the Authority's website, selected local publications and/or selected overseas journals. The advertisement should contain a brief description of the Procurement along with its estimated timescale, cost range, details of any special requirements and closing date. Applicants shall be advised to apply for prequalification and to provide details of their experience, resources and capabilities with respect to the Procurement being considered, so that their suitability for prequalification can be assessed.
 - d. A suitably structured prequalification questionnaire shall be issued to the interested applicants, to be completed and returned as an Application for Prequalification for the subject Procurement. This will be evaluated by the assessment panel and scored accordingly. Scoring will be coordinated by the Leader of the assessment panel, and the appropriate number of top scoring applicants will normally be selected as tenderers.
 - e. Prequalification questionnaires for a specific Procurement should be returned on a common closing date. Nevertheless, unsolicited or late applications for prequalification may be considered on their merit, provided there is sufficient time for processing within the procurement programme. A flexible and equitable approach should be maintained in order to ensure that sufficient applicants and information would be available to be considered. Approval for any change in the closing date is NOT necessary but should be notified to the appropriate approving authority retrospectively.
 - f. Upon completion of a prequalification process, each applicant shall be notified in writing, whether or not he has been successful in prequalifying, for a specific Procurement. All discussions, documents and correspondence

relating to tenderer selection shall be treated as confidential and all communication with prospective tenderers shall be undertaken via the leader of the assessment panel and copied to the Head, Project Procurement and Contracts.

- g. Before requesting approval from the approving authority for the list of tenderers (in particular where the prequalification process has taken a considerable time), the proposed tenderers shall be advised that they are being considered for an intended Procurement and shall be asked to confirm their willingness to submit a bona fide tender. The request shall include details of the scope, extent, value range, contract arrangement, and programme for the Procurement. Proposed tenderers who decline shall be replaced with the next best potential tenderer.
- h. The proposed tenderers shall be approved by the appropriate authority as described in these Procurement Procedures according to the category of the intended procurement.

For procurements governed by the WTO GPA, the criteria in respect of information to be provided in the Tender Notice are set out in paragraph 6 of Article IX of the WTO GPA.

SUBMISSION OF TENDERS

- 15. Selected Tenderers shall be required to comply with the requirements in respect of “Submission of Tenders” as described below. These requirements shall be clearly described in the tender documents.
 - A) The “Three Envelope System” shall be adopted
 - I) In the Three Envelope System, Tenderers are required to place their “Tender Price Documents” and “Technical Submission” in two separate sealed envelopes, and the two envelopes shall then be enclosed in the third sealed envelope before the submission of their Tender.
 - II) The purpose of this three envelope system is to ensure –
 - i) All tender price documents and technical submissions are assessed by the financial assessment team and the technical assessment team independently and separately, and no financial or price related information will be made known to any of the technical assessment team (unless approved by the relevant Approving Authority);
 - ii) Both the “Tender Price Documents” and “Technical Submission” submitted by the Tenderer will be submitted and received in one package to eliminate any possible logistical problems.

III) The requirement and the process of this three envelopes system would normally be set out in the “Conditions to Tenderers” as follows-

i) The Tender Price Documents and Technical Submission shall be placed in two separate envelopes as specified below.

ii) In the first sealed envelope clearly marked with the ‘**Tender Reference**’ and the words ‘**Tender Price Documents (RESTRICTED)(TENDER)**’, the following tender price documents shall be deposited (note: the Tender Price Documents listed below would be determined on a contract-specific basis and shall be stated clearly in the Conditions to Tenderers)-

- a. The Form of Tender in hard copy format fully completed, signed, witnessed and dated;
- b. The Bills of Quantities in either hard copy format or electronic format fully priced as to each item, extended, cast and totaled as appropriate;
- c. The Price Fluctuation Factor completed, in hard copy format; and
- d. The Grand Summary of the Bills of Quantities in either hard copy format or electronic format.

iii) In the second sealed envelope clearly marked with the ‘**Tender Reference**’ and the words ‘**Technical Submission (RESTRICTED)(TENDER)**’, the following technical submissions shall be deposited (note: the Technical Documents listed below would be determined on a contract-specific basis and shall be stated clearly in the Conditions to Tenderers)

- a. Technical resources and technical proposals;
- b. Tenderer's experience and past performance;
- c. Proposed organization chart and CVs of key personnel;
- d. Proposed design consultant, subcontractors and suppliers;
- e. Proposed method statement and construction sequences;
- f. Proposed construction programme; and
- g. Statement of Convictions.

iv) The two envelopes shall then be enclosed in the third sealed envelope addressed, endorsed and deposited as required by the “Letter of Invitation to Tender” or the “Tender Notice”.

B) Tenderers shall be advised in the Conditions of Tender, that their tenders shall be submitted in separate sections as follows:

- i) The Tender Price Documents, comprising the Form of Tender and the Pricing Document, along with any financing proposals, alternative financial offers and any contractual or commercial statements.
 - ii) The Technical Submission, comprising all technical details, including where appropriate any alternative technical proposals.
 - iii) Hard copies of the Tender Price Documents and the Technical Submission shall be contained in two separate sealed envelopes, affixed with the address label supplied by the Authority, and shall be placed in the third sealed envelope.
- C) All tender submissions shall be deposited in the Authority's Tender Box on or before the designated closing time. The submission time and the tender opening shall be recorded by the designated officer and witnessed by a second officer.
- D) **Under no circumstance shall late tenders be opened or accepted without the express written approval of the approving authority.** Nevertheless, a tenderer shall not be penalized if a tender is received in the office designated in the tender documents after the time specified because of delay due solely to the mishandling on the part of the Authority's staff.
- E) Any prescribed time-limits for submission of tenders shall be adequate to allow the tenderers to prepare and submit tenders before closing of the tendering procedures. In determining any such limit, the needs, complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders by mail from foreign as well as domestic points are factors to be taken into account. For procurements governed by the WTO GPA, the requirements in respect of time-limits for tendering and delivery are set out in Article XI of the WTO GPA (and in brief, not less than 40 days for open tendering and not less than 25 days for selective tendering).

TENDER DOCUMENTS

16. The form and content of a tender document package will depend upon the type and value of the intended Procurement to be made but the tender documents should normally consist of:
- (I) General Contract Documents, comprising:
 - (i) Standard terms and conditions, e.g. Conditions of Contract, Terms of Agreement, Terms of Purchase;
 - (ii) General Specifications;
 - (iii) Materials and Workmanship Specifications;
 - (iv) Form of Tender (unless a bespoke FoT is used).

Where Standard Forms are used for these documents it will normally be sufficient to include them by reference, but with a statement to say that hard or soft copies will be made available on request by tenderers.

(II) Particular Contract Documents, comprising:

- (i) Particular Specifications or Services Specifications
- (ii) Drawings
- (iii) The Pricing Document, e.g. the Bill of Quantities, Schedule of Prices or Schedule of Fees
- (iv) The Form of Tender (Where a bespoke FoT is used)
- (v) Special Conditions of Tender
- (vi) Special Conditions of Contract

(III) Other Contract Documents, incorporated into the Contract by reference e.g.:

- (i) The Drawing & CADD Manual
- (ii) The Design Standards Manual
- (iii) The Health & Safety Manual
- (iv) Other reference documents (e.g. special insurance policies)

(IV) Non Contract Documents, comprising:

- (i) Instructions to Tenderers (General and Particular if necessary).
- (ii) The tender invitation letter
- (iii) Other documents such as schedules of rates/prices which may be used for tender/claims evaluation but which it is not intended to be incorporated into the contract

For procurements governed by the WTO GPA, the requirements in respect of tender documentation are set out in paragraph 2 of Article XII of the WTO GPA.

17. The Subject Officer responsible for the procurement shall ensure that tender specifications which define the requirements of the contract are drawn up in a manner which meets the Authority's procurement policy of maintaining open and fair competition. Tender specifications shall not be prepared, adopted or applied with a view to or with the effect of creating obstacles to international trade or to competition amongst the potential tenderers.
18. When inviting tenders under whichever type of procedures, the tender specifications should be written in easily comprehensible general terms based on the functional and

performance characteristics of the products required, and not around the technical data of a certain model of the goods or equipment to be purchased. There shall be no requirement for or reference to a particular trade mark or name, patent, design or type, specific origin, producer or service provider, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and words such as “or equivalent” are included in the tender documents. Where standards are referred to, where practicable, international standards should be used. For procurements governed by the WTO GPA, the requirements in respect of tender specification are set out in Article VI of the WTO GPA.

19. The Subject Officer shall be responsible for establishing the design and/or performance criteria and other technical requirements, coordinating programming information, accurate pricing documents and cost estimates to ensure that the tender documents truly reflect the scope and requirements of the intended Procurement. Where the intended Procurement is designed and administered by external consultant(s), the Subject Officer shall be responsible to ensure that the respective consultant(s) are adhering to the requirements set out in these Procurement Procedures.
20. The Subject Officer shall be responsible for reviewing the draft tender documents during preparation to ensure that their requirements are properly reflected in the documents, and ensuring, with the support of the General Counsel, that the appropriate Conditions of Contract are adopted.
21. Before issuing a tender invitation, the Subject Officer shall obtain written confirmation from the Director, Project Control that the tender scope and content have been approved for issue and shall copy this confirmation to the Head, Project Procurement and Contracts.
22. Where non-standard terms and conditions are to be included in the tender documents, legal clearance from the General Counsel shall be obtained (Note, this shall include in all cases, Instructions to Tenderers (General and Particular if necessary), the tender invitation letter (and other documents such as schedules of rates/prices which may be used for tender/claims evaluation but which it is not intended to incorporate into the contract) the Consultancy Brief, the Particular Specification or Services Specification, The Pricing Document, e.g. the Bill of Quantities, Schedule of Prices or Schedule of Fees, The Form of Tender, Special Conditions of Tender and the Special Conditions of Contract, together with any other non-standard forms and documents.) The Subject Officer shall copy the legal clearance to the Head, Project Procurement and Contracts.
23. Normally, the estimated contract value should not be disclosed to the tenderers as it may affect the tenderers in the preparation of their tender proposals, which may undermine the position of the Authority. If however, the estimated contract value has already been disclosed to the public prior to the issue of tenders, in all fairness, all the tenderers should be informed of the estimated contract value.

TENDERS IN FOREIGN CURRENCIES

24. In general, contract sums should be quoted and paid in Hong Kong dollars. Where the contents of the works included in the tender contain substantial value of equipment or items manufactured / imported from foreign countries, in order to avoid tenderers putting in an unreasonable amount of allowance in their quotations to cover exchange risks for the contract period, provided it is agreed by the Director, Project Control and Executive Director, Finance, tenderers may be allowed to quote in foreign currencies subject to the following conditions —
- (i) the goods or equipment offered are manufactured outside Hong Kong and form a significant part of the contract;
 - (ii) the foreign currency quoted must be the currency of the country supplying the goods or equipment, and more than one currency may be quoted if items from more than one foreign country are involved;
 - (iii) tenders likely to cost HK\$10 million or more cannot be quoted in a foreign currency, other than US dollars, without the prior approval of the Executive Director, Finance, and prior arrangement having been lined up with the Treasurer, who must be satisfied that a refusal to allow tenderers to quote in a foreign currency other than US dollars will significantly reduce the degree of competition in tendering to the detriment of the public interest;
 - (iv) local materials and labour should be priced in Hong Kong dollars, which generally should include materials manufactured outside Hong Kong but which require a substantial amount of further processing in the Hong Kong Special Administrative Region; and
 - (v) services provided by personnel based outside Hong Kong and salaried in a foreign currency may be quoted in that foreign currency.
25. If DPC and ED, F approve the invitation of tenders in foreign currencies, for tender comparison purposes quotations in foreign currencies must be converted to Hong Kong dollars. The conversion is to be based on the selling rate of the relevant currency quoted by the Hong Kong Association of Banks at the close of business on the day before the tender closing date. The Approving Authority, in considering recommendations for the award of contracts, will also take into consideration any significant fluctuations in exchange rates after the tender closing date. The Subject Officer should state in tender reports the converted tendered sums based on the exchange rates on the tender closing date and at the date of reporting and should indicate whether the ranking of the tender sums has changed as a result of currency fluctuations between the two dates.

TENDER DEPOSITS/TENDER BONDS

26. A tender deposit / bond is not normally required. Where a tender deposit/ bond is required, the tender documents shall specify the amount of the deposit/ bond and the methods of payment (whether by cheque, cashier order and/or presentation of original receipts along with the tender) and refund. Tender deposits will be refunded to unsuccessful tenderers without interest. If a tender bond is required, the bondsman (i.e. the bank or insurance company issuing the bond) shall be approved by the Authority. In the case of a bank, the bank shall either be incorporated in Hong Kong or shall be a registered branch in Hong Kong, not a representative office. In the case of an insurance company the Company shall be recognized by the Hong Kong Insurance Commissioner and shall have a Branch office in Hong Kong. Both banks and insurance companies shall be required to have their address for the service of process in Hong Kong. If a tenderer proposes a bank or insurance company that does not meet the above criteria to be the bondsman, advice must be sought from the Finance and Legal departments as regards its acceptability and the need for additional provisions in the Bond (e.g. choice of law clause, jurisdiction clause, appointment of local agent for service of process clause and immunity waiver clause) and if required, the wording of such provisions.

CONTRACT DEPOSITS/PERFORMANCE BONDS

27. Depending on the potential risks arising from the contract and the terms of the Conditions of Contract adopted, successful tenderers may be required to pay a contract deposit (in the form of cash) or submit a performance bond to the Authority within a specified period (usually 14 days after the date of the Letter of Acceptance, rather than at the time of tender submission) as security for the due and faithful performance of the contract. A performance bond may be in the form of a guarantee arranged by a bank, insurance company, or the parent company (which has been assessed to be financially capable) of the tenderer.
28. Unless otherwise approved by the DPC and ED, F, the requirements in respect of the contract deposit, performance bond or guarantee should follow the guidelines below -
- a) A bond is required for any Works or Supply Contract of HK\$10M or more (i.e. Category 1 and Category 2 procurements for Works Contracts). A bond is not required for Works or Supply contracts of less than HK\$10M (i.e. Category 3 procurements for Works Contracts), A bond is not required for any consultancy agreements, unless considered necessary by the Finance Department with regard to the financial capability of the tenderers. The amount of cash security or bond required is shown as follows-

	Estimated Value of Contract	Amount of cash security or bond, calculated at % of the Contract Price
Category 1 procurement – Works contracts	Over \$100M	5%
Category 2 procurement – Works contracts	Over \$10M and up to \$100M	10%
Category 3 procurement – Works contracts	Up to \$10M	Not required
All consultancy agreements	Any value	Not required

- b) If a bond is required, the bondsman (i.e. the bank or insurance company issuing the bond) shall be approved by the Authority. In the case of a bank, the bank shall either be incorporated in Hong Kong or shall be a registered branch in Hong Kong, not a representative office. In the case of an insurance company the Company shall be recognized by the Hong Kong Insurance Commissioner and shall have a Branch office in Hong Kong. Both banks and insurance companies shall be required to have their address for the service of process in Hong Kong. If a tenderer proposes a bank or insurance company that does not meet the above criteria to be the bondsman, advice must be sought from the Finance and Legal departments as regards its acceptability and the need for additional provisions in the Bond (e.g. choice of law clause, jurisdiction clause, appointment of local agent for service of process clause and immunity waiver clause) and if required, the wording of such provisions.
- c) Guarantees are required for all Category 1 and Category 2 procurements. These should be in the form of a Parent Company Guarantee where the contractor is a subsidiary of another company and a Joint and Several Guarantee where the contractor is a partnership or joint venture, in which case a Parent Company Guarantee is also required from each participant who is a subsidiary of another company. Guarantees are not required for Category 3 procurements except for those companies the financial capability of which, as assessed by the Financial Department, is inadequate or there is some reservation on their technical performance.
- d) Professional Indemnity Insurance (PII) is normally required for engineering and architectural design consultancies and for Category 1 and Category 2 procurements. Category 3 procurements do not normally require PII except where a substantial design element is included.
29. Unless otherwise provided in the contract terms that contract deposits and performance bonds are released in stages, contract deposits shall not be refunded until the contract has been completed according to the terms of the contract. Likewise, performance bonds must be maintained in force until the contractor has duly performed all his obligations under the contract.

RETENTION MONEYS

30. To the extent as provided under the terms of the Conditions of Contract, to protect the interest of the Authority, the payment schedule for the contractor shall preserve a right for the Authority to hold back a certain sum as retention money. Unless it is provided in the contract terms that retention moneys shall be released in stages (which is usual in civil engineering contracts), retention moneys will not be released to the contractor until the Final Certificate is issued indicating that the Authority is satisfied that the works under the contract are complete. The amounts of retention money required are as follows-

	Estimated Value of Contract	Retention to be deducted from interim payments at the rate of	Cap on retention money, as a % of the Contract Price
Category 1 procurement – Works contracts	Over \$100M	10%	5%
Category 2 procurement – Works contracts	Over \$10M and up to \$100M	10%	5%
Category 3 procurement – Works contracts	Up to \$10M	10%	5%
All consultancy agreements	Any value	Not required	Not required

LIQUIDATED DAMAGES

31. For works contracts, the assessment of liquidated damages shall follow the guidelines or practice notes as approved by the Development Committee of the Authority. In the absence of the Authority's own guidelines, where applicable, guidelines in the relevant Development Bureau Technical Circular(s) (Works) may be followed.

RECEIPT AND CLARIFICATION OF TENDERS

32. After the tenders envelopes have been opened and authenticated by the tender opening team (who shall be different and separate from the Technical and Financial TAPs (collectively called TAP)), one copy of the duplicates of the technical and financial proposals received will be kept by the tender opening team for record. The originals and the remaining duplicates of the technical proposals will be sent to the Technical TAP and the originals and the remaining duplicates of the financial proposals will be sent to the Financial TAP respectively for assessment.
33. After receipt of the original tenders from the tender opening team, the Technical TAP should check that the tenders contain, inter alia, the names and residential addresses of all partners (if the tender is submitted by a partnership) or offices (if the tender is

submitted by an unincorporated body) and the number of the business registration certificate.

34. Where certain tender information is found missing or where a tender contains some technical ambiguities, qualifications or counter-proposals, the TAP will need to consider carefully whether to seek the missing information or clarification from the relevant tenderer. In general, the TAP shall keep such post-tender closing contacts with tenderers to the minimum. They shall record clearly and in full all such contacts. Most importantly, they must ensure that such contacts will not give a tenderer any advantage or perceived advantage over other tenderers. The opportunities that may be given to tenderers to correct unintentional errors of form (for instance, clerical errors) shall not be permitted to give rise to any discriminatory practice.
35. If tender briefing/presentation is considered necessary, to ensure consistency and fairness in providing supplementary information to prospective tenderers, Subject Officer shall ensure that equal opportunity is allowed for all prospective tenderers to attend the briefing/presentation. Similarly, in handling tender enquiries, all prospective bidders shall have equal access to information relating to the tender exercises, including questions and answers raised by all bidders on the tender documents.
36. Where the provision of certain information is specified as an “essential requirement” in the tender document and where such information is missing in a tender, the tender shall be considered as non-conforming. TAP shall not approach the concerned tenderer for the missing information of this nature.
37. Where the missing information relates to factual information which does not materially affect compliance with the essential requirements specified in the tender document, and where there is no room for manipulation by a tenderer by virtue of late submission of such information, TAP may approach the concerned tenderers for such missing information.
38. In approaching a tenderer for clarification, TAP must NOT provide any information that may assist the tenderer to improve his tender to the level of tenders from other tenderers.
39. In case of special circumstances requiring different consideration, TAP shall seek the advice of the General Counsel and/or the relevant Directors / Executive Directors.
40. Under no circumstance shall any amendment to the tender sum in the course of the tenderer’s providing technical clarifications be acceptable to the Authority. If a clarification or correction in respect of arithmetical error results in an adjustment of the tender sum, the TAP shall ask the tenderer to confirm whether he is prepared to abide by the adjusted tender sum. If the tenderer refuses to so abide, the TAP shall consult the General Counsel on how to deal with the tender. Under no circumstances may the TAP assume a tender has been rejected as a qualified bid (expressly or

otherwise) without the approval of the relevant approving authority for contract award.

TENDER NEGOTIATIONS

41. In general, it is the Authority's policy to procure goods, works or services on the basis of competitive tendering, with the contract being awarded to the tenderer that conforms with the tender specifications and offers the most advantageous terms to the Authority. Because circumstances can always arise which would mean it would be in the Authority's best interest to negotiate with a tenderer or tenderers Subject Officers shall ensure that tender documents contain terms that provide that the Authority shall not be bound to accept the offer with the lowest price, or with the highest technical score, or with the highest combined scores under the technical and fee proposals. The tender documents shall also contain terms that shall enable the Authority to reserve its right to negotiate with any tenderer about any terms and conditions, including but not limited to the tender price or in the case of consultancies, the fee proposals, prior to award of contract, and reserve its right to award the contract to the tenderer whose tender is considered most advantageous overall to the Authority.
42. The approving authority for the contract award shall be the authority to approve the undertaking of tender negotiations. The approving authority shall be notified after the conclusion of the tender negotiations.
43. Normally, negotiations may be necessitated in the following circumstances —
 - (i) when a single tender has been invited with the prior approval of the appropriate approving authority; or
 - (ii) when only one tender or very few tenders have been received in response to an open tender invitation and when the concerned Subject Officer considers the tenders received may not be sufficiently competitive, whether in terms of price or other key quality attributes; or
 - (iii) when the tender price to be recommended is too high in comparison with the price of similar procurement in the past or in relation to other market information; or
 - (iv) when the tender to be recommended contains counter-proposals or qualifications to the tender terms which are disadvantageous to the Authority but are not sufficiently substantial or do not cause substantial deviation from the essential requirements contained in the invitation to tender to render the recommended tender non-conforming.

Negotiations under the above circumstance shall normally be conducted only with the single conforming tenderer or with the conforming tenderer whose tender has been found to be clearly the most advantageous. In the latter case, if the negotiation team fails to achieve the targets via the negotiations with this conforming tenderer, further negotiations would be carried out with the next conforming tender whose tender is found to be the second most advantageous to the Authority. Where no one tender is

clearly more advantageous or where the most advantageous tender cannot be determined until the counter-proposals have been resolved or withdrawn, it may be necessary to hold negotiations also with the other conforming tenders. For procurements governed by the WTO GPA, the requirements in respect of tender negotiation are set out in Article XIV of the WTO GPA.

44. For the avoidance of doubt, price may be the subject of negotiations as it is an essential element in determining the strength and weakness of a tender. Before negotiations are initiated, however, the Subject Officer shall take a view as to whether any reduction of price that may be achieved would exceed the cost of undertaking the negotiations, or would adversely affect the quality of services to be procured.
45. The justifications, recommended negotiation strategy, membership, terms of reference of the negotiation team and the targeted achievements of the negotiation shall be approved by the relevant approving authority. The Chairman of the negotiation team shall be at executive director level, unless otherwise approved by the relevant approving authority. In all cases, only officers with no real or potential conflict of interest shall lead or participate in negotiations.

TENDER ASSESSMENT

46. The TAP shall carry out the tender assessment strictly in accordance with the assessment criteria approved by the relevant authority. Technical and financial assessments shall be conducted separately and independently by the Technical and Financial TAPs and no communication shall be allowed between the Technical and Financial TAPs unless prior approval has been given by the relevant authority. The Technical TAP shall normally consist of not less than three persons. Technical TAP may, as appropriate, consist of representatives from external consultants to assist the assessment on technical submissions. To safeguard the integrity of procurement exercises, the Financial TAP should comprise only Authority's officials in the assessment of financial submissions. Only properly qualified persons shall be appointed to assess technical submissions in their tender exercises. Where practicable, assessment is to be made without the TAP (except the Chairman and the secretary) knowing the identity of the tenderers. All persons including Board members, all staff of the Authority or its consultants involved in the assessment of the tender submissions shall declare any conflicts of interest.
47. The TAP shall also examine tenders against the technical specifications, terms and conditions laid down in the tender documents to determine whether they are fully conforming. In recommending a tender for acceptance, the TAP should also take into account the following in the evaluation, as appropriate —
 - (i) technical and financial capability of the tenderers and their previous experience in similar projects. Reference from the clients of the previous projects should be obtained if necessary;

- (ii) resources to be provided (including amount, qualification and experience of key personnel, supervisors, tradesmen/skilled labourers, and sub-contractors/sub-consultants);
- (iii) capability and reliability in respect of timely delivery or completion;
- (iv) safety and health, programming, quality, and environmental aspects;
- (v) compatibility with existing or planned procurement;
- (vi) after sale support and service including maintenance and spare parts provision, warranty and/or guarantees;
- (vii) running and maintenance costs (if applicable);
- (viii) fair market prices;
- (ix) life-cycle costs;
- (x) net present values; and,
- (xi) the relative value to the Authority of financial offers made with the tender, e.g. export credit insurances/finances, contractor direct finance etc.

Where applicable, relevant requirements as regards information to be provided in technical submissions shall be stated clearly in the tender documents.

- 48. Where prior approval has been given for the use of a marking scheme based on a technical/fee weighting in the evaluation of tenders, assessment panels shall assess the tenders according to the criteria previously endorsed by the relevant approving authority. Normally, the tender which attains the highest overall score should be recommended.
- 49. In normal circumstances, TAP shall determine the ranking of the tenders received according to the original tender prices or the adjusted tender prices, or the overall scores they have attained when a marking scheme is used in tender evaluation. Where price negotiations are undertaken as approved by the relevant approving authority, TAP shall use the negotiated prices to determine the ranking of the tenders or their price scores.
- 50. Tender negotiations may be used to seek resolution of any qualification or counterproposal put forward by a tenderer. If the qualification seeks to reduce the tenderer's risk or to construct payment terms which are more to his advantage, the negotiation team should seek a corresponding adjustment in the tender price before formally recommending the tender for acceptance.
- 51. In recommending the acceptance of a tender to the relevant approving authority, TAP shall have value for money in mind. If the tendered sums are very close or if the contract to be awarded involves payments over a number of years, e.g. interim payments to the contractor, the TAP shall compare the tenders by discounting future payments to obtain the present value. In assessing the present values of tenders, departments may approach the Senior Manager, Finance and the Treasurer for advice.

52. If none of the tenders received is fully conforming to the specifications, terms and conditions laid down, Subject Officer shall consider, with approval from the relevant approving authority, cancelling the tender exercise and re-tendering with revised specifications, terms and conditions, where applicable. If, exceptionally, TAP wish to recommend a non-conforming tender, they shall state clearly in the tender report any deviation of the recommended tender from the specifications and terms and the reasons for so recommending.

TENDER REPORTS

53. TAP shall prepare a tender report containing a clear recommendation. Initial tender assessment reports shall be prepared by the Subject Officer, who is normally the Chairman of the TAP. The draft tender report shall be presented to and agreed by the Director, Project Control, Head, Project Procurement and Contracts and General Counsel before the finalized tender report is submitted to the relevant approving authority for consideration. Tender reports in respect of Category 1 and Category 2 procurements must be signed by the Subject Officer, reviewed by both the Head of User Department concerned and the Head of Procurement and Contracts, and endorsed by Director, Project Control and signed off by General Counsel or his delegate. Tender reports for Category 3 procurements should be signed, reviewed and endorsed by officers of appropriate rank and General Counsel or his delegate.
54. Final tender reports shall be signed off by the Chairman of the TAP before it is to be reviewed, endorsed and submitted to the relevant approving authority for consideration. A typical tender report should comprise the following -
- A) Purpose
 - (i) A brief statement describing the purpose of the paper.
 - B) Background
 - (i) A summary of the Procurement describing its scope.
 - (ii) Its estimated value (or in-house cost for maintenance contracts) and its budget provision.
 - (iii) Details of any Options, if any, to be included along with their estimated value and budget provision.
 - (iv) The list of tenderers invited to bid, tender invitation date, tender closing date, tender validity period and proposed award date.
 - (v) The type of contract being adopted, with reasons, e.g. fixed price lump sum, remeasurable, target cost, or reimbursable, etc.
 - (vi) The method of tendering being adopted, with reasons, e.g. Selective Tendering, Pre-qualification or Single/Restricted Tendering.

C) Contract Details

- (i) The terms and conditions to be adopted.
- (ii) The requirement for bonds, guarantees and professional indemnity insurance.
- (iii) Commencement and Completion and rates of liquidated damages.
- (i) Payment Schedule.
- (ii) Interfacing contracts.
- (iii) Other relevant details

D) Tenderer Selection

- (i) The criteria for selection, with a summary of the relevant results, a table of the prequalification criteria with TAP's scores. Where Single/Restricted tendering is adopted, details of the special circumstances that justify Single/Restricted Tendering.
- (ii) The proposed tenderers' confirmation in writing that they are willing to tender.

E) Financial Capability Assessment

Results of the financial capability assessment, which shall be required for all Category 1 and 2 procurements.

F) Tender Assessment

- (i) The basis of assessment, e.g. lowest compliant bid or technical/financial weighted assessment. Detailed justification shall be provided if a combined weighting assessment method is recommended.
- (ii) Details of the scoring system to be used for the technical assessment of the tenders.
- (iii) The membership of the TAP during the tender assessment stage.
- (iv) Findings of the technical and financial assessment.
- (v) Tender qualifications remaining after requirement to withdraw qualifications has been sent to tenderers.
- (vi) Alternative offer, if applicable
- (vii) Tender negotiations, if applicable

G) Recommendations

- (i) The tenderer to be recommended for contract award.
- (ii) The reserved tenderer to be used for the replacement of the selected tenderer who may subsequently decide to quit.
- (iii) Confirmation that the selected tenderer and the reserved tenderer have agreed and signed Letters of Clarification (where applicable).

CANCELLATION OF TENDER EXERCISE

55. Unless it is in the Authority's interest not to do so, a procuring department should award a contract to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, in terms of the specific evaluation criteria set forth in the tender documentation is determined to be the most advantageous to the Authority. That will normally be the lowest tender or the most favourable bid after a technical/financial weighted assessment, but the Authority shall retain the right to award the contract to any tender that it may deem in its sole discretion to be the most advantageous to it, regardless of whether or not it is the lowest.
56. Approval of the cancellation of a tender exercise is not required when no tender has been received at the close of tenders.
57. Other than cancellation due to no tender having been received as described above, if a procuring department proposes to cancel a tender exercise once tenders have been invited, or not to award a contract following a tender evaluation, it shall first obtain the approval of the approving authority which approved the "Proposal to Proceed". The Subject Officer shall provide detailed justifications for cancelling a tender exercise and state whether and when a further tender exercise will be conducted.

ACCEPTANCE OF TENDERS

58. After a decision has been made on the acceptance of a tender by the relevant approving authority, the Subject Officer with the assistance of the TAP secretary shall forthwith notify the respective persons in the relevant departments (including the user department, the finance department and the audit department).
59. The user department will then send a letter to the successful tenderer accepting his tender (where applicable, as clarified by the Letter of Clarification) ("Letter of Acceptance" or "LoA") and, where necessary, inviting him to sign the contract on a specified date. In notifying unsuccessful tenderers of the outcome of their tenders, normally no reasons are given for the failure of their tenders. However, upon written request from any of the unsuccessful tenderers, a debriefing may be given to all unsuccessful tenderers if the user department considers appropriate to do so.
60. User Departments should forward the original Contract Documents or Agreements to Legal department for safe keeping, and shall maintain a record of all contracts awarded. In respect of procurements covered by WTO GPA, separate (or additional) records should be maintained in respect of each contract awarded under single or restricted tendering (referred to as limited tendering in the WTO GPA and for which they have been given authority to adopt) for the purpose of meeting the specific statistical reporting requirements of the WTO Committee on Authority Procurement on limited tendering.

61. The Authorized Signatories in respect of letters of clarification, letters of acceptance and formal agreements are as follows-

DOCUMENTS	AUTHORIZED SIGNATORIES		
	Category 1	Category 2	Category 3
Letters of Clarification	Signed by Director, Project Control	Signed by Heads of Section	Signed by Heads of Section
Letters of Acceptance	Signed by CEO	Signed by Director, Project Control	Signed by Heads of Section
Formal Agreement	Signed by CEO	Signed by CEO	Signed by Director, Project Control

62. The requirement for a formal agreement to be executed under seal is as follows –
- (i) Formal Agreements to be executed under seal are required for all Category 1 Procurements where the provision exists in the contract documents. A Formal Agreement under seal may also be required for a Category 2 Procurement dependent upon the nature of the Works e.g. a procurement with a significant design element. This requirement is to be verified by the appropriate approvals authority during the tenderer selection and tender assessment stages.
 - (ii) Formal Agreement with “Execution under Seal” is not required for Category 3 Procurements, except for cases where there is likely to be extensive use of custom made components or the contract is design build.

BID CHALLENGES

63. Subject Officer shall ensure that all the activities throughout the procurement are fair, open and transparent. In the event of a complaint or challenge by a tenderer, it shall be handled with great care and in a timely, equitable, non-prejudicial and non-discriminatory manner. For procurements governed by the WTO GPA, the requirements in respect of bid challenges are set out in Article XX of the WTO GPA.

Attachment I – An extract of the WTO Agreement of Government Procurement

REVISED AGREEMENT ON GOVERNMENT PROCUREMENT***Preamble**

The Parties to this Agreement (hereinafter referred to as "the Parties"),

Recognizing the need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization and expansion of, and improving the framework for, the conduct of international trade;

Recognizing that measures regarding government procurement should not be prepared, adopted or applied so as to afford protection to domestic suppliers, goods or services, or to discriminate among foreign suppliers, goods or services;

Recognizing that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the performance of the Parties' economies and the functioning of the multilateral trading system;

Recognizing that the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party;

Recognizing the need to take into account the development, financial and trade needs of developing countries, in particular the least developed countries;

Recognizing the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption;

Recognizing the importance of using, and encouraging the use of, electronic means for procurement covered by this Agreement;

Desiring to encourage acceptance of and accession to this Agreement by WTO Members not party to it;

Hereby *agree* as follows:

* Annex to the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012 (GPA/113).

Article I Definitions

For purposes of this Agreement:

- (a) **commercial goods or services** means goods or services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes;
- (b) **Committee** means the Committee on Government Procurement established by Article XXI:1;
- (c) **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);
- (d) **country** includes any separate customs territory that is a Party to this Agreement. In the case of a separate customs territory that is a Party to this Agreement, where an expression in this Agreement is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified;
- (e) **days** means calendar days;
- (f) **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;
- (g) **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;
- (h) **limited tendering** means a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice;
- (i) **measure** means any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement;
- (j) **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;
- (k) **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;
- (l) **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, counter-trade and similar action or requirement;
- (m) **open tendering** means a procurement method whereby all interested suppliers may submit a tender;
- (n) **person** means a natural person or a juridical person;
- (o) **procuring entity** means an entity covered under a Party's Annex 1, 2 or 3 to Appendix I;

- (p) **qualified supplier** means a supplier that a procuring entity recognizes as having satisfied the conditions for participation;
- (q) **selective tendering** means a procurement method whereby only qualified suppliers are invited by the procuring entity to submit a tender;
- (r) **services** includes construction services, unless otherwise specified;
- (s) **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 labelling requirements as they apply to a good, service, process or production method;
- (t) **supplier** means a person or group of persons that provides or could provide goods or services; and
- (u) **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 labelling requirements, as they apply to a good or service.

Article II Scope and Coverage

Application of Agreement

1. This Agreement applies to any measure regarding covered procurement, whether or not it is conducted exclusively or partially by electronic means.
2. For the purposes of this Agreement, covered procurement means procurement for governmental purposes:
 - (a) of goods, services, or any combination thereof:
 - (i) as specified in each Party's annexes to Appendix I; and
 - (ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;
 - (b) by any contractual means, including: purchase; lease; and rental or hire purchase, with or without an option to buy;
 - (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 annexes to Appendix I, at the time of publication of a notice in accordance with Article VII;
 - (d) by a procuring entity; and
 - (e) that is not otherwise excluded from coverage in paragraph 3 or a Party's annexes to Appendix I.

3. Except where provided otherwise in a Party's annexes to Appendix I, this Agreement 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 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 Agreement.

4. Each Party shall specify the following information in its annexes to Appendix I:

- (a) in Annex 1, the central government entities whose procurement is covered by this Agreement;
- (b) in Annex 2, the sub-central government entities whose procurement is covered by this Agreement;
- (c) in Annex 3, all other entities whose procurement is covered by this Agreement;
- (d) in Annex 4, the goods covered by this Agreement;
- (e) in Annex 5, the services, other than construction services, covered by this Agreement;
- (f) in Annex 6, the construction services covered by this Agreement; and
- (g) in Annex 7, any General Notes.

5. Where a procuring entity, in the context of covered procurement, requires persons not covered under a Party's annexes to Appendix I to procure in accordance with particular requirements, Article IV shall apply *mutatis mutandis* to such requirements.

Valuation

6. 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 Agreement; 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.

7. 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.

8. 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 instalment multiplied by 48; and
- (c) where it is not certain whether the contract is to be a fixed-term contract, subparagraph (b) shall be used.

Article III Security and General Exceptions

1. Nothing in this Agreement 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 defence purposes.

2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement 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 labour.

Article IV General Principles

Non-Discrimination

1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to:

- (a) domestic goods, services and suppliers; and
- (b) goods, services and suppliers of any other Party.

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

- (a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or
- (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.

Use of Electronic Means

3. 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

4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:
- (a) is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering;
 - (b) avoids conflicts of interest; and
 - (c) prevents corrupt practices.

Rules of Origin

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

Offsets

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

Measures Not Specific to Procurement

7. 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.

Article V Developing Countries

1. In negotiations on accession to, and in the implementation and administration of, this Agreement, the Parties shall give special consideration to the development, financial and trade needs and circumstances of developing countries and least developed countries (collectively referred to hereinafter as "developing countries", unless specifically identified otherwise), recognizing that these may differ significantly from country to country. As provided for in this Article and on request, the Parties shall accord special and differential treatment to:

- (a) least developed countries; and
- (b) any other developing country, where and to the extent that this special and differential treatment meets its development needs.

2. Upon accession by a developing country to this Agreement, each Party shall provide immediately to the goods, services and suppliers of that country the most favourable coverage that the Party provides under its annexes to Appendix I to any other Party to this Agreement, subject to any terms negotiated between the Party and the developing country in order to maintain an appropriate balance of opportunities under this Agreement.

3. Based on its development needs, and with the agreement of the Parties, a developing country may adopt or maintain one or more of the following transitional measures, during a transition period and in accordance with a schedule, set out in its relevant annexes to Appendix I, and applied in a manner that does not discriminate among the other Parties:

- (a) a price preference programme, provided that the programme:
 - (i) provides a preference only for the part of the tender incorporating goods or services originating in the developing country applying the preference or goods or services originating in other developing countries in respect of which the developing country applying the preference has an obligation to provide national treatment under a preferential agreement, provided that where the other developing country is a Party to this Agreement, such treatment would be subject to any conditions set by the Committee; and
 - (ii) is transparent, and the preference and its application in the procurement are clearly described in the notice of intended procurement;
- (b) an offset, provided that any requirement for, or consideration of, the imposition of the offset is clearly stated in the notice of intended procurement;
- (c) the phased-in addition of specific entities or sectors; and
- (d) a threshold that is higher than its permanent threshold.

4. In negotiations on accession to this Agreement, the Parties may agree to the delayed application of any specific obligation in this Agreement, other than Article IV:1(b), by the acceding developing country while that country implements the obligation. The implementation period shall be:

- (a) for a least developed country, five years after its accession to this Agreement; and
- (b) for any other developing country, only the period necessary to implement the specific obligation and not to exceed three years.

5. Any developing country that has negotiated an implementation period for an obligation under paragraph 4 shall list in its Annex 7 to Appendix I the agreed implementation period, the specific obligation subject to the implementation period and any interim obligation with which it has agreed to comply during the implementation period.

6. After this Agreement has entered into force for a developing country, the Committee, on request of the developing country, may:

- (a) extend the transition period for a measure adopted or maintained under paragraph 3 or any implementation period negotiated under paragraph 4; or
- (b) approve the adoption of a new transitional measure under paragraph 3, in special circumstances that were unforeseen during the accession process.

7. A developing country that has negotiated a transitional measure under paragraph 3 or 6, an implementation period under paragraph 4 or any extension under paragraph 6 shall take such steps during the transition period or implementation period as may be necessary to ensure that it is in compliance with this Agreement at the end of any such period. The developing country shall promptly notify the Committee of each step.

8. The Parties shall give due consideration to any request by a developing country for technical cooperation and capacity building in relation to that country's accession to, or implementation of, this Agreement.

9. The Committee may develop procedures for the implementation of this Article. Such procedures may include provisions for voting on decisions relating to requests under paragraph 6.

10. The Committee shall review the operation and effectiveness of this Article every five years.

Article VI Information on the Procurement System

I. 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, 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 any Party, on request.

2. Each Party shall list:

(a) in Appendix II, the electronic or paper media in which the Party publishes the information described in paragraph 1;

(b) in Appendix III, the electronic or paper media in which the Party publishes the notices required by Articles VII, IX:7 and XVI:2; and

(c) in Appendix IV, the website address or addresses where the Party publishes:

(i) its procurement statistics pursuant to Article XVI:5; or

(ii) its notices concerning awarded contracts pursuant to Article XVI:6.

3. Each Party shall promptly notify the Committee of any modification to the Party's information listed in Appendix II, III or IV.

Article VII Notices

Notice of Intended Procurement

I. For each covered procurement, a procuring entity shall publish a notice of intended procurement in the appropriate paper or electronic medium listed in Appendix III, except in the circumstances described in Article XIII. 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 Annex 1, be accessible by electronic means free of charge through a single point of access, for at least any minimum period of time specified in Appendix III; and

- (b) for procuring entities covered under Annex 2 or 3, 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 Annex 2 or 3, 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 Agreement, 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 the 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 the 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 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 IX, 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 Agreement.

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 one of the WTO languages. The summary notice shall contain at least the following information:

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

Notice of Planned Procurement

4. Procuring entities are encouraged to publish in the appropriate paper or electronic medium listed in Appendix III 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.

5. A procuring entity covered under Annex 2 or 3 may use a notice of planned procurement as a notice of intended procurement provided that the notice of planned procurement includes as much of the information referred to in paragraph 2 as is available to the entity and a statement that interested suppliers should express their interest in the procurement to the procuring entity.

Article VIII 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.

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

- (a) shall not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of a given Party; and
- (b) may require relevant prior experience where essential to meet the requirements of the procurement.

3. In assessing whether a supplier satisfies the conditions for participation, 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.

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

- (a) bankruptcy;
- (b) false declarations;
- (c) significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;
- (d) final judgments in respect of serious crimes or other serious offences;
- (e) professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or
- (f) failure to pay taxes.

Article IX 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.

Selective Tendering

4. 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 VII:2(a), (b), (f), (g), (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 VII:2 (c), (d), (e), (h) and (i) to the qualified suppliers that it notifies as specified in Article XI:3(b).

5. 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 and the criteria for selecting the limited number of suppliers.

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

Multi-Use Lists

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

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

in the appropriate medium listed in Appendix III.

8. The notice provided for in paragraph 7 shall include:

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

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

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

10. A procuring entity shall allow 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.

11. 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 XI: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.

Annex 2 and Annex 3 Entities

12. A procuring entity covered under Annex 2 or 3 may use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement, provided that:

- (a) the notice is published in accordance with paragraph 7 and includes the information required under paragraph 8, as much of the information required under Article VII: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 VII:2, to the extent such information is available.

13. A procuring entity covered under Annex 2 or 3 may allow a supplier that has applied for inclusion on a multi-use list in accordance with paragraph 10 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

14. 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.

15. 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 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.

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

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

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 fulfil the requirements of the procurement by including words such as "or equivalent" in the tender documentation.

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

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

6. For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.

Tender Documentation

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

- (a) the procurement, including the nature and the 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, 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;
- (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.

8. 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, de-stocking and transport of goods from the point of supply or for supply of services.

9. 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.

10. A procuring entity shall promptly:

- (a) 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

11. 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 re-issued notice or tender documentation:

- (a) to all suppliers that are participating at the time of the modification, amendment or re-issuance, 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 re-submit amended tenders, as appropriate.

Article XI 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 VII: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;
 - (iv) the address from which documents relating to the procurement may be obtained; and
 - (v) as much of the information that is required for the notice of intended procurement under Article VII:2, as is available;
- (b) the procuring entity, for recurring contracts, indicates in an initial notice of intended procurement that subsequent notices will provide time-periods for tendering based on this paragraph; 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 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 Annex 2 or 3 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 XII 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 VII:2; or
 - (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 XIII 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 any other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles VII through IX, X (paragraphs 7 through 11), XI, XII, XIV and XV 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:
- (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 Agreement, 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 XIV 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;
- (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 XV Treatment of Tenders and Awarding of Contracts*Treatment of Tenders*

1. A procuring entity shall receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.
2. 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 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 Agreement.

Article XVI 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 XVII, 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 Agreement, a procuring entity shall publish a notice in the appropriate paper or electronic medium listed in Appendix III. 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;
- (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 XIII, 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 XIII; and
- (b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.

Collection and Reporting of Statistics

4. Each Party shall collect and report to the Committee statistics on its contracts covered by this Agreement. Each report shall cover one year and be submitted within two years of the end of the reporting period, and shall contain:

- (a) for Annex I procuring entities:
 - (i) the number and total value, for all such entities, of all contracts covered by this Agreement;

- (ii) the number and total value of all contracts covered by this Agreement awarded by each such entity, broken down by categories of goods and services according to an internationally recognized uniform classification system; and
 - (iii) the number and total value of all contracts covered by this Agreement awarded by each such entity under limited tendering;
- (b) for Annex 2 and 3 procuring entities, the number and total value of contracts covered by this Agreement awarded by all such entities, broken down by Annex; and
 - (c) estimates for the data required under subparagraphs (a) and (b), with an explanation of the methodology used to develop the estimates, where it is not feasible to provide the data.

5. Where a Party publishes its statistics on an official website, in a manner that is consistent with the requirements of paragraph 4, the Party may substitute a notification to the Committee of the website address for the submission of the data under paragraph 4, with any instructions necessary to access and use such statistics.

6. Where a Party requires notices concerning awarded contracts, pursuant to paragraph 2, to be published electronically and where such notices are accessible to the public through a single database in a form permitting analysis of the covered contracts, the Party may substitute a notification to the Committee of the website address for the submission of the data under paragraph 4, with any instructions necessary to access and use such data.

Article XVII Disclosure of Information

Provision of Information to Parties

1. On request of any other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Agreement, 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.

Non-Disclosure of Information

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

3. Nothing in this Agreement 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 XVIII 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 Agreement; or
- (b) where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement,

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

2. In the event of a complaint by a supplier, arising in the context of covered procurement in which the supplier has, or has had, an interest, that there has been a breach 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.

3. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge, which in no case shall be less than 10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier.

4. 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.

5. Where a body other than an authority referred to in paragraph 4 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.

6. 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.

7. 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.

Article XIX Modifications and Rectifications to Coverage

Notification of Proposed Modification

1. A Party shall notify the Committee of any proposed rectification, transfer of an entity from one annex to another, withdrawal of an entity or other modification of its annexes to Appendix I (any of which is hereinafter referred to as "modification"). The Party proposing the modification (hereinafter referred to as "modifying Party") shall include in the notification:
- (a) for any proposed withdrawal of an entity from its annexes to Appendix I in exercise of its rights on the grounds that government control or influence over the entity's covered procurement has been effectively eliminated, evidence of such elimination; or
 - (b) for any other proposed modification, information as to the likely consequences of the change for the mutually agreed coverage provided for in this Agreement.

Objection to Notification

2. Any Party whose rights under this Agreement may be affected by a proposed modification notified under paragraph 1 may notify the Committee of any objection to the proposed modification. Such objections shall be made within 45 days from the date of the circulation to the Parties of the notification, and shall set out reasons for the objection.

Consultations

3. The modifying Party and any Party making an objection (hereinafter referred to as "objecting Party") shall make every attempt to resolve the objection through consultations. In such consultations, the modifying and objecting Parties shall consider the proposed modification:
- (a) in the case of a notification under paragraph 1(a), in accordance with any indicative criteria adopted pursuant to paragraph 8(b), indicating the effective elimination of government control or influence over an entity's covered procurement; and
 - (b) in the case of a notification under paragraph 1(b), in accordance with any criteria adopted pursuant to paragraph 8(c), relating to the level of compensatory adjustments to be offered for modifications, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement.

Revised Modification

4. Where the modifying Party and any objecting Party resolve the objection through consultations, and the modifying Party revises its proposed modification as a result of those consultations, the modifying Party shall notify the Committee in accordance with paragraph 1, and any such revised modification shall only be effective after fulfilling the requirements of this Article.

Implementation of Modifications

5. A proposed modification shall become effective only where:
- (a) no Party submits to the Committee a written objection to the proposed modification within 45 days from the date of circulation of the notification of the proposed modification under paragraph 1;
 - (b) all objecting Parties have notified the Committee that they withdraw their objections to the proposed modification; or
 - (c) 150 days from the date of circulation of the notification of the proposed modification under paragraph 1 have elapsed, and the modifying Party has informed the Committee in writing of its intention to implement the modification.

Withdrawal of Substantially Equivalent Coverage

6. Where a modification becomes effective pursuant to paragraph 5(c), any objecting Party may withdraw substantially equivalent coverage. Notwithstanding Article IV:1(b), a withdrawal pursuant to this paragraph may be implemented solely with respect to the modifying Party. Any objecting Party shall inform the Committee in writing of any such withdrawal at least 30 days before the withdrawal becomes effective. A withdrawal pursuant to this paragraph shall be consistent with any criteria relating to the level of compensatory adjustment adopted by the Committee pursuant to paragraph 8(c).

Arbitration Procedures to Facilitate Resolution of Objections

7. Where the Committee has adopted arbitration procedures to facilitate the resolution of objections pursuant to paragraph 8, a modifying or any objecting Party may invoke the arbitration procedures within 120 days of circulation of the notification of the proposed modification:

- (a) Where no Party has invoked the arbitration procedures within the time-period:
 - (i) notwithstanding paragraph 5(c), the proposed modification shall become effective where 130 days from the date of circulation of the notification of the proposed modification under paragraph 1 have elapsed, and the modifying Party has informed the Committee in writing of its intention to implement the modification; and
 - (ii) no objecting Party may withdraw coverage pursuant to paragraph 6.
- (b) Where a modifying Party or objecting Party has invoked the arbitration procedures:
 - (i) notwithstanding paragraph 5(c), the proposed modification shall not become effective before the completion of the arbitration procedures;

- (ii) any objecting Party that intends to enforce a right to compensation, or to withdraw substantially equivalent coverage pursuant to paragraph 6, shall participate in the arbitration proceedings;
- (iii) a modifying Party should comply with the results of the arbitration procedures in making any modification effective pursuant to paragraph 5(c); and
- (iv) where a modifying Party does not comply with the results of the arbitration procedures in making any modification effective pursuant to paragraph 5(c), any objecting Party may withdraw substantially equivalent coverage pursuant to paragraph 6, provided that any such withdrawal is consistent with the result of the arbitration procedures.

Committee Responsibilities

8. The Committee shall adopt:

- (a) arbitration procedures to facilitate resolution of objections under paragraph 2;
- (b) indicative criteria that demonstrate the effective elimination of government control or influence over an entity's covered procurement; and
- (c) criteria for determining the level of compensatory adjustment to be offered for modifications made pursuant to paragraph 1(b) and of substantially equivalent coverage under paragraph 6.

Article XX Consultations and Dispute Settlement

1. Each Party shall accord sympathetic consideration to and shall afford adequate opportunity for consultation regarding any representation made by another Party with respect to any matter affecting the operation of this Agreement.

2. Where any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded as the result of:

- (a) the failure of another Party or Parties to carry out its obligations under this Agreement; or
- (b) the application by another Party or Parties of any measure, whether or not it conflicts with the provisions of this Agreement,

it may, with a view to reaching a mutually satisfactory solution to the matter, have recourse to the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as "the Dispute Settlement Understanding").

3. The Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, with the exception that, notwithstanding paragraph 3 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in Appendix 1 of the Dispute Settlement Understanding.

Article XXI Institutions*Committee on Government Procurement*

1. There shall be a Committee on Government Procurement composed of representatives from each of the Parties. This Committee shall elect its own Chairman and shall meet as necessary, but not less than once a year, for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.
2. The Committee may establish working parties or other subsidiary bodies that shall carry out such functions as may be given to them by the Committee.
3. The Committee shall annually:
 - (a) review the implementation and operation of this Agreement; and
 - (b) inform the General Council of its activities, pursuant to Article IV:8 of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as "WTO Agreement"), and of developments relating to the implementation and operation of this Agreement.

Observers

4. Any WTO Member that is not a Party to this Agreement shall be entitled to participate in the Committee as an observer by submitting a written notice to the Committee. Any WTO observer may submit a written request to the Committee to participate in the Committee as an observer, and may be accorded observer status by the Committee.

Article XXII Final Provisions*Acceptance and Entry into Force*

1. This Agreement shall enter into force on 1 January 1996 for those governments¹ whose agreed coverage is contained in the Annexes of Appendix I of this Agreement, and which have, by signature, accepted the Agreement on 15 April 1994, or have, by that date, signed the Agreement subject to ratification and have subsequently ratified the Agreement before 1 January 1996.

Accession

2. Any Member of the WTO may accede to this Agreement on terms to be agreed between that Member and the Parties, with such terms stated in a decision of the Committee. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession that states the terms so agreed. This Agreement shall enter into force for a Member acceding to it on the 30th day following the deposit of its instrument of accession.

Reservations

3. No Party may enter a reservation in respect of any provision of this Agreement.

¹ For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Union.

Domestic Legislation

4. Each Party shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by its procuring entities, with the provisions of this Agreement.

5. Each Party shall inform the Committee of any changes to its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

Future Negotiations and Future Work Programmes

6. Each Party shall seek to avoid introducing or continuing discriminatory measures that distort open procurement.

7. Not later than the end of three years from the date of entry into force of the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012, and periodically thereafter, the Parties shall undertake further negotiations, with a view to improving this Agreement, progressively reducing and eliminating discriminatory measures, and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, taking into consideration the needs of developing countries.

8. (a) The Committee shall undertake further work to facilitate the implementation of this Agreement and the negotiations provided for in paragraph 7, through the adoption of work programmes for the following items:

- (i) the treatment of small and medium-sized enterprises;
- (ii) the collection and dissemination of statistical data;
- (iii) the treatment of sustainable procurement;
- (iv) exclusions and restrictions in Parties' Annexes; and
- (v) safety standards in international procurement.

(b) The Committee:

- (i) may adopt a decision that contains a list of work programmes on additional items, which may be reviewed and updated periodically; and
- (ii) shall adopt a decision setting out the work to be undertaken on each particular work programme under subparagraph (a) and any work programme adopted under subparagraph (b)(i).

9. Following the conclusion of the work programme to harmonize rules of origin for goods being undertaken under the Agreement on Rules of Origin in Annex 1A to the WTO Agreement and negotiations regarding trade in services, the Parties shall take the results of that work programme and those negotiations into account in amending Article IV:5, as appropriate.

10. Not later than the end of the fifth year from the date of entry into force of the Protocol Amending the Agreement on Government Procurement, the Committee shall examine the applicability of Article XX:2(b).

Amendments

11. The Parties may amend this Agreement. A decision to adopt an amendment and to submit it for acceptance by the Parties shall be taken by consensus. An amendment shall enter into force:

- (a) except as provided for in subparagraph (b), in respect of those Parties that accept it, upon acceptance by two thirds of the Parties and thereafter for each other Party upon acceptance by it;
- (b) for all Parties upon acceptance by two thirds of the Parties if it is an amendment that the Committee, by consensus, has determined to be of a nature that would not alter the rights and obligations of the Parties.

Withdrawal

12. Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date the Director-General of the WTO receives written notice of the withdrawal. Any Party may, upon such notification, request an immediate meeting of the Committee.

13. Where a Party to this Agreement ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect on the date on which it ceases to be a Member of the WTO.

Non-application of this Agreement between Particular Parties

14. This Agreement shall not apply as between any two Parties where either Party, at the time either Party accepts or accedes to this Agreement, does not consent to such application.

Appendices

15. The Appendices to this Agreement constitute an integral part thereof.

Secretariat

16. This Agreement shall be serviced by the WTO Secretariat.

Deposit

17. This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party a certified true copy of this Agreement, of each rectification or modification thereto pursuant to Article XIX and of each amendment pursuant to paragraph 11, and a notification of each accession thereto pursuant to paragraph 2 and of each withdrawal pursuant to paragraphs 12 or 13.

Registration

18. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.