國立政治大學法學院碩士
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我國政府採購法異議及申訴制度之研究-以比較「政府採購協定」及各國政府採購爭端解決機制為核心

A Study of the Dispute Settlement System on the Government Procurement Act under GPA and Other Nations

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摘　要

本論文目的在藉由研析美國聯邦政府採購規則、歐盟採購指令及大陸政府採購法救濟制度，並比較 GPA 爭端解決機制及我國政府採購救濟制度，論述政府採購協定適用主體、適用客體及其爭端解決機制，從中尋求 GPA 與我國政府採購救濟制度規範不一致之處，為與政府採購協定之爭端解決機制之規範一致，並建立一個公平、公正及公開爭端解決機制，以吸引更多國外廠商來台參與投標，並帶動國際貿易商機。本研究結論建議如下：

一、建立異議及申訴前之諮商制度，經由爭議廠商與採購機關之事先諮商，有助爭端事先解決，以機先解決爭議。

二、廢除異議前置失權效規定，賦予爭議廠商得直接提起申訴之權，以加速程序進行並保障採購廠商應有之權益。

三、放寬異議及申訴主體資格，廠商採購權益之相關利害關係人，即得具有提出申訴之主體資格，以擴大解決採購紛爭。

四、增加異議或申訴之原因與事由，擴及未違反法令或條約、協定，廠商政府採購權益直接或間接遭受損害，即得提起救濟，以擴大行政自我預先審查功能與範圍。

五、採公開審議程序，以維護政府採購審議公平、公開審理，並保障申訴廠商之採購權益，避免造成書面審議失去公平判斷之可能。

六、明確規範暫停採購程序事由，避免事後因無法即時改正招標機關錯誤採購行為，而影響異議人之權益。

七、改正採購爭議審議委員會審議判斷，以符合政府採購協定（GPA）救濟有效性之要求。

關鍵詞：諮商、爭端解決、公開審議、暫停採購程序、審議判斷

Abstract

The purpose of the research is to study the inconsistency between GPA and Government Procurement Act in Taiwan by analyzing the subject, object and the dispute settlement mechanism and making comparison among U.S Federal Acquisition Regulation (FAR), EU Procurement Directives and China Government Procurement Law dispute settlement . In order to attract more foreign firms to participate in the vendors, and promote international trade opportunities. The main conclusion of the research is as follows:

1. It is suggested to establish a consultation mechanism to assist disputing parties to discuss and resolve their differences prior to the protests and appeals.
2. It is advised to add "causes and reasons" to protest and appeal on Government Procurement Act of Taiwan to expand administrative function and the scope of self-examination in advance.
3. In consideration of the interests of the vendors, it is recommended to abolish the regulation on the loss of efficiency right without protest.
4. To ensure the interests of the complained vendors, it is advised to broaden the qualification of objections and appeals.
5. Implement a transparent and open public review process to maintain the fairness of government procurement and secure the interests of the complained vendors.
6. It is important to define suspend procurement procedure clearly to avoid jeopardizing the rights of complaining suppliers and the entity.
7. In order to comply with the effectiveness of the relief requested under Government Procurement Agreement (GPA), it is necessary to correct the review decision of the Complaint Review Board for Government Procurement (CRBGP).

Key words：consultation, dispute settlement, public review, suspend procurement procedure, review decision

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第一章 緒論

第一節　研究動機

歐美各工業先進國家，為擴展海外市場，促進國內經濟成長，在西元（以下同）1979年關稅暨貿易總協定（General Agreement on Tariffs and Trade，以下簡稱GATT）[1]舉行東京回合談判，制定政府採購協定（Agreement on Government Procurement，以下簡稱GPA），並於1994年烏拉圭回合談判，修正政府採購協定版本，新政府採購協定條文於1996年1月1日正式生效，我國於2002年元月1日正式成為世界貿易組織（World Trade Organization，以下簡稱WTO），依據我國入會文件理應於2003年元月之前簽署政府採購協定，因政治力等國際因素，我國於2008年始正式成為政府採購協定之簽署國，並於次一年經總統公布生效[2]，簽署GPA對於簽署國於辦理政府採購時，若屬於政府採購協定各簽署國承諾開放之中央機關、中央以下次一級機關、其他機關，其所辦理之工程、產品及服務採購案，達到各簽署國所承諾開放之門檻金額以上者，則應開放國際標，雖引進更多外來競爭，但也因此打開外國政府採購市場，我國廠商亦得參與其他簽署國依據本協定所開放之案件，由於國際間經貿往來越為密切，產生衝突與爭端亦將越為頻繁，因此有建立獨立、公正之機制處理政府採購爭端事件之必要。由於政府機關之採購交易市場對於國家整體經濟影響愈來愈大，各國政府對於本國廠商之保護措施或對於外國廠商之歧視措施，也愈來受到重視，政府採購不再僅是內國事務，對外亦屬於國際經貿全球化事務之一環，因此，避免各國政府利用政府採購造成貿易障礙，促進各國企業間之公平競爭，另因經貿往來頻繁更易造成衝突與爭端，實有必要建立公平、公正與公開之爭端解決機制，政府採購協定為各簽署國間複邊協定之規範，各簽署國間並受此政府採購協定之拘束，藉由政府採購協定爭端解決機制之建立與運作，以了解我國政府採購法救濟制度之現況、程序及效力等事項，為本文研究重點。

我國政府之採購，為因應舊有之稽查條例已不符合國際間要求，於1998年經立法院通過制定符合國際標準之政府採購法，由於政府採購協定屬於條約性質，其法律性質、效力及拘束力，與政府採購法之國內法間適用範圍及救濟程序規範不同，產生現行法與政府採購協定產生規範一致性與不一致性之問題，二者間究應如何適用，於我國政

[1]關稅暨貿易總協定（GATT），即目前世界貿易組織（WTO）之前身。
[2]2009年8月12日華總一義字第09800200281號總統令。

府辦理政府採購達一定之門檻金額，適用政府採購協定開放國際標產生爭議，究應與政府採購法之國內法循如何救濟程序調和解決。尤其同為政府採購協定之締約國，因本國政府採購法之國內法，與政府採購協定規範不一致，致產生衝突適用之情況，他國政府採購之供應商以政府採購協定之相關規範於國內異議或申訴，將產生政府採購協定與政府採購法之衝突適用問題。

第二節　研究目的

政府採購法於 1998 年 5 月 27 日公布，並於公布後 1 年施行，迄今已逾 15 年，對於依據政府採購法辦理採購，積極面具有達成政府公務行政之興利目的，消極面為公部門辦理採購有一法源依據之防弊功能，此法之制定，除了建立政府採購制度，使政府採購程序公平化、公開化及透明化，以提升採購之效率與功能，並確保採購之品質，惟實施迄今，實務上產生不少適用上問題及疑義，或須透過學說，或須主管機關行政院公共工程委員會解釋，更甚至須透過修法解決。

本論文透過政府採購協定與我國政府採購法爭端解決機制之關連性與適用關係，藉由其他同為政府採購協定之締約國，或非政府採購協定之締約國，其相關政府採購協定之爭端解決機制於各該國之適用關係，以尋求我國政府採購法爭端解決機制與國際貿易爭端機制接軌。

第三節　研究方法

本論文之研究方法大致採取下列四方法：

一、歷史研究法

法律制度的形成必有一段演進歷程，透過歷史研究方法，了解為何該項制度在當時社會環境下會做如此之設計，進而逐漸演變至現今的模式。故本論文透過政府採購法規歷史的沿革與法治的演變，探究立法者真意以及立法背景，輔以所蒐集之文獻，進行研究分析，以瞭解政府採購爭端解決之機制。

二、文獻分析法

本論文主要參考文獻包含學者著作之專書與研究報告、相關期刊雜誌所刊登之文章與論文、報紙新聞之報導、研究生所撰寫之博碩士論文以及國內外相關之網站資料等。藉由上述各種相關文獻資料之蒐集、彙整並予以分析探討，以利於更深入了解，並對本論文研究問題之釐清實為一大助益。

三、外國法例比較分析法

本論文主要以討論政府採購協定爭端解決機制於我國政府採購法異議及申訴制度之實踐，並兼論美國聯邦政府採購規則、歐盟採購指令之救濟制度及大陸政府採購救濟制度，透過分析政府採購協定爭端解決機制於他國政府採購爭端解決機制之實踐，並酌取各國制度上之優點，以作為未來修法方向參考。

四、歸納比較法

藉由文獻蒐集與探討，並與國外立法例作出比較，分析歸納研究成果，以研析我國政府採購救濟程序符合及未符合政府採購協定，並提出結論與建議，以尋求符合國內及國際間政府採購之爭端解決機制。

第四節　研究架構

本論文以論述政府採購協定為出發，從政府採購協定制定沿革，探討該協定於國內之適用關係及其適用範圍，並研究政府採購協定之爭端解決機制相關原理原則及程序規範，另外，從我國政府採購法規範適用及其爭端解決機制，論述我國政府採購法與政府採購協定之適用關係，及相關異議及申訴制度，再藉由比較美國聯邦政府採購規則、歐盟採購指令及大陸政府採購救濟制度，以瞭解相關先進國家政府採購爭端解決機制之立法例，及探討政府採購協定之爭端解決機制，並比較各國政府採購救濟制度。藉由參酌政府採購協定爭端解決機制於其他國家政府採購救濟制度之實踐，分析並比較政府採購協定與我國政府採購法之救濟制度，以研析我國政府採購救濟程序，有與政府採購協定規範一致者，亦有與政府採購協定規範不一致者，就我國政府採購法與政府採購協定規範不一致部分，研擬相關修法建議。

第五節　研究範圍

本論文著重本國政府採購法爭端解決機制之建立與探討，政府採購履約階段之爭端解決之救濟程序及 WTO 架構下政府採購協定國際貿易爭端案例，不在本論文討論範圍，本論文係以我國政府採購法所定，採購案件決標前之異議及申訴制度為核心，以尋求我國政府採購救濟制度與國際接軌，針對未符合政府採購協定規範，提出我國政府採購法異議及申訴制度之建議及改進措施，以作為未來修法之參考。

第六節　研究成果

本論文藉由比較歐、美等先進國家政府採購之爭端解決機制，分析歸納該等國家與

政府採購協定救濟制度規範之一致性，對照我國政府採購救濟制度而言，我國仍有與政府採購協定救濟規範不一致者，透過我國政府採購法相關救濟法制之修法建議，使我國政府採購救濟制度與國際爭端解決機制接軌，以保障國外廠商政府採購救濟之權利，賦予投標廠商即時有效之救濟管道，並與政府採購協定之爭端解決機制之規範一致，藉由政府採購救濟制度之保障，以建立一個公平、公正及公開爭端解決機制，並能吸引更多國外廠商來台參與投標，以帶動國際貿易商機。

第二章 政府採購協定適用與爭端解決機制

第一節　政府採購協定背景介紹

第一項　沿革簡介

國際間為互利互惠，以不歧視為原則，削減關稅及非關稅措施，各締約國間乃於 1947 年簽署關稅暨貿易總協定，但當時政府採購規模及市場都很小，對國際貿易之影響不明顯，因此，GATT 將政府採購作為例外，排除在其約束範圍之外。如 GATT 有關國民待遇之第三條八之（a）即規定：「本條規定不適用於有關政府採購供政府公用、非商業轉售或非用以生產供商業銷售的物品之法律、法規或規定[3]。隨著國際貿易往來越加頻繁，尤其政府成為國際貿易中之貨物或服務之大宗業主，GATT 將政府採購排除在其約束範圍之外，造成歧視性之政府採購，進而產生國際貿易自由化之障礙，各締約國開始試圖將政府採購重新納入國際規範，自 GATT 1947 年成立以來，迄 1993 年為止共舉行 8 次回合談判，其中以第七回合（東京回合）與第八回合（烏拉圭回合）談判最為重要，因該二回合之談判除包括關稅談判外，亦對其他貿易規範包括政府採購進行廣泛討論。

第二項　東京回合談判之 GPA 版本

GATT 第七回合東京談判，各談判國咸認為政府採購中歧視外國產品及國民待遇等問題，已成為國際貿易自由化之障礙，引此主張「規則取向」美國代表占上風，而認為應有形成政府採購國際行為準則之必要，就政府採購之公開透明、公平解決爭議等問題制定一專門協定，在各締約國共同努力下，終於在 1979 年 4 月 12 日於日內瓦簽署第一個政府採購協定，並於 1981 年 1 月 1 日正式生效。 當時政府採購協定第二條已將國民待遇原則及不歧視原則訂於協定中，另對於諮商、爭端解決與實施亦於政府採購協定第七條有所規範。

第三項　烏拉圭回合談判之 GPA 版本

烏拉圭回合談判自 1986 年開始，於 1993 年 12 月 15 日完成，談判內容主要為去除非關稅貿易障礙及爭端解決機制等，該回合談判後期，各簽署國在東京回合之基礎上，就去除保護主義，打開各簽署國政府採購市場，降低適用案件之門檻金額等進行協商。

[3] GATT 1947 Art.3.8. （a）： The provisions of this Article shall not apply to laws，regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

與東京回合談判形成之 1979 年政府採購協定相比，烏拉圭回合談判形成之 1994 年政府採購協定主要之修正如下[4]：

1、擴大受協定拘束之政府採購範圍。工程、勞務採購及中央政府以下之地方機關，首度納入適用範圍。

2、嚴格規定採購契約之訂價原則。

3、放寬使用限制性招標方式之情形，限制性招標方式另外增列 5 種情況，使政府採購採用限制性招標方式更具靈活性。

4、要求提供法律救濟程序。各簽署國應提供一套非歧視、及時、透明且有效之程序，以使各供應商對其有或曾有利益關係之採購過程中可能存在之違反協定之情況提出申訴，同時鼓勵供應商與採購實體進行諮商以解決爭議。

5、進一步健全爭端解決機制，明確規定 WTO 下之爭端解決機制適用於本協定，以有利於保障協定之實施。

第四項　現行適用之 GPA 版本

現行政府採購協定於 1993 年關稅暨貿易總協定烏拉圭回合談判議定，屬一非強制性之協定，由 WTO 各會員國依其意願選擇加入後，相互開放經談判議定之政府採購市場，其範圍涵蓋中央機關、中央以下次一級地方機關、事業機構所辦理之工程、財物及勞務採購。GPA 係規範政府採購權利義務之國際框架，目的係降低對國內產品及供應商的保護，減少對外國產品及供應商的歧視，增加透明度以及建立磋商、監督和爭端解決機制，其特點有：

1、為複邊協定：僅適用於加入 GPA 之 WTO 會員。

2、會員國相互開放經諮商議定之政府採購市場：僅開放載明於市場開放清單內之採購，而非全面開放。

3、會員國少：目前 WTO 159 個會員國中只有 43 個加入 GPA（我國已於 2009 年 7 月 15 日正式成為 GPA 第 41 個會員國）。

4、不適用轉售性質之採購：如公營事業採購之原物料。

第五項　2012 年修正之 GPA 版本（尚未生效）

WTO 政府採購協定委員會為改善該協定內容，並擴大簽署國市場開放範圍，自 1997

[4] 蕭渭明，論《政府採購法協議》與我國政府採購市場的逐步開放，法學， 2003 年第 1 期，頁 68。

年起展開 GPA 新一輪談判。我國自 2009 年 7 月加入 GPA 之後，即積極參與該項談判。2011 年 12 月 15 日 GPA 委員會召開 GPA 第 8 屆部長級會議，就修訂的協定文本及開放市場範圍等，達成共識，簽署國同意採認相關法律文件，並簽署新版 GPA 修正議定書。GPA 委員會 2012 年 3 月 30 日召開會議，會中各締約國採認通過修正 GPA 法律文件，並同意儘速完成修正 GPA 議定書及其附件的國內批准程序。新版 GPA 並非立即對我國生效，除須經國內立法及批准程序外，依新版 GPA 協議內容，尚須三分之二以上的會員通知 WTO 秘書處接受新版 GPA 後 30 日，新版 GPA 始對該等接受的會員生效，目前新版 GPA 於我國尚未生效。新版 GPA 與現行 GPA 之差異如下：

1、增訂是否採用電子競標、採購機關辦理選擇性招標得載明邀標廠商家數之條件[5]。

2、增訂 GPA 會員及採購機關得基於下列理由排除廠商參與採購，除原列倒閉、不實內容外，尚包括：重大履約瑕疵、法院最終判決嚴重罪行、違反專業行為、違反誠信原則、逃漏稅[6]。

3、鬆綁招標期限之規定，增訂網路刊登招標公告、電子領標、電子投標各得縮短 5 天等標期[7]。

4、增訂機關電子競標於競價開始前，應提供審查評選方式等資料予各投標廠商[8]。

第二節　政府採購協定於國內適用關係

世界貿易組織於 1995 年 1 月 1 日正式成立，總部設在瑞士日內瓦，WTO 協定為一多邊協定，不論原始締約國及其後加入簽署之會員國，均為 WTO 協定之締約國，受 WTO 協定之拘束。WTO 架構下有附屬三個複邊協定，政府採購協定為其中一種（另二種為民用航空器協定與資訊技術產品協定），多邊貿易協定具有強制性，係對所有參與會員國有拘束力，而複邊貿易協定則屬選擇性，僅對參加之會員國具有拘束力，WTO 締約國未必須參加[9]。故 GPA 協定具有多個雙邊協定性質，僅適用於締約之雙邊，於各 WTO 締約國並無一體適用。

我國於 1990 年以「台澎金馬關稅領域」名義，申請加入 GATT，1992 年獲得觀察員身分，為加入世界貿易組織與未來簽署政府採購協定預作準備，我國於 1998 年 5 月公

[5] 新版 GPA 第七條「招標公告」參照。
[6] 新版 GPA 第八條「參與條件」參照。
[7] 新版 GPA 第十一條「等標期」參照。
[8] 新版 GPA 第十四條「電子競標」參照。
[9] 羅昌發著，政府採購法與政府採購協定論析，元照出版，2004 年 10 月，頁 6。

布，隔年施行政府採購法，使政府採購規範法制化，我國於 2002 年正式成為 WTO 會員國[10]，惟因政治主權爭議遲至 2008 年始正式成為政府採購協定之簽署國，使得我國政府採購國際化，惟當國際貿易之 WTO 不斷擴大適用範圍時，其與國內法領域產生相連結互動之關係[11]。

政府採購之爭議，大致可分為「招標爭議」與「履約爭議」，我國已成為 WTO 會員國，且亦簽署政府採購協定，各國廠商已紛紛投入我國政府採購市場，我國廠商參與國際政府採購案件之機會必將大大增加，如採購發生爭議，涉及國際間政府採購案件之準據法選定及管轄問題，供應商之採購爭議，應由何管轄法院及適用何種法律，可由合意管轄及選定準據法之方式，事先尋求相互可供遵循之依據。惟現行政府採購法之規定有符合政府採購協定之規範要求者，亦有不符合政府採購協定之規範要求者，適用上將發生衝突，尤其遇有政府採購爭議事項，政府採購法與政府採購協定兩者間應如何適用，必須先探討條約協定與國內法之法律性質與適用關係。

第一項　條約在我國之地位

有主張條約既經外交簽署，又經立法院通過，總統公布，其效力已與法律相當[12]，條約固可在國內法院適用，但應注意條約條款是否明確，不能僅作原則性規定，須待立法機關通過始能適用[13]，大法官釋字第三二九號解釋，認為條約內容涉及國家重要事項或人民之權利義務且具有法律上之效力者，應送立法院審議，始其與國內法具相同效力。另從大法官會議釋字第三二九號解釋文可知，經過立法院通過批准公約後，該條約即具有國內法之效力，條約於國內之運用方式有三：(一) 直接作為法規適用，例如避免雙重課稅之條約或協定、引渡條約等；(二) 須制定法規始能適用，例如我國與美國間智慧財產權之協議，須規定於相關法規才能有效執行；(三) 經司法審判機關採用，並作為判決先例者[14]。我國既已成為政府採購協定簽署國且經立法院通過統統公布，已具有一定法律效力，其規範若與現行政府採購法國內法不一致時，將產生適用上衝突。

第二項　條約與國內法之適用

[10]劉倩妏著，政府採購之救濟制度，政治大學法律學研究所碩士論文，1997 年 6 月，頁 1；黃立等合著，WTO 國際貿易法論，元照出版， 2002 年 6 月，頁 61。
[11]林彩瑜著，國際貿易法，月旦法學雜誌，第 138 期，2006 年 11 月，頁 129 以下參照。
[12] 林紀東，中華民國憲法釋論，1971 年 4 月版，頁 365-366。
[13] 丘宏達主編四人合著，現代國際法，三民書局，1995 年初版，頁 129。
[14] 丘宏達，現代國際法，修訂二版，2010 年，頁 116-117。

條約本身即為國際法[15]，與國內法適用上，有主張國內法優先適用說，有主張兩者同時適用說，亦有主張國際法優先適用說，蓋國際法規範與其他國家之關係，條約如經立法院通過，總統公布，其效力與法律相等[16]，條約與法律應依特別法優於普通法之原則，而認為條約優於法律適用[17]，我國實務見解以為：條約在我國是否有國內法之效力，依憲法第一百四十一條尊重條約之規定，條約之效力應優先國內一般法律[18]。

第三項　政府採購協定於國內之適用關係

現行政府採購協定第二十四條第五項規定：「各接受加入本協定之政府應確保在本協定之政府應確保在本協定對其開始生效之前，其國內一切法律、規章、行政程序及適用於附件所列機關之規則、程序與實務均已符合本協定之規定」；另 2012 年修正政府採購協定第二十二條第四項亦規定：「各締約國應確保在不晚於本協定對其開始生效日前，其適用於其採購機關之法律、規章、行政程序、規則、程序與實務均符合本協定之規定」，因此政府採購法應以政府採購協定為基礎，將須遵守之相關規定全納入後，再依我國政府採購法制定各種目的為方針，作更全面性、詳細之規定，以使二者環環相扣，避免法條適用上之矛盾[19]。

第三節　政府採購協定之適用範圍

現行政府採購協定主要內容包括兩大部分：第一大部分為協定條文本身，包括前言及二十四條文，第二大部分則為各簽署國依據本協定所承諾開放之政府採購市場清單，即發布政府採購資訊之刊物清單。修正政府採購協定主要內容亦包括兩大部分：第一大部分為協定條文本身，包括前言及二十二條文，第二大部分亦為各簽署國依據本協定所承諾開放之政府採購市場清單，即發布政府採購資訊之刊物清單。

第一項　適用主體

於政府採購協定納入簽署國「機關清單」中之採購案始有 GPA 之適用，並非現行政府採購法所規範之採購主體均一律適用政府採購法，目前現行 GPA 版本，我國附件清單應適用之主體包括中央機關、中央以下次一級機關及其他機關[20]。各 GPA 締約國所適用

[15] 許慶雄、李明峻合著，現代國際法入門，月旦出版社股份有限公司，1994 年 3 月 1 版 2 刷，頁 17-25。
[16] 林紀東，中華民國憲法釋論，三民書局，1971 年 4 月版，頁 365-366。
[17] 林紀東，中華民國憲法逐條釋義（四），三民書局，1986 年，頁 267。
[18] 高等法院七十九年上更（一）第一二八號判決。
[19] 廖宗盛，WTO 架構下政府採購協定適用範圍之研究-兼論我國政府採購法相關規定，世新大學碩士論文，2002 年，頁 126-127。
[20] GPA 第一條第一項規定本協定適用於有關本協定附錄一所列之適用機關清單。

之「主體」並不盡一致，究何機關之採購行為須列入 GPA 之規範中，端視締約國簽署前之談判結果而定[21]。2012 年修正政府採購協定於第二條第四項亦有規定，各締約國應於附錄一之附件載明受本協定規範之中央政府機關及中央以下次一級機關及其他機關[22]。

第二項　適用客體

GPA 締約國以正面表列及負面表列附件清單方式，列舉締約國應適用政府採購協定之採購客體，且須達到一定之採購金額門檻以上始有適用，目前現行 GPA 版本並非所有清單內之採購客體均受 GPA 之規範，各國對於採購金額適用門檻規範不盡相同[23]。2012 年修正政府採購協定於第二條第四項亦有規定，適用本協定之財物採購、服務採購及工程採購[24]。

第三項　不適用政府採購協定之例外

目前現行 GPA 版本，GPA 第二十三條第一項規定本協定除外事項，其中對於武器、彈藥或戰爭物資之「國防採購」，為保護國家基本安全利益且為國家安全或國防目的所不可或缺之採購，締約國除可不公開採購資料外，尚得不採公開招標之方式進行採購，因此，此等採購案件之採購程序得不受政府採購協定之拘束。現行 GPA 第二十三條第二項規定，各締約國基於保護公共道德、秩序或安全、人類及動植物生命或健康、智慧財產權所必要[25]；或與殘障人士、慈善機構或服刑人生產之產品或服務有關[26]，而實施或執行之措施，亦得排除政府採購協定之適用。但以該等措施之適用方式，不應成為對具有相同條件之國家予以武斷或不合理歧視之手段，或成為對國際貿易隱藏性限制者為限。另 2012 年修訂版 GPA 第二條第三項規定，除締約國於附錄一附件另有規定外，本協定

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[21] 羅昌發，政府採購法與政府採購協定論析，2004 年，元照出版社，頁 392-396。

[22] 2012 年修訂 GPA 第二條第四項規定：各締約國應於附錄一之附件載明下述資訊：
(a)　於附件一載明採購行為受本協定規範之中央政府機關；
(b)　於附件二載明採購行為受本協定規範之中央以下次一級政府機關；
(c)　於附件三載明採購行為受本協定規範之所有其他機關；

[23] GPA 第一條第二項規定：本協定適用於任何以契約方式進行之採購，包括購買或租賃或租購，而不論有無附帶購買選擇權，且包括兼含產品與服務於一採購之情形。
GPA 第一條第三項規定：就適用本協定之採購，若有機關要求未列於附錄一之企業依照特別要求決標時，該等要求準用本協定第三條之規定。
GPA 第一條第四項規定：本協定適用於不低於附錄一所標示之相關門檻金額之任何採購合約。

[24] 2012 年修訂 GPA 第二條第四項規定：各締約國應於附錄一之附件載明下述資訊：
(d)　於附件四載明適用本協定之財物採購；
(e)　於附件五載明適用本協定之服務採購，但不包括工程服務；
(f)　於附件六載明適用本協定之工程服務採購；及
(g)　於附件七載明任何總附註。

[25] 我國政府採購法第二十二條第一項規定「機關辦理公告金額以上之採購，符合下列情形之一者，得採限制性招標：」同項第二款乃規定：「屬專屬權利、獨家製造或供應、藝術品、秘密諮詢，無其他合適之替代標的者。」

[26] 此部分我國政府採購法第二十二條第一項規定「機關辦理公告金額以上之採購，符合下列情形之一者，得採限制性招標：」同項第十二款乃規定：「購買身心障礙者、原住民或受刑人個人、身心障礙福利機構、政府立案之原住民團體、監獄工場、慈善機構所提供之非營利產品或勞務。」

有相關排除規定[27]。

第四節　政府採購協定之爭端解決程序

政府採購協定提供之救濟方式與管道大致分為雙軌進行，一為受不公平對待之供應商向辦理採購之相關機關申訴程序；一為各簽署締約國間之爭端解決程序。

第一項　政府採購協定之爭端解決原理原則

有關政府採購協定規定之申訴制度，應遵循不歧視、適時、透明及有效性等原則，分別說明如下：

一、不歧視原則（Non-discriminatory）

現行政府採購協定於前言第二項及第三條，相關不歧視原則均有所論述，於協定第二十條第二項針對締約國之申訴程序則特別重申其意旨，其目的在於確保締約國所設計之申訴程序之正當，於申訴程序中，不得訂定不平等或差別待遇之條款，進而影響相關締約國之救濟權利。另 2012 年修正政府採購協定前言，亦有不得基於保護國內財物或服務或國內廠商之目的，採用相關措施，亦不得歧視或差別對待國外財物、服務或國外廠商，於爭端解決機制中，修正版政府採購協定第十八條國內審查程序亦規定，締約國應提供無歧視之行政或司法審查程序[28]。

二、適時性原則（Timely）

現行政府採購協定第二十條規定七項（a）規定，揭示快速臨時措施的採行，其目的在確保對違反協定之採購案提供申訴廠商救濟之適時性，以確保商機，基於此，申訴受理機關得令採購案暫時停止進行。而在決定是否採行上開快速臨時之措施，應就公共利益等因素綜合考量，而當申訴受理機關決定不採行上開措施時，應以書面向當事人說

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[27] 2012 年修訂 GPA 第二條第三項規定：除締約國於附錄一附件內另有規定者外，本協定不適用於：
(a) 購買或租賃土地、既有建築物，或其他不動產或其上之權利；
(b) 非契約之協議，或締約國以任何形式提供之協助，包括合作協定、補助金、貸款、注資、保證與財務獎勵措施；
(c) 財務代理或存託服務之採購或收購、受管制金融機構之清算及管理服務，或涉及公債發售、贖回、發行之服務，包括貸款或政府債券、票券與其他證券；
(d) 公共僱傭契約；
(e) 下述性質之採購：
(i) 為提供國際援助之特定目的，包括開發援助；
(ii) 依照關於軍隊派駐，或關於某一計畫簽署國聯合執行之國際協定所要求之特定程序或條件；或
(iii) 依照國際組織之特殊程序或條件，或接受國際資助、貸款或其他協助，其適用程序或條件異於本協定者。

[28] 2012 年修訂 GPA 第十八條第一項規定：「締約國應提供及時、有效、透明且無歧視之行政或司法審查程序使廠商得對涉及或曾涉及其利益且為適用本協定之採購」。

明理由[29]。同條第八項則規定，為求商機及其他利益之確保，各締約國之申訴程序在正常情形下應適時完成[30]，亦為申訴應適時完成之規定。2012 年新修正政府採購協定第十八條第七項亦有採行快速臨時措施，使採購程序暫停進行，保留廠商參與採購之機會[31]。

三、透明化原則（Transparent）

現行政府採購協定中首見於前言第三項，其要求締約國關於政府採購之法律、規章、程序及執行措施應予透明化，於第二十條第三項規定締約國應將申訴程序以書面公開，並使申訴廠商能普遍獲得相關資訊[32]；第二十條第四項規定，要求締約國對適用本協定之政府採購案，招標機關於辦理採購過程中之所有文件應保留三年[33]；另外第六項（a）程序參與者得陳述意見，(c）程序參與者得參與全部程序，及（d）申訴程序公開化要求，均是申訴制度透明化之表現。新修正政府採購協定前言亦強調採購措施透明化之重要性，對於申訴程序應以書面列明並得供一般人取得[34]；另外第十八條第六項，(a）採購機關應以書面回覆申訴，且將一切相關文件向審查機關揭露；(b）程序之參與者應有權於審查機關作成決定前陳述意見 (e)參與者有權要求程序公開進行，且得提出證人，亦是申訴制度透明化之表現[35]。

四、有效性原則（Effective）

對於現行政府採購協定第二十條規定七項（a）規定，快速臨時措施的採行，類似

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[29] GPA Art.20 （7）(a) rapid interim measures to connect 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；

[30] GPA Art 20（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.

[31] 2012 新修正政府採購協定第十八條第七項規定：「締約國應採用或維持含有下列事項之程序：
(a) 快速臨時措施，俾保留廠商參加採購之機會。該臨時措施得使採購程序暫停進行，但申訴程序得規定於決定是否適用此等措施時，得就避免對包括公共利益在內之有關利益所生之不利後果列入考量，且應以書面說明不採取此等措施之正當理由」。

[32] GPA Art 20 （3）Each Party shall provide its challenge procedures in writing and make them generally available.

[33] GPA Art 20 （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.

[34] 2012 新修正政府採購協定第十八條第一項規定：「申訴之程序規定應以書面列明，且得供一般人取得。」。

[35] 2012 年修訂 GPA 第十八條第六項規定：「締約國應確保非屬法院之審查機關之決定，應受司法審查或具備下列審查程序：
(a) 採購機關應以書面回覆申訴，且將一切相關文件向審查機關揭露；
(b) 程序之參與者（以下簡稱「參與者」）應有權於審查機關作成決定前陳述意見；
(c) 參與者有權派遣代表或有人陪同；
(d) 參與者應可參與全部程序；
(e) 參與者有權要求程序公開進行，且得提出證人；及
(f) 審查機關應即時以書面作成決定或建議，且應包含其各項決定或建議之理由。

保全程序為政府採購有效救濟之落實，同條項（c）要求採購機關於採購案確有本協定之情事時，應予修正或對申訴廠商所遭受之損害予以補償[36]，亦為有效性原則之彰顯。2012 修正版政府採購協定第十八條第七項（b）亦有違反本協定之情形，應有改正措施或賠償所受損害之規定，其所受之損害賠償限於備標之成本或與申訴有關之成本，或兩者之總和[37]。

第二項　政府採購協定廠商救濟程序規範

第一款　締約國應設之內國救濟救濟

第一目　諮商程序

依據現行政府採購協定第二十條規定，若依供應商投訴採購案有違反本協定情事時，締約國應鼓勵該供應商與採購機關諮商以解決爭議。在此情形下，該採購機關應以不損及按申訴程序取得改正措施之方式，對投訴事項予以公正且適時之考量。2012 年修正政府採購協定第十八條第二項規定，如廠商之投訴係針對涉及或曾涉及其利益且為適用本協定之採購，有第一項所述之違反本協定或未遵守措施情形者，採購機關之締約國應鼓勵該機關與廠商以諮商方式解決爭議；修正第二十條「諮商與爭端解決」第一項亦規定，締約國對另一締約國就任何影響本協定運作事項所為之表示，應予以同理心考量且給予充分的諮商機會，故諮商並非申訴之先行程序，亦非與申訴程序相排斥之概念，而係可同時進行之救濟程序[38]，採取鼓勵方式事先以諮商程序解決採購紛爭。

第二目　申訴程序

一、現行政府採購協定第二十條第二項及 2012 年新修正政府採購協定第十八條規定意旨以下：

1、締約國應提供無歧視、適時、透明化且有效性之程序，使供應商得以對涉及彼等權益且有違本協定情事之購案提出申訴。

2、締約國應書面列明申訴程序並使其得以普遍取得。

3、締約國應確保購案有關文件應保留三年。

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[36] GPA Art 20 (7)(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.

[37] 2012 新修正政府採購協定第十八條第七項（b）規定：「如審查機關決定有第一項違反本協定或未遵守措施之情形存在，應有改正措施或賠償所受損害，所受損害之賠償得限於備標之成本或與申訴有關之成本，或兩者之總和。」

[38] 劉倩妏，政府採購救濟制度-以政府採購之法律性質為中心，國立政治大學法律研究所碩士論文，1997 年，頁 13。

4、供應商應得在知悉異議之時或合理情況下可得而知之時起一定期限內，開始其申訴程序並通知採購機關。前述期間不得少於十天。

5、現行政府採購協定第二十條第六項及 2012 年新修正政府採購協定第十八條第六項規定意旨，申訴案件應由公正客觀之獨立機構審理。非屬法院審查單位者，應受司法審查或具備一定公開程序。

（1）做成意見或決定前，程序之參與者得陳述其意見。

（2）程序之參與者得派遣代表或有人陪同。

（3）程序之參與者應可參與全部程序。

（4）程序能公開進行。

（5）意見或決定應以書面為之並陳述其意見或決定之基礎。

（6）得以提出證人。

（7）一切文件向審查單位公開。

二、申訴程序應允許下列事項：

1、快速臨時措施，俾改正違反本協定情事及保全商機。該措施得令採購案暫停進行。但應將包括公共利益在內之有關利益所生之不利後果，予以列入考量。

2、對申訴正當性評估及達成決定之可能性。

3、對違反本協定情事之改正或遭受損失或損害之賠償。賠償得限於準備投標或申訴之成本。

三、提起申訴之主體：

依現行政府採購協定第二十條第五項規定，締約國得要求有利害關係之廠商，於期限內聲明不服提出申訴。

四、提出申訴之期限：

申訴程序係對有利害關係之廠商，提供救濟管道以迅速及有效解決紛爭，若未於期限內提出申訴，致採購機關已完成部分或全部採購程序，如欲要求採購機關回復或暫停採購程序之進行，對其他利害關係人將造成一定程度之不利益[39]，故要求利害關係之廠商應在知悉或可得而知對採購案得聲明不服之原因事實之時起之一定期

[39] 羅昌發，國際貿易法：世界貿易組織下之法律新秩序，元照出版有限公司，2002 年 2 月，初版 4 刷，頁 816。

間內，開始其申訴程序並通知採購機關。但前述期限不得少於十日[40]。

五、申訴之審理機關[41]：

（一）由法院受理申訴案件。

（二）由與政府採購結果無利害關係且由公正、客觀之獨立機構受理申訴案件，然審理結果應受司法審查。

第二款　締約國間之爭端解決程序

依據現行政府採購協定第二十二條第一項及 2012 年新修正政府採購協定第二十條第三項規定，世界貿易組織協定之「爭端解決規則及程序瞭解書」(Understanding on rules and procedures governing the settlement of disputes,以下簡稱 DSU）之規定，應適用於本協定。爭端解決瞭解書屬於 WTO 協定附件二。爭端解決程序一般可分為六個階段，包括：1、雙邊諮商。2、斡旋、調解及調停。3、個案審議小組之成立。4、小組報告之採認。5、上訴程序。6、監督與執行。解釋上政府採購協定所生爭端得適用 WTO 爭端解決瞭解書規定，但 GPA 協定另有除外規定者，則優先適用 GPA 協定爭端解決機制之規定。現行政府採購協定第二十二條第三項及 2012 年新修正政府採購協定第二十條第二項規定，僅具備世界貿易組織會員身分之本協定締約國，始得參與爭端解決機構就本協定之爭端所採取之決定或行動，此部分列為適用之例外。

第一目　諮商

世界貿易組織協定之「爭端解決規則及程序瞭解書」第四條規定，各會員國應確保並改進諮商程序之效率，被指控國應於收到諮商請求後十日內答覆，並於三十日內進行協商，以期獲致雙方協議。如會員未於收到請求十日內答覆或於三十日內展開諮商，或於其他合意期間內展開諮商，則請求諮商之會員得逕要求成立小組。

如諮商未能於收到諮商請求後六十日內解決爭端，指控國得要求設立小組。於上述六十日期間內，如當事國均認為諮商無法解決爭端時，指控國得要求設立小組。遇有緊急案件，包括涉及易腐貨品，會員應於收到請求後十日內，展開諮商，如諮商未能於收到請求後二十日內解決爭端，指控國得要求成立小組。

現行政府採購協定第二十條及 2012 年新修正政府採購協定第十八條第二項諮商之

[40] 參照現行政府採購協定第二十條第五項及 2012 年新修正政府採購協定第十八條第三項規定。

[41] 參照現行政府採購協定第二十條第六項及 2012 年新修正政府採購協定第十八條第四項、第五項規定。

規定，有關被指控國答覆時限，協商時限及要求成立小組等規定，因未有特殊例外規定，故依 DSU 之規定辦理。

第二目　斡旋、調解及調停

DSU 第五條規定，如爭端當事國同意，得自行約定採取斡旋、調解及調停之程序。此等程序所採之立場，應予保密，並得隨時開始或終止，斡旋、調解及調停程序一旦終止後，指控國得要求設立小組。如斡旋、調解及調停於收到請求諮商後六十日內為之，指控國必須俟屆滿六十日後方得要求成立小組，惟如爭端當事國均認為斡旋、調解及調停無法解決爭端時，指控國於六十日期間內得要求成立小組。小組成立後，如爭端當事國同意，亦得繼續進行斡旋、調解及調停程序。

第三目　成立爭端解決小組

小組應由合格之官方或非官方人士組成，依 GPA 規定應包括在政府採購領域專業之人士，小組之功能，係協助履行其依本瞭解書所應負之責任，準此，小組應提出案件之客觀評估，包括案件事實與相關協定之適用性及一致性之客觀評估，並作成調查結果以協助爭端解決機構（Settlement Dispute of Body,以下簡稱 DSB）作建議或裁決。小組應定期與爭端當事方諮商，俾讓當事方有足夠機會獲致相互滿意之解決。

第四目　小組報告之期限

DSU 第十二條規定，為使爭議處理程序更有效率，小組自小組成員組成日起至提交最終報告予爭端當事方止之期間，原則上不得超過六個月。又當小組認為其無法在六個月內提出報告時，應以書面告知原因，惟仍不得超過九個月。

GPA 第二十二條第六項有較短期間之規定，小組應嘗試自其組成及委任條件被同意起四個月內，向爭端當事國提出最終報告。若有遲延，亦不得超過自其組成及委任條件被同意起七個月。是故，應盡所有努力將爭端解決瞭解書所定之期限減少二個月。

第五目　裁定及建議事項之執行監督

為確保爭端有效解決並使各會員受益，必須立即遵行 DSB 所作之建議或裁決。DSB 應監督所通過之小組報告或建議之履行，且應確保於合理期間內履行，WTO 爭端解決體系改革重點，有認為應加強其協定、決議、報告在會員國之適用及履行[42]。

第三項　政府採購協定爭端解決機制探討

[42] 洪德欽，WTO 爭端解決體系之研究，台大法學論叢第二十八卷第四期，1999 年 7 月，頁 312。

第一款　採取雙軌申訴管道

一、依據 GPA 第二十條及 2012 年新修正 GPA 第十八條規定，締約國應鼓勵供應商向採購機關諮商以解決爭議；另提出申訴，應由法院或公正且獨立之單位審理，若非由法院審理則須具備得陳述意見、程序參與、公開進行等程序。

二、依據現行 GPA 第二十二條第三項規定，締約國亦得請求爭端解決機構設立小組，就爭端事項提出建議或做出裁決。

三、因此締約商除得對採購招標國提出諮商及申訴程序外，依據 DSU 規定，爭端當事國亦得於 WTO 架構下爭端解決機制中，提出諮商、調解及申訴等救濟程序，故採取雙軌之申訴管道。

第二款　小組報告採認時間較短

一、GPA 爭端解決機制，除爭端之當事國於爭端解決機構小組成立後二十天內另有合意外，小組應受任就提交爭端解決機構認定之事項予以審查，並做成判斷，以協助爭端解決機構依本協定就該事項做成建議或決定，縱有爭端解決瞭解書第二十一條第五項之規定，於當事國間對於遵循建議或決定所應採行之措施是否存在及與適用之協定是否符合而有歧見時，小組應嘗試於六十天內提出其決定。

二、解決爭端之程序應加速進行，小組應自組成及委任條件被同意起向爭端當事國提出最終報告，若有遲延，亦不得超過自組成及委任條件被同意起七個月，均較 WTO 架構下 DSU 第十二條規定短二個月。

三、GPA 相對於 WTO 架構下 DSU 所訂時限較短之目的，在於保障供應商參與採購機會能較為迅速獲得處理。

第三款　排除跨協定報復

現行政府採購協定第二十二條第七項及 2012 年新修正 GPA 第二十條第三項規定，本協定除外，所生之爭端，均不得導致依本協定所為之減讓或其他義務之中止，簡言之，政府採購協定排除「跨協定報復[43]」。依據 DSU 第二十二條規定，允許當事國得到授權，「暫停減讓或其他義務」，一般俗稱「貿易報復」。而本協定所生之爭端亦不得導致依該瞭解書附錄一所列之其他協定下之減讓或其他義務之中止。

促進國際貿易自由化，為政府採購協定體現之價值目標，在其序言中亦強調落實三

[43] 肖北庚，「國際組織政府採購規則比較研究」，中國方正出版社，大陸，2003 年 1 月，頁 147-148。

個基本原則：非歧視原則、透明化原則及國民待遇原則，政府採購協定序言亦強調爭端解決機制之建立，可確保有關政府採購規範之公平、迅速且有效之執行，並維持權利與義務之平衡，期以國際社會共同行為準則規範，達到實現政府採購協定貿易自由化之價值目標，而國際社會共同行為準則規範得以有效實現，有賴各國不同經貿利益主體之國內法規則，有效救濟制度之規範，更是保障權利實現及法律制度設計之必要手段。

從 GPA 協定爭端解決機制之規範可知，其與 WTO 架構下 DSU 現有程序規定不盡相同，從 GPA 爭端解決機制現況瞭解，其可能缺失有：一、程序分歧：各有不同爭端解決程序，易造成各國對於條文解釋不同，產生適用上之混淆。二、提出爭端案件少：爭端控訴並未影響採購程序之停止進行，對於採購權益之保障較為不周，造成政府採購協定爭端案件較少。三、效率不彰：小組成立及爭端調查與結果報告之作成曠日費時，效率不彰，使爭端解決機制運作受影響。四、執行裁決情況不佳：裁決通過，執行情況仍取決於敗訴方之意願，不理會裁決結果，又不允許跨協定報復，故無法發揮實際效用。故在適用上是否有所衝突而排除 DSU 之適用，原依據 DSU 第一條第一項規定，GPA 屬於本瞭解書附錄一所列之涵括協定，應適用本瞭解書有關諮商及爭端解決之規定，但因 GPA 本身另有爭端解決特殊規定，另可組成專家小組及上訴機構，兩者適用產生不一致情形；且由於 GPA 並非本瞭解書附錄二之涵括協定，可否適用 DSU 第一條第二項衝突條款之規定，適用上亦產生爭議。

本文認為 DSU 第一條明白表示 DSU 係為 WTO 協定下所有涵括協定所提供之廣泛性及整體性爭端解決機制，因此，僅有在特殊情況下，即 DSU 之條文與特別及增訂條文二者間無法符合時，該等特別及增訂條文才優先適用。此種情形是否有「場域選擇（forum-shopping）」之適用情形，端視 DSU 之規範與 GPA 爭端解決在程序、效果是否產生無法融合之情形，並運用協定適用關係解決衝突問題。惟依據 GPA 第二十二條第一項規定：「世界貿易組織協定之『爭端解決規則及程序瞭解書』之規定，應適用於本協定，但本協定另有規定者除外。」，且 2012 年新修正政府採購協定第二十條「諮商及爭端解決」刪除 GPA 本身另有爭端解決特殊規定，及另可組成專家小組及上訴機構等相關規定，兩者適用不一致情形已消除，亦無「場域選擇（forum-shopping）」之情形發生，故發生政府採購爭議時，同為 GPA 簽署國，應優先適用 GPA 之爭議處理程序，GPA 未規定者或非 GPA 簽署國，則適用爭端解決瞭解書之爭端解決程序。

第三章　我國政府採購法之規範適用與爭端解決機制

第一節　政府採購法救濟背景介紹

第一項　政府採購法救濟制定沿革

為公平有效處理政府採購「決標前紛爭」與「決標後紛爭」，政府採購法制定之初，參酌政府採購協定第二十條、二十二條及二十四條規定，建立「廠商異議及申訴制度」、設置「採購申訴審議委員會」，以行政自我省察之救濟制度，處理採購申訴及履約爭議案件。

一、1998 年 5 月 1 日制定政府採購法第七十四條規定：「廠商與機關間關於招標、審標、決標、履約或驗收爭議，得依本章規定提出異議或申訴。但得標廠商與機關間之私法爭議，以提付仲裁、申（聲）請調解或提起民事訴訟者，不在此限[44]。」，此種立法雖係增加廠商之救濟管道，並兼顧政府採購之時效性，但仍發生以下問題：

（一）決標後之「履約」與「驗收」事項，相關私權爭議既可申請調解、提付仲裁或民事訴訟，是否有賦予其提起異議或申訴之實益？

（二）採購申訴審議委員會對於採購爭議所為審議判斷之性質，依舊法第八十三條規定，視同訴願決定或調解方案，何者為「訴願決定」，何者為「調解方案」，實務未有一定規範標準。

（三）履約或驗收之私權爭議，得標廠商可自由選擇異議、申訴或仲裁、起訴，可能引發行政法院或民事法院與採購申訴審議委員會見解歧異，造成救濟體系之積極衝突。

二、2002 年 2 月 6 日修正政府採購法第七十四條規定，刪除履約、驗收爭議事項得提起異議及申訴之規定，限於招標、審標及決標爭議事項始得提起異議及申訴；並修正同法第八十三條規定：「審議判斷，視同訴願決定」。此修法雖將申訴審議判斷之定位與功能重新釐清，但實務運作及學說對於政府採購之法律性質定性及其救濟程序，仍有予以深入探討之必要。

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[44] 政府採購法第七十四條修正前之立法理由：「政府採購行為一向被認定係私經濟行為，廠商與機關之間如有爭議，本應循民事程序解決，惟因廠商於招標、審標、決標階段，與機關並無契約關係，難有可供訴訟提起之訴因，故為增加廠商之救濟與保護，並兼顧政府採購之時效性需要，爰參酌政府採購協定第二十條之規定，訂定異議及申訴程序。至於履約及驗收之爭議，本已有仲裁、調解或民事訴訟得以救濟，但為擴大本章適用範圍，故就屬於第七十五條之履約或驗收爭議，亦得依本法提出異議及申訴。」

第二項　政府採購行為之法律性質

政府機關為達成特定行政目的，執行公務預算經費，而從中獲得行政活動所需資源之行為，其中涉及採購需求、編列預算、通過預算、訂定採購資格、規格、決定招標方式、擬定招標文件、招標公告、開標、審標、比議價、決標、簽約、履約、驗收、結案驗收、付款、保固……等程序[45]，政府採購行為係以行政主體一方為當事人，與他方當事人私人間成立法律行為，對於政府採購行為公法或私法性質之爭議，影響後續對於政府採購爭議處理救濟之定位、功能及效力。

第一款　公私法二元論及區分標準

政府採購應屬政府之私經濟行為，但對於招標規範及停權處分，又以公法關係處理，對於公法抑或是私法關係之區分標準，大致上係以法律所欲規範之主體，或是法律適用之目的及關係為認定標準[46]，茲將公私法區分標準分述如下：

一、利益說：

此說係以法律所欲保障之利益或目的為準，但私法兼有保障公益性質，公法也兼有保障私益性質，如民法重視交易安全之公共利益，刑法保障個人財產權之私有利益，故難作為一區分標準，此說不可採。

二、意思說

公法關係以優越之支配或上下服從之意思，命令其作為或不作為；而私法關係係以對等意思，對於財產支配作出規範，此說忽略對於法治國以來，人民對於政府不再僅是上下支配服從關係，而是互享權利之關係，故亦無法從此說定出區分標準。

三、從屬說

主張規範上下隸屬或秩序關係者為公法，亦即高權間之服從關係；規範平等關係者為私法，典型之私法契約，國家機關或其他公共團體有時仍不免立於私人地位（即準私人地位之國家），與私人締結買賣契約、運送等契約，而發生法律關係；而私人有時會因國家授予公權力，亦不免立於國家之地位（即準國家之地位），對其他私人行使公權力，而認此說亦非盡善[47]。

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[45] 湯德宗，「美國公共契約法制之研究」，行政院研究發展考核委員會委託研究，1993 年 9 月，頁 7-8。
[46] 李建良，行政法第三講-公法與私法的區別（上），月旦法學第 5 期，2003 年 3 月，頁 38-49。
[47] 鄭玉波著，民法總則，三民出版，2003 年 9 月，頁 3。

四、法律主體說

法律適用之主體為國家或政府者為公法；法律適用主體為個人為私法，公法之適用主體亦可能擴及任何一般私人，其所賦予權力或課予義務之對象，亦不僅限於公法主體或機關，故此說亦不可採。

五、公權力行使說

行政機關欲對特定私人產生權利義務關係，必須經由法律作為規範依據，而得以使行政機關介入私人行為，故規範公權力行使關係為公法，因該公權力之行使，產生私法效果關係者，為私法，形成雙階理論[48]。

公私法之區別實益除攸關政府對於人民權利義務關係之規範與政府效能外，更對人民訴訟權能之保障息息相關，若從政府採購行為套用公私法區別標準理論，從利益說論，政府採購應係保障公益，為公法；但就意思說、從屬說及法律主體說而言，政府採購行為與私人間係基於對等地位，並無上下統治權關係，又為私法關係，就公權力行使說論，政府採購行為於招標階段具有上下關係規範採購秩序，應歸屬於公法關係，但對於採購履約階段有具有私經濟行為之私法關係，對於發生爭端尋求救濟之途徑，即對傳統公私法爭端尋求普通法院或行政法院解決紛爭之方式，產生適用上之疑義。

第二款　學說見解

一、私法行為說：

政府採購屬於私經濟行為，政府機關與人民係立於平等私權主體地位，不論其階段為何，係立於私法主體地位從事私經濟行政中之行政輔助行為[49]，另從行政院版草案政府採購法第七十五條立法理由，述明「政府採購屬於私經濟行為」[50]，救濟管道之異議及申訴，僅係在增加廠商救濟管道，避免廠商投訴無門，無法解明為其係具有公法性質之法律行為。

二、公法行為說：

本說認為行政主體自任一方當事人，且政府採購須依法受監督及政府審計，其

[48] 司法院大法官會議釋字第 540 號解釋參照。
[49] 私經濟行政已可稱為國庫行政，指國家非居於公權力主體地位行使其統治權，係處於與私人相當之法律地位所為之私法行為。而依其行政之目的，可區分為三種不同行為類型，即「行政輔助行為」、「行政營利行為」及「行政形式之給付行政行為」。參見吳庚，行政法之理論與實用，1999 年 6 月增訂 5 版，頁 13-14。
[50] 參見行政院八十五年院訂版政府採購法草案。

應屬於公法行為中之「行政契約」[51]，此係以主體說為主要論點；若以契約標的論，以契約之內容與效力，定其是否具有公法關係[52]；學說亦認為原則應以契約標的為準，如依契約標的仍無法判斷其法律性質時，則兼採契約目的加以衡量[53]。

三、雙階理論說：

主要認為將私經濟行為分為「受理申請」及「履行行為」兩階段，亦即行政主體於決定是否准駁其申請，為公法關係，行政機關之決定，為干涉行政且具異質性屬一般處分[54]（對象尚不特定）或行政處分（對象可得特定）；其後之履行行為，則多屬國庫或財產上之私法問題[55]。惟採購決定係機關基於職權，就政府採購個別案件上所為之單方行政決定，是否屬於訴願法及行政程序法所稱之行政處分「指中央或地方機關就公法上具體事件所為之決定或其他公權力措施而對外直接發生法律效果之單方行政行為」之定義，尚有疑義，又採購之決定雖屬單方行政行為，並非公權力之行使，尚難遽認屬於行政處分[56]。

又政府採購法九十二年修正理由重申「私經濟行為說」，並將採購申訴審議判斷「視同」訴願決定，有可能係主管機關為避免掉入政府採購行為定性爭議之漩渦，故意將申訴具體個案上，與救濟程序分開處理[57]，既然分開處理，於機關內部異議申訴程序之處理，準用訴願相關規定即可，何須疊床架屋，另設專責之採購爭議申訴委員會[58]。

四、特殊行為或公私法併存說：

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[51] 採此說者，許宗力，雙方行政行為-已非正式協商協定與行政契約為中心，收錄於第五屆海峽兩岸學術研討會論文集，台灣行政法學會，2001 年 9 月 8 日，頁 15；劉倩妏，政府採購救濟制度-以政府採購之法律性質為中心，國立政治大學法律研究所 1997 年碩士論文，頁 56-71。

[52] 最高法院 61 年度台上字第 1672 號判決：「公法上契約與私法上之契約，其主要區別為契約之內容與效力，是否均為公法所規定。苟契約之內容及效力，並無公法規定，而全由當事人之意思訂定者，縱其一方為執行公務，仍屬於私法契約之範圍。」。

[53] 吳庚，行政法之理論與實用，增訂七版，2001 年八月，頁 398 以下；陳敏，行政法總論，1998 年五月初版，頁 492-498；陳新民，行政法學總論，2000 年八月修訂七版，頁 352-355。

[54] 一般處分係行政程序法第九十二條第二項之文義，指相對人雖非特定，而可得確定其範圍者謂之，如行政法院 53 年判字第 39 號。

[55] 李惠宗，行政法要義，五南出版，2000 年 11 月，頁 291。

[56] 羅昌發，政府採購法與政府購協定論析，元照出版公司，2004 年二版第一刷，頁 324-326；張祥暉，政府採購法修法後之問題探討-以 2002 年二月修訂版本為核心，台灣本土法學雜誌第四十七期，民國 2003 年六月。

[57] 陳建宇，政府採購異議、申訴、調解實務，永然文化出版公司，2003 年八月初版，頁第 15。

[58] 張祥暉，政府採購法修法後之問題探討-以 2002 年二月修訂版本為核心，台灣本土法學雜誌第 47 期，2003 年六月。

此說認為政府採購行為兼有公私法行為之性質，就政府採購之各個單一行為，認定其為公法行為或私法行為，政府採購法之主管機關行政院公共工程委員會議採取此見解[59]，本說最大缺點在實際上仍未提出任何標準以供實務之運用[60]，仍未提出一套確切可能之判斷標準。

第三款　實務見解

政府採購具有達成公行政目的之公共利益性質，透過政府採購法之規範拘束，避免行政機關恣意為採購行為，亦含有公法性質，但透過立法手段規定，將非屬於「行政處分」性質之採購行為，依政府採購法第八十三條之規定，將審議判斷「視同」訴願決定，以立法技術方式透過法律擬制產生特殊法律效果，但仍無法改變採購行為本身之法律性質，故解釋上立法者似已將政府採購行為認定為私法性質[61]，否則無須另以法律規定申訴審議判斷視同訴願決定，但仍不宜完全依立法者之意見，逕以私法性質視之，仍應依現行實務運作，依政府採購法之規範執行。

實務上既認為政府採購為私經濟行為，政府與廠商間係基於平等地位進行商業交易往來，既與政府統治權無關，亦無「行政處分」存在，故原則上政府採購發生爭議應循普通法院民事庭尋求救濟，但在政府採購開標、審標及決標過程中，因未締約，機關與廠商間並未有契約關係[62]，故尚未發生請求權基礎，及未生「訴訟標的」，此時廠商仍然無法循民事訴訟途徑救濟，在政府採購過程受到不利決定或不利過程之廠商，需招標機關滿足條文中締約過失責任之要件[63]，才能向招標機關請求損害賠償。況且如循民事訴訟程序，難有可提起訴訟之訴因，為維護其權益，並為符合我國加入政府採購協定之規

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[59] 1999 年 7 月 8 日（八八）工程企字第 8809382 號函：「招標、審標、決標、履約或驗收之爭議，究屬公法行為或私法行為，原則上依個案性質認定。屬於公法行為者，得續行訴願及行政訴訟；屬於私法行為者，得提起民事訴訟或依照仲裁法以仲裁方式解決。」

[60] 林家祺，政府採購法救濟程序之研究，國立中正大學法律學研究所碩士論文，2002 年 1 月，頁 22。

[61] 最高法院二十年度上字第二二一二號判例，略謂「訴願，為人民對於行政處分不服之救濟方法，若國家經營私經濟事業，與私人間發生私法關係，顯屬民事事件，因此而有爭執，當然受法院之裁判。」；最高法院八十年度台上字第五二五號民事判決：「所謂行使公權力，係指公務員居於國家機關之地位，行使統治權作用之行為而言。並包括運用命令及強制等手段干預人民自由及權利之行為，以及提供給付、服務、救濟、照顧等方法，增進公共及社會成員之利益，以達成國家任務之行為。如國家機關立於私法主體之地位，從事一般行政之補助行為，如購置行政業務所需之物品或處理行政業務相關之物品，自與公權力之行使有間，不生國家賠償法適用之問題。」

[62] 法務部法律字第 0910700625 號。

[63] 民法第 245 之 1 規定：契約未成立時，當事人為準備或商議訂立契約而有左列情形之一者，對於非因過失而信契約能成立致受損害之他方當事人，負賠償責任：
一、就訂約有重要關係之事項，對他方之詢問，惡意隱匿或為不實之說明者。
二、知悉或持有他方之秘密，經他方明示應予保密，而因故意或重大過失洩漏之者。
三、其他顯然違反誠實及信用方法者。
前項損害賠償請求權，因二年間不行使而消滅。

範，而參酌政府採購協定訂定爭議處理機制[64]。

第二節　政府採購法之適用關係

第一項　政府採購法與政府採購協定關聯

政府採購法的制定與我國加入世界貿易組織並承諾簽署政府採購協定有關，且由於政府採購法的規範及其運作，多處涉及政府採購協定之規定。如政府採購法第四十三條規定之補償交易及優先決標等規定，均以政府採購協定允許作為條件；第四十四條之優惠價格規定，亦同；且政府採購法第七十五條規定，違反協定亦屬可以異議及申訴的理由；再者，相關之採購機關究竟在何種情形下必須開放外國廠商參與投標以及我國業者在何種情形下必須與外國廠商競爭國內採購市場（甚至我國廠商在何種情形下可以參與外國的政府採購市場），均有賴對政府採購協定的瞭解。另許多國家均有政府採購的相關立法，但各國立法內容差異相當大，由於政府採購協定的締約國立法，必須受到政府採購協定的拘束，故該協定締約國的法律大致上與協定的規範均能配合[65]。

第二項　政府採購法與政府採購協定適用關係

我國政府採購法既是參酌 WTO 架構下之政府採購協定，並因應我國現有之政府採購現況制定而成，應屬於能與國際接軌之採購規範，政府採購相關規範之訂定，其立法宗旨無非是以公平公開方式進行採購程序，並以提升採購效率與功能，並確保採購品質為目的，惟對於爭端解決機制而言，政府採購法仍有許多與政府採購協定規範差異之處，對於政府採購協定之國際條約性質與我國政府採購法內國法之適用關係，國際條約應具有優先適用地位，司法機關與行政機關於適用法律時，應尊重國際條約之義務[66]，故應可認為政府採購協定為我國政府採購法之特別法，而具有優先適用之效力。

第三節　政府採購法之適用範圍

第一項　適用主體

我國適用政府採購法之機關如下：

一、政府機關：源自於政府採購協定附件一之中央機關及附件二中央機關之下一級機關，即中央及各地方機關、包括行政機關、民意機關、考試院、監察院等均

[64] 陳建宇、駱忠誠，政府採購法實例解析，元照出版社，2000 年，頁 229。
[65] 羅昌發，政府採購法與政府採購協定論析，元照出版社，2004 年，序論。
[66] 參大法官李志鵬司法院大法官解釋第 329 號不同意見書。

有政府採購法之適用[67]。

二、公立學校：指中央政府及地方政府設立之學校，包括國立、省立、市立及縣立大專院校、高中職、國中及國小均適用政府採購法。

三、公營事業：中央或地方政府獨資或出資占總資本額超過百分之五十之事業[68]。

四、受補助團體：依據政府採購法第四條規定：「法人或團體接受機關補助辦理採購，其補助金額占採購金額半數以上，且補助金額在公告金額以上者，適用本法之規定，並應受該機關之監督。」

第二項　適用客體

我國政府採購法不似政府採購協定以附錄清單方式，表列出一定門檻金額以上始在其適用範圍，政府採購法對於工程、財物及勞務不同需求項目，均為其適用客體[69]。

第三項　不適用政府採購法之例外

政府採購協定第二十三條規定，對於武器、彈藥或戰爭物資之「國防採購」、「智慧權採購」、「公益採購」或對於殘障、慈善或服刑人生產之產品或服務，設有除外規定，不適用該協定規定，我國政府採購法對於上述有關採購於政府採購法第二十二條各款規定仍應依法辦理限制性招標。惟於同法第第一０四條規定有關軍事機關之採購，應依本法之規定辦理，但有面臨戰爭或特殊緊急狀況時，或第一０五條有關人民之生命、身體、健康、財產遭遇緊急危難等規定，需緊急處置之採購事項，即有排除政府採購法之適用。

第四節　我國政府採購法對爭議處理之相關規範

第一項　爭議處理機制之基本原則

政府採購法第六章爭端處理機制，其中第七十四條即規定有關招標、審標及決標之爭議，得依本章規定提出異議及申訴，對於發生爭議之採購案件，基於招標機關之採購效率，不允許投標廠商任意濫訴，但仍有必要維護投標廠商之投標權利，因此除了公平

[67] 羅昌發，政府採購法與政府採購協定論析，2004 年，元照出版社，頁 62；林鴻銘，政府採購法之實用權益，永然文化二版，1999 年 9 月，頁 14。

[68] 參國營事業管理法第三條規定及公營事業移轉民營條例第二條規定。

[69] 政府採購法第七條規定：本法所稱工程，指在地面上下新建、增建、改建、修建、拆除構造物與其所屬設備及改變自然環境之行為，包括建築、土木、水利、環境、交通、機械、電氣、化工及其他經主管機關認定之工程。
本法所稱財物，指各種物品（生鮮農漁產品除外）、材料、設備、機具與其他動產、不動產、權利及其他經主管機關認定之財物。
本法所稱勞務，指專業服務、技術服務、資訊服務、研究發展、營運管理、維修、訓練、勞力及其他經主管機關認定之勞務。

處理廠商之異議與申訴案件之外，學者認為尚有採購申訴審議專業性、救濟即時性及救濟快速性等特點[70]。

一、賦予正式救濟管道：政府採購法實施後除招標、審標及決標應公開透明外，遇有違反法令規定，致損害權利或利益者，均得提起異議及申訴，解決政府採購法實施前投訴無門，受到招標機關歧視或不當處置之情況。

二、採購申訴審議專業性：採購申訴審議委員會設置於主管機關、直轄市或各縣（市）政府，委員成員由法律、工程之學界及實務界專業人士組成，使審議判斷較為專業，並能建立權威與正確之判斷意見。

三、救濟即時性：政府採購法第八十二條第二項規定，採購申訴審議委員會於完成審議前，必要時得通知招標機關暫停採購程序，由於投標廠商之申訴，原則不停止招標程序之進行，為保障實際救濟之有效性並具有救濟實益，避免不當得標之廠商於申訴期間已經履約等情事發生，賦予採購申訴審議委員會暫停採購程序之權，但由於暫停採購程序之規範事由不明確，造成實務運作上案例屈指可數。

四、救濟快速性：廠商對於招標機關提出異議，政府採購法七十五條規定必須於規定期限內以書面提出，招標機關應自收受異議之次日起十五日內為適當之處理，並將處理結果以書面通知提出異議之廠商。另廠商依第七十八條規定提出申訴，應同時繕具副本送招標機關。機關應自收受申訴書副本之次日起十日內，以書面向該管採購申訴審議委員會陳述意見。採購申訴審議委員會應於收受申訴書之次日起四十日內完成審議，並將判斷以書面通知廠商及機關。必要時得延長四十日。與其他民事、刑事及行政救濟比較，堪稱快速定訟止紛之救濟制度設計。

第二項　異議制度

廠商對於招標機關，在招標、審標及決標過程中，如認為有違反法令或我國所締結之條約、協定，致損害其權利或利益之情形，均得於法定期限內，以書面向招標機關提出異議，廠商對於招標機關異議之處理結果不服，或逾越期限不予處理，廠商得向採購申訴審議委員會提起申訴，是謂「異議前置制度」，若招標機關於廠商異議階段，得自承辦理標案過程中有違反法令或條約等情事，就快速解決紛爭而言，當可減少後續申訴程序資源之浪費。但若實務現實面，招標機關不易自承辦標有誤，異議廠商無法從中獲

[70] 羅昌發，政府採購法與政府採購協定論析，元照出版，2004 年 10 月，頁 325-327。

得滿意結果，則仍要進行後續申訴程序，是否反而造成救濟資源程序之浪費，因此，異議前置制度存廢與否，則有討論空間。另對於廠商停權之爭議，廠商認為招標機關所為之停權處分違反本法或不實者，賦予其救濟管道得提出異議。

第一款　提出異議之要件

第一目　招標、審標、決標爭議之異議

依據政府採購法第七十五條規定觀之，廠商對於機關在決標前採購相關措施或行政作為，如招標文件訂定、廠商資格、採購規格、招標方式、審標、底價訂定或決標方式等等，若有認機關違背法令規定，致損害其權利或利益者，均得提起異議，惟對於決標後履約及驗收階段，於修法後已排除異議及申訴救濟程序，應屬民事契約，循民事訴訟救濟程序解決[71]。

一、異議主體：

政府採購法第七十五條規定之廠商，同法第八條規定已規定：「所稱廠商，指公司、合夥或獨資之工商行號及其他得提供各機關工程、財物、勞務之自然人、法人、機構或團體。」惟仍應以權利或利益遭受損害之廠商，始有法律上資格提出異議[72]，但是否權利或利益遭受損害，實務上似僅廠商主觀認定招標機關違背法令致損害其權利或利益者，即得提起異議。法規範對於提起異議之資格條件越為寬鬆，越能增加行政自我省察之機會，但也須注意可能造成訴訟不經濟之情形。

二、異議事由：對於招標、審標及決標採購過程中，依政府採購法第七十五條觀之，招標機關違反法令或條約、協定，致廠商權利或利益受損害，均得提起異議。

（一）違反法令：

招標機關於辦理採購時違反國內「法令」，應係指法律或命令，惟是否須限於違反政府採購法相關法令，廠商始得向招標機關提出異議，有主張所謂法令不限於政府採購法相關法令，非屬政府採購法令之部分，例如政府採購機關就有關採購事項，違反公平交易法、民法者，均應許廠商依政府採購

[71] 政府採購法第七十四條修正理由：「已有契約關係之履約或驗收爭議應民事爭訟途徑解決，使救濟制度單純化」。
[72] 羅昌發，前揭書，頁 327。

法提出異議及申訴[73]；亦有認為將機關辦理招標違反其他法令，列為得提起異議之範圍，易使其他法令主管機關之權責與異議、申訴機關之權責發生混淆，應將所定「法令」，限縮於「與政府採購招標相關之監督法令」予以適用，方與設立異議制度，係為釐清招標機關不當招標行為之制度本質相符[74]。本文認為基於增加政府機關自我省察、擴大保障廠商救濟機會並先期迅速獲得救濟等原因，認為前說較為可採。

（二）違反國際條約或協定：

將違反我國所締結之條約、協定作為廠商得以提起異議之規範，避免我國所締結之條約、協定轉換為內國法時，廠商喪失救濟管道，而有違反國際義務[75]之虞，我國既已成為政府採購協定之簽署國，於辦理採購時除應遵照內國政府採購法之規範外，亦應遵守政府採購協定之規範，故應加強將國際條約、協定完整轉化為政府採購法之規定[76]。

惟依政府採購協定第二十二條第二項規定：若任何締約國認為其依本協定直接或間接可得利益遭取消或減損，或本協定目標之達成因其他締約國未能履行其於本協定下之義務，或因其他締約國採取任何措施而受阻，不論該等措施是否與本協定之規定牴觸，該締約國得以書面向其所認定之相關締約國提出意見或建議，以謀問題之圓滿解決。該締約國上述行動，應迅速依下述規定，通知依爭端解決瞭解書所組成之爭端解決機構。其相對締約國應對該締約國提出之意見或建議予以慎重之考慮。即所謂「非違反協定之控訴」[77]，我政府採購法未設有此規定，相較政府採購協定之規範，對於廠商得提出異議之事由限於違反法令、條約或協定，兩者規範即有不一致之處。

（三）致損害廠商之權利或利益

有認為廠商提出異議須主張自己權利或利益遭受損害，若非主張自己權利或利益遭受損害，則無法律上資格提出異議[78]，從政府採購法第七十五條規定

[73]羅昌發，前揭書，頁 329。
[74]李嵩茂，政府採購法招標爭議處理制度評析，主計月報第 535 期，2000 年，頁 37。
[75] 參考政府採購法第七十五條第一項之立法理由。
[76] 李嵩茂，政府採購法招標爭議處理制度評析，主計月報第 535 期，2000 年，頁 38。
[77] 黃政傑，「GATT/WTO 爭端解決體系下『非違反協定之控訴』之研究」，中原大學法律研究所碩士論文，2002 年，頁 39-40。
[78] 羅昌發，前揭書，第 327 頁。

之文義，廠商認為權利或利益遭受損害得提起異議觀之，應認為採此說。實務上亦認為，損害其權利或利益乃實體上應審究之事項，不得從程序上駁回[79]。另未得標之廠商提出異議無損於決標之結果，即應不予受理[80]。

三、受理異議機關：

政府採購法第七十五條規定，廠商對於機關辦理採購，認為違反法令或我國所締結之條約、協定，致損害其權利或利益者，以書面向招標機關提出異議，故異議之受理機關為招標機關，另依據政府採購法第三條及第四條規定，辦理採購之政府機關、公立學校、公營事業，及接受機關補助辦理採購，其補助金額占採購金額半數以上，且補助金額在公告金額以上之「法人」或「團體」，依政府採購法辦理採購者，均屬受理異議之機關。另依政府採購法第四十條規定，機關之採購，得洽由其他具有專業能力之機關代辦，招標事項既委由代辦機關辦理，故以代辦機關為招標機關提出異議及申訴即可[81]。

四、提出異議之期限：

依政府採購法七十五條規定，廠商得提起異議期限可分為三：

（一）對招標文件規定提出異議者：自公告或邀標之次日起等標期之四分之一，其尾數不足一日者，以一日計。但不得少於十日。

（二）對招標文件規定之釋疑、後續說明、變更或補充提出異議者：為接獲機關通知或機關公告之次日起十日。

（三）對採購之過程、結果提出異議者：為接獲機關通知或機關公告之次日起十日。其過程或結果未經通知或公告者，為知悉或可得而知悉之次日起十日。但至遲不得逾決標日之次日起十五日。

對於逾越異議期限而提起異議，是否為不變期間而當然生失權效果，應為不受理，前有主張異議期限僅為訓示規定，若廠商申訴已逾異議期限，招標機關仍予以受理，並就實體部分處理並函覆處理結果，則該逾期異議仍屬合法異議[82]。惟為確保招標結果之穩定，提高招標作業之效率，異議期限性質應屬不變期間，否則任意將異議期間縮短或

[79] 行政法院 69 年度判字第 234 號判例。
[80] 參見行政院公共工程委員會採購申訴審議判斷書訴 89136 號。
[81] 參見行政院公共工程委員會採購申訴審議判斷書 89 年訴 89089 號。
[82] 參見行政院公共工程委員會採購申訴審議判斷書 88 年訴 88130 號、訴 88073 號。

延長，將造成等標期不確定之狀態，進而影響採購安定，因政府採購法施行細則第一零五條已修正[83]為：「異議逾越法定期間者，『應』不予受理，並以書面通知提出異議之廠商」，故異議期限已成為法定不變期間，招標機關就廠商逾期提出之異議，皆應不予受理，惟受理異議之機關仍得評估其事由，於認為其異議有理由時，招標機關仍得自行撤銷或變更原處理結果或暫停採購程序之進行[84]。

第二目　廠商停權爭議之異議

招標機關辦理採購，應以維護公共利益及公平合理為原則，對廠商不得為無正當理由之差別待遇，政府採購法第六條定有明文，故招標機關於辦理採購時，發現廠商有政府採購法第一零一條各款，如容許他人借用本人名義或證件參加投標者、借用或冒用他人名義或證件，或以偽造、變造之文件參加投標、訂約或履約者……等事由，應將其事實及理由通知廠商，並附記如未提出異議者，將刊登政府採購公報，刊登於政府採購公報之廠商，於一年或三年期間，不得參加投標或作為決標對象或分包廠商。因此，對於招標機關之「停權處分」，影響廠商相關參與投標之權益，本於政府採購協定第二十條規定：「各締約國應建立一公正單位，以快速有效的處理廠商對於不法招標過程之申訴案件」，故我國政府採購法對於接受停權處分之廠商，設有相關救濟制度。

一、異議主體：

不良廠商之通知，即屬行政處分，廠商如有不服，即應循行政爭訟程序提起救濟，否則無法除去此一行政處分之不利狀態[85]，對於招標機關之停權通知，提出異議，依據政府採購法第一零二條第四項規定，準用第六章爭議處理之規定，故應認招標機關認為廠商具有政府採購法第一零一條各款事由，如無異議將刊登政府採購公報予以停權之廠商，為異議之主體。

二、異議事由：

廠商具有政府採購法第一零一條所定十四款停權事由，對於附記如未提出異議，將刊登政府採購公報之通知，均得提出異議，此時並未若對於招標、審標、決標之異議，須主張或聲明廠商權利或利益遭受損害，蓋廠商一旦未異議，刊

[83]修正前政府採購法施行細則第一百零五條前段規定：「異議逾越法定定期間者，『得』不予受理，並通知提出異議之廠商」。
[84] 參政府採購法施行細則第一零五條之一規定。
[85] 趙偉宏，政府採購法中拒絕往來之制度之研究，中央大學營建管理研究所碩士論文，2005 年，頁 62。

登政府採購公報予以停權，將不能參與投標或作為決標對象，已對廠商造成權利或利益之損害。

三、受理異議機關：

依政府採購法第一零二條第一項規定，廠商對於機關依前條所為之通知，認為違反本法或不實者，得於接獲通知之次日起二十日內，以書面向該機關提出異議，故此時之受理異議機關為政府採購法第一零一條通知之機關。

四、提出異議之期限：

對於廠商停權處分提出異議之期限規定，依據政府採購法第一零二條第一項規定，廠商應於接受招標機關停權通知之次日起二十日內，以書面向該機關提出異議，此應屬於不變期間，逾越提出異議之期間，即生失權效果，以快速解決紛爭並求採購穩定進行。故政府採購法第一零二條第三款規定，廠商未於規定期限內提出異議，機關應即將廠商名稱及相關情形刊登政府採購公報。

第二款　招標機關對於異議之處理方式

依政府採購法第七十五條第二項規定，招標機關應自收受異議之次日起十五日內為適當之處理，並將處理結果以書面通知提出異議之廠商。若處理結果涉及變更或補充招標文件之內容者，除選擇性招標之規格標與價格標及限制性招標應以書面通知各廠商外，應另行公告，並視需要延長等標期。招標機關對於廠商所提出之異議，除於程序上如是否屬權益受損之廠商、是否於期限內提出、是否以書面為之……等要件加以審查，是否符合規定，再進行異議之實質處理，對於異議處理結果，有異議無理由之書面通知，若認為廠商之異議有理由者，招標機關應自行撤銷、變更原處理結果，或暫停採購程序之進行，但為應緊急情況或公共利益之必要，或其事由無影響採購之虞者，不在此限[86]。

第一目　程序審查

一、異議不備要件：

逾期異議、非採購權利或利益受損之廠商、未以書面提出異議等不備程序要件者，招標機關應為不受理之決定，並繼續進行採購招標作業，異議如不合法定程式，招標機關得不予受理，但其情形可補正者，應定期間命其補正，逾期不補正者，不予受理。但若招標機關自認招標程序有瑕疵，而涉及變更或補充招

[86] 參政府採購法第八十四條之規定。

標文件者，應自行撤銷或變更原處理結果，或暫停採購程序，並視需要另行變更公告並延長等標期。惟招標機關不論異議是否不受理、有無理由，均應以書面加以說明、解釋、澄清[87]。

二、異議要件完備：

招標機關受理廠商之異議申請，應自收受異議之次日起算十五日為適當之處理，並將處理結果以書面通知提出異議之廠商。廠商對於異議處理之結果不服，或招標機關逾十五日之期限仍不為處理，廠商得以書面向採購申訴審議委員會提出申訴。

第二目　實質處理

一、異議有理由：

政府採購法第八十四條規定，招標機關評估廠商異議理由，認其主張有理由者，應撤銷或變更原處理結果，或暫停採購程序之進行，但為應緊急情況或公共利益之必要，或其事由無影響採購之虞者，不在此限。另若對於廠商停權處分之異議，招標機關認為有理由者，機關不得刊登廠商於政府採購公報。

二、異議無理由：

招標機關應駁回廠商異議申請，並將異議處理結果以書面通知異議廠商，對於異議處理結果之通知，其法律性質有主張屬於行政機關「觀念通知」，蓋政府採購法既規定招標機關為異議結果之書面通知，而認為政府採購行為應屬私經濟行為[88]；亦有主張為行政機關之「行政處分」，蓋招標機關對於異議處理結果已含有否准之意涵，應屬行政處分[89]。本文以為對於異議處理結果之通知，對其結果不服向審議委員會提出申訴，依政府採購法第八十三條規定，對於申訴審議之判斷視同訴願決定，蓋對於申訴審議判斷以法律擬制規定，已將採購私經濟行為透過法律規範為公法性質之行政處分，對於異議結果之通知，應認為仍應遵守救濟教示規定，已具有准駁之決定，本於救濟權利之保障，應認為屬於「行政處分」性質。

第三項　申訴制度

[87] 參陳建宇，政府採購異議、申訴、調解實務，永然文化出版公司，2003 年八月初版，頁 38。
[88] 法務部九十一年十一月一日行政法諮詢小組第三十一次會議討論意見。
[89] 最高行政法院 91 年判字第 2308 號判決。

申訴制度係對於招標、審標及決標爭議提出異議，不服招標機關之處理結果或逾越期限不為處理之後續救濟程序，依據採購申訴審議規則第十條規定，對於申訴事件，應先為程序審查，其無不受理之情形者，再進而為實體審查。前項程序審查，發現有程式不合而其情形可補正者，應酌定相當期間通知廠商補正。廠商之申訴如符合法定程式者，機關應自收受申訴書副本之次日起十日內，以書面向該管採購申訴審議委員會陳述意見。採購申訴審議委員會應於收受申訴書之次日起四十日內完成審議，並將判斷以書面通知廠商及機關，必要時得延長四十日。

第一款　提出申訴之要件

廠商提出申訴，前提是須先經異議程序，且須廠商適格、符合公告金額以上採購案、受理申訴機關、於法定期限內為之、具一定之形式等要件，如未符合一定程序要件，即可能為申訴不受理之決定。

第一目　招標、審標、決標爭議之申訴

一、限於公告金額以上採購案：

依政府採購法第七十六條規定，限於公告金額以上之採購爭議異議之處理結果不服，始得以書面向採購申訴審議委員會提出申訴。惟對於招標機關逾越期限未對廠商之異議處理，是否仍限於公告金額以上之採購案，才能提起申訴，基於採購申訴審議規則第十一條第一款規定採購事件未達公告金額者，應為不受理，故仍應限於公告金額以上之採購案始得提起申訴。

二、須先經異議程序並對異議處理結果不服：

限於同一廠商異議後不服始得再提出申訴，至若對於因其他廠商提起異議，經招標機關撤銷或變更原採購決定之處理結果表示不服之廠商，其仍不得逕為申訴[90]。且須限於前所提出異議之事由不服招標機關處理結果，始得於申訴階段再為提出，例如申訴廠商原係針對「審標不合格之結果」提出異議，就「招標文件」之部分，因其未提出異議，該部分之主張應非申訴案件應審究之內容，申訴會不應予以審議，並應就其對招標文件訂定不當之申訴，給予不受理之判斷[91]。

三、須異議機關逾越期限仍不為處理：

[90] 參陳建宇，政府採購異議、申訴、調解實務，永然文化出版公司，2003 年八月初版，頁 43-44。
[91] 行政院公共工程委員會採購申訴審議判斷書訴 89197 號。

依政府採購法第七十五條及七十六條規定，招標機關應自收受異議之次日起十五日內為適當之處理，並將處理結果以書面通知提出異議之廠商，招標機關逾七十五條第二項所定期限不為處理者，得於收受異議處理結果或期限屆滿之次日起十五日內提出申訴。此係指受理異議機關逾越法定期限不為處理，如未就廠商爭議異議事由為處理，或僅觀念通知未就異議事由為准駁之決定，非屬招標機關逾期未為處理，故不應課予廠商十五日內應提出申訴之期限[92]。因招標機關未於異議處理結果教示救濟方式、期間或受理機關，致廠商遲誤申訴期間者，如該廠商自該異議處理結果送達後一年內聲明不服時，應類推適用行政程序第 98 條第 3 項「處分機關未告知救濟期間或告知錯誤未為更正，致相對人或利害關係人遲誤者，如自處分書送達後一年內聲明不服時，視為於法定期間內所為」之規定，視為於法定期間內所為[93]，仍應允許其提出申訴。

四、向中央或地方採購申訴審議委員會提出申訴：

廠商誤向該管採購申訴審議委員會以外之機關申訴者，以該機關收受之日，視為提起申訴之日。收受申訴書之機關應於收受之次日起三日內，將申訴書移送於該管採購申訴審議委員會，並通知申訴廠商。

五、繕具申訴書並載明申訴事由並得委任代理人：

申訴書應記載之內容，政府採購法第七十七條第一項及採購申訴審議規則第三條均有明確規定。廠商提出申訴，應同時繕具副本送招標機關；機關應自收受申訴書副本之日起十日內，以書面向該管採購申訴審議委員會陳述意見，政府採購法第七十八條第一項及採購申訴審議規則第七條均定有明文。

六、須於期限內提出申訴：

廠商得於收受異議處理結果或期限屆滿之次日起十五日內提起申訴，申訴逾期提出，採購申訴審議委員會即應依政府採購法第七十九條前段及採購申訴審議規則第十一條第二款判斷申訴不受理，是故，申訴之期間是為法定不變期間。

七、繳納申訴費用：

[92] 臺北高等行政法院八十九年度訴字第二八一九號判決見解。
[93] 行政院公共工程委員會採購申訴審議判斷書訴 90453 號。

依採購申訴審議收費辦法第三、四條規定，廠商提出申訴時，應繳納審議費，每一申訴事件為新臺幣三萬元，廠商未繳納者，應通知補繳，逾期未繳納者，應不受理其申訴，此規定應係為防止廠商濫行申訴，但申訴為行政救濟的途徑，而公法爭訟如訴願、行政訴訟，原則上均不收費；就實質面來說，廠商因為機關違法行為，權益遭受損害尋求救濟，卻需先行繳納審議費，經審議結果若作成招標機關違法之判斷，廠商雖能依政府採購法第八十五條第三項規定向向機關請求償付投標、異議、申訴之必要費用，惟機關如不給付或就數額有爭議，廠商亦僅能再提起民事訴訟以求解決，似可就其必要性再作審酌[94]。

第二目　廠商停權爭議之申訴

有關廠商停權爭議之申訴，與前述招標、審標及決標之申訴程序，由於政府採購法第一零二條第四項準用本法第六章爭議處理之規定，故其申訴制度並無大差異，惟程序及要件略有不同：

一、申訴事由限於政府採購法第一零一條第一項各款事由：

由於停權處分限制廠商投標作為決標對象或成為分包廠商，影響廠商參與政府採購之基本權利，故各款停權之要件，招標機關不得任意擴張其適用要件與範圍，亦不得自行創設法條所無之款次，否則將違反法律保留原則[95]。

二、不以公告金額以上採購案件為限：

廠商對前項異議之處理結果不服，或機關逾收受異議之次日起十五日內不為處理者，無論該案件是否逾公告金額，得於收受異議處理結果或期限屆滿之次日起十五日內，以書面向該管採購申訴審議委員會申訴。因不良廠商停權之認定，涉及不得參與政府機關採購行為之嚴重後果，故不以公告金額以上案件為限，若屬於公告金額以下之採購案，仍得對停權處分提出申訴。

三、無暫停採購程序之規定：

不良廠商之停權事由，有投標階段，亦有得標後、履約、驗收、保固等不同採購階段，故對於採購停權處分，僅影響該廠商參與其他採購投標或成為分包廠商之權利，並未影響本採購案之權益，故招標機關並無暫停採購程序之必要，

[94] 彭麗春，政府採購法上申訴制度之研究，輔仁大學法律研究所碩士論文，1999 年，頁 147。
[95] 游麗慧，政府採購法拒絕往來制度實施問題探討，中央大學管理研究所碩士論文，2005 年，頁 44；另參行政院公共工程委員會（88）年工程企字第 8812173 號函。

不若招標、審標及決標之申訴，限於決標前爭議事件，為保障爭議申訴廠商之投標或決標權利，設有招標機關得暫停採購程序之規定。

第二款　招標機關對於申訴之處理方式

招標機關對於異議廠商之申訴，應先就是否符合法定程式加以審查，若逾越法定期間或不符合法定程式者，應依政府採購法第七十九條規定，為不受理之決議；而採購申訴審議規則第十一條，亦有採購事件未達公告金額者、申訴逾越法定期間者、申訴不合法定程式不能補正，或經通知限期補正屆期未補正者、申訴事件不屬收受申訴書之申訴會管轄而不能依第九條規定移送者、對於已經審議判斷或已經撤回之申訴事件復為同一之申訴者、招標機關自行依申訴廠商之請求，撤銷或變更其處理結果者、申訴廠商不適格者……等應為不受理決議之規定。對於同為不受理之決議，其所引用之法條依據，採購申訴審議委員會作通盤之檢討，就申訴不受理審議判斷之處理原則，作成下列決議[96]：

一、依政府採購法第七十九條規定，為不受理之決議：

申訴逾期，申訴不合法定程式不可補正，或申訴不合法定程式可以補正，經限期補正而逾期不補正，如未依格式書寫申訴書、未收受異議結果即提出申訴、未對特定採購申訴等。

二、依採購申訴審議規則第十一條，為不受理之決議：

非屬以上情形而應為不受理者，異議廠商不適格、未依採購申訴審議收費辦法繳納審議費等。

第一目　程序審查

依現行政府採購協定第二十條第六項之規定，異議應由法庭或者公正而獨立，對於採購結果無利害關係的審查機構審理，而其成員在任職期間應確保其不受外界影響，審查機構如非法庭時，應受司法審查之拘束，故我國政府採購法乃依政府採購協定之要求，設計「公正而獨立，對於採購結果無利害關係的審查機構」以及相關之「審查程序」[97]。

一、招標機關書面陳述意見：

[96] 參行政院公共工程委員會採購申訴審議委員會第三十五次會議記錄。
[97] 周瑤敏，政府採購法異議及申訴制度之研究，國立政治大學法律學研究所碩士論文，2004 年，頁 98。

依政府採購法第七十八條及採購申訴審議規則第七條均規定機關應自收受申訴書副本之次日起十日內，以書面向該管採購申訴審議委員會陳述意見。

二、到場陳述意見：

採購申訴審議委員會得依職權或申請，通知申訴廠商、機關到指定場所陳述意見。

三、申訴得委任代理人為之：

依政府採購法八十條第三項規定，採購申訴審議委員會並得囑託具專門知識經驗之機關、學校、團體或人員鑑定，並得通知相關人士說明或請機關、廠商提供相關文件、資料。

四、採購申訴以書面審議：

依政府採購法第八十條第一項規定，採購申訴得僅就書面審議之。

五、學者專家組成申訴審議委員會並定有迴避條款，以維持公正審議：

依據採購申訴審議組織準則第五、七及十三條定有應由學者或專家組成委員會，並應超然、公正行使職權及定有相關利益迴避條款。

六、以書面作成決定：

政府採購法第八十二條第一項規定，「採購申訴審議委員會審議判斷，應以書面附事實及理由，指明招標機關原採購行為有無違反法令之處；其有違反者，並得建議招標機關處置之方式。」另政府採購法第八十五條第一項規定，「審議判斷指明原採購行為違反法令者，招標機關應另為適法之處置。」

第二目　實質審議判斷

我國採購申訴審議委員會之功能主要界定為紛爭處理之機制，其職權範圍為處理中央及地方採購之廠商申訴及機關與廠商間之履約爭議調解[98]，對於招標、審標及決標等爭議提出異議及申訴，係屬公法爭議，循公法救濟途徑，政府採購法第八十三條規定，申訴審議判斷視同訴願決定，更表明具公法性質之爭訟程序，對於採購申訴審議委員會之審議判斷，其決定期限及效力分述如下：

一、審議判斷決定期限：

依政府採購法第七十八條規定，採購申訴審議委員會應於收受申訴書之次日起四十

[98] 李怡芳，韓國政府採購廠商停權制度之研究，國立政治大學法律碩士專班碩士論文，2009 年，頁 73。

日內完成審議，並將判斷以書面通知廠商及機關。必要時得延長四十日。以法律規定審議作成之期限，兼有快速解決紛爭，並著重採購效率之目的，惟法律未就逾期完成審議有何法效性之規範，因此有認為「完成審議期間」非「法定不變期間」而應視為「訓示期間」[99]。但此說法與儘速解決採購紛爭有違，且採購申訴審議判斷既已視同訴願決定，自應遵守行政爭訟所設期間之規範，應屬於不變期間，遲誤期間即生失權效果。

二、審議判斷之效力：

（一）視同訴願決定：

對於審議判斷，依政府採購法第八十三條規定，視同訴願決定，依訴願法第九十五條規定，訴願之決定確定後，就其事件，有拘束各關係機關之效力，招標機關即應為適法之處置，惟若招標機關不服採購申訴審議委員會之審議判斷，不另為適法處置，依政府採購法第八十五條規定，應於收受判斷之次日起十五日內報請上級機關核定，並由上級機關於收受之次日起十五日內，以書面向採購申訴審議委員會及廠商說明理由，對於上級機關之說明在所不論，原招標機關仍應受審議判斷之拘束。另依採購申訴審議規則第二十二條規定，審議判斷書應附記如不服審議判斷，得於審議判斷書送達之次日起二個月內，向行政法院提起行政訴訟。

（二）招標機關應另為適法之處置：

對於採購申訴審議委員會之審議判斷，若指明招標機關原採購行為違法之處，依政府採購法第八十五條規定，招標機關應另為適法之處置，此時招標機關所應為之處置可能包括[100]：

1、招標機關自行撤銷、變更原處分結果：

對於申訴廠商所提申訴事由，招標機關認為有理由者，依政府採購法第八十四條規定，應自行撤銷或變更原處分結果。

2、不予開標、不予決標或撤銷決標、終止或解除契約：

惟依政府採購法第五十條第二項，撤銷決標、終止契約或解除契約反不符公共利益，並經上級機關核准者，得不撤銷決標、終止契約或解除契約。

[99] 陳建宇，政府採購異議、申訴、調解實務，永然文化出版公司，2003 年八月初版，頁 51。
[100] 游麗慧、蘇明通合著，政府採購法實務 Q&A，元照出版二刷，2001 年 12 月，頁 351。

採購申訴審議委員會於審議判斷中，對於招標機關處置方式，僅係以建議方式為之，採購申訴審議委員會充其量僅得為確認採購行為是否違法之功能，而該違法行為應如何處理則仍應由機關本於職權為適法處置。基此，當機關仍堅持不予改正時，政府採購法亦無如何處理之相關規定，從而廠商提起異議、申訴，能否能獲得救濟，不無疑問[101]。

（三）暫停採購程序之進行：

政府採購法第八十二條第二項及第三項規定：「採購申訴審議委員會於完成審議前，必要時得通知招標機關暫停採購程序」、「採購申訴審議委員會為……前項之通知時，應考量公共利益、相關廠商利益及其他有關情況。」，故招標機關評估申訴有理由時，得暫停採購程序之進行，但緊急情況或公共利益之必要，或其事由無影響採購之虞者，依政府採購法第八十四條第一項但書規定，仍繼續進行採購程序。

（四）請求必要費用：

廠商對於採購申訴審議判斷，具體指明原招標機關採購行為違背法令，廠商得向招標機關請求償付其準備投標、異議及申訴所支出之必要費用。其請求之費用應以本項列舉「所受損害」為限，蓋此項費用並非民法之損害賠償，自不應包括民法第二百十六條之「所失利益」[102]。

[101] 駱忠誠，新修正政府採購爭議處理機制評析（上）（下）。營造天下第七十六、七十七期，2002 年 4、5 月。

[102] 陳建宇，政府採購異議、申訴、調解實務，永然文化出版公司，2003 年 8 月初版，頁 57。

第四章　政府採購協定於各國政府採購救濟制度之適用關係

有關現行政府採購協定爭端解決機制第二十二條第二項及 2012 年修正政府採購協定第十八條所定，要求各締約國之申訴程序應遵循不歧視原則、適時性原則、透明化原則及有效性原則，故各締約國對於其內國政府採購相關爭端解決機制，應遵循政府採購協定所定之原理原則。

第一節　美國聯邦政府採購規則之救濟制度

美國聯邦採購規則（Federal Acquisition Regulation,FAR）對於政府採購之定義為，供聯邦政府使用之目的，以適當之經費經由買賣或租賃契約，獲得物品或服務之行為。至於物品或服務是否既已存在，抑或待創造、開發、展示及評估，則在所不問[103]。美國政府採購爭議，亦以決標前或決標後，分為招標爭議及契約履約爭議，前者指未得標之投標廠商，因認為採購機關之採購過程有瑕疵，如公告事項不完整、開標過程有瑕疵或規格之制定不合理等，而向政府主管機關控告採購機關作業違法或不當；後者則係指已與採購機關簽訂採購契約之得標廠商，就契約之內容或因履行契約所生之事項，與採購機關發生爭議之情形[104]。因此，美國採購爭議制度有關招標爭議，即為我國政府採購法第七十四條招標、審標及決標之爭議；有關履約爭議，即為我國政府採購法第八十五條之一履約爭議。本論文僅就招標階段所生之爭議救濟提出說明，美國政府採購對招標爭議之救濟，大體可分為二類救濟管道：一、直接向採購機關提出異議。二、向聯邦主計署提出異議[105]。

第一項　異議制度

美國聯邦採購規則就採購決標前之爭議異議處理程序，有較為詳盡之規範，希望採購機關與廠商間之紛爭，能於此一程序解決，當發生爭議時，任何「有利害關係之當事人」，依聯邦採購規則（FAR）33.103 節規定均得以書面向採購機關提出異議；另依聯邦聯邦採購規則（FAR）33.104 節亦規定向聯邦主計署（General Accounting Office,GAO）

[103] FAR2.101：Acquisition means the acquiring by contract with appropriated funds of supplies or services （including constructing）by and for the use of the Federal Government through purchase or lease,whether the supplies or services are already in existence or must be created，demonstrated,and evaluated.

[104] 參經濟部國際貿易局，GATT 政府採購協定及美國與歐體政府採購制度研究，1991 年 12 月，頁 6-7。

[105] 原尚可向聯邦總務署政府契約訴願會(General Services Administration Board of Contract Appeals, GSABCA)提出異議，但自 1996 年 8 月起處理採購爭議之權限已被取消，故處理採購決標爭議之行政機關，僅剩採購機關及聯邦主計署，參劉倩妏，政府採購之救濟制度-以政府採購之法律性質為中心，國立政治大學法律研究所碩士論文，1997 年 6 月，頁 126-127。

提出異議之相關規定，聯邦主計署投標異議規則(GAO Bid Protest Regulation)中 4CFR（Code of Federal Regulation）Part 21.4，規定向聯邦主計署提出異議相關規範，依 FAR 之規定，二項規定如有衝突時，應以聯邦主計署之投標異議規則為準[106]。FAR 要求當事人在向採購機關提出異議前，應在契約官之層級盡其最大努力，以公開、真誠協商以解決紛爭[107]，採購機關亦應提供一套便宜、快速且程序簡便的異議處理程序，利用爭議解決替代方案（Alternative Dispute Resolution,ADR）或是透過中立的第三者，均是解決爭議的適當方式[108]。以下就向採購機關及聯邦主計署提出異議相關規範分別論述。

第一款　提出異議之要件

一、異議主體：

依據美國聯邦採購規則之規定，得向辦理政府採購機關或聯邦主計署提出異議，異議主體為利害關係人（Interested Party）[109]，利害關係人除包含投標廠商外，其他因決標或採購機關未決標而受影響之實際投標人或可能之投標人，故得向辦理採購機關提出異議之主體，包括參與投標之廠商及其他具經濟上利害關係之人。

二、異議事由：

依據聯邦採購規則規定，有利害關係之人於下列四項採購爭議，得向採購機關或聯邦主計署以書面提出異議[110]：

（一）採購機關對財物或服務採購契約之投標廠商所為之裁決或要求。

（二）採購機關對上開裁決或要求所為之撤銷。

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[106] FAR33.104：Protests to GAO. Procedures for protests to GAO are found at 4 CFR Part 21 (GAO Bid Protest Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR Part21, 4 CFR Part 21 governs.

[107] FAR33.103（b)：Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.

[108] FAR33.103（c)：The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

[109] FAR33.101：Interested party for the purpose of filing a protest" means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract；See 4 CFR Sec.21.0.（a）.

[110] FAR33.101：Protest" means a written objection by an interested party to any of the following:
1）A solicitation or other request by an agency for offers for a contract for the procurement of property or services.
2）The cancellation of the solicitation or other request.
3）An award or proposed award of the contract.
4）A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

（三）對已決標或即將決標之採購契約內容之異議。

（四）採購機關以決標有全部或部分錯誤為理由而終止或撤銷決標，對上開終止或撤銷之決定所為之異議。

三、受理異議機關：

（一）採購機關：

採購利害關係人提出異議，應向機關契約官署或採購機關另有授權機關內之他人受理異議[111]，有利害關係之當事人，亦可要求在契約官層級以上的獨立單位審查其異議，招標文件中並應載明此一獨立審查之規定，以使投標廠商知悉。同時，機關之內規及招標文件亦應訂明，此一獨立審查結果係由受理異議之契約官做為其作成裁定之考量，抑就作為契約官就異議所為裁定之上訴機關。機關應指派專人負責獨立審查，且該負責獨立審查之人，須不在契約官之行政監督拘束範圍內[112]。

（二）聯邦主計署（GAO）：

向聯邦主計署提出異議者，應於提出異議一日內，繕具與異議案有關之文件影本及所有相關資料於招標文件中所指定收受異議之人或處所，如招標文件中未予指定，則送交契約官員。如果聯邦主計署未於一日內收到異議者之所有文件，則該異議將為聯邦主計署駁回[113]。

四、提出異議期限：

（一）採購機關：

[111] FAR33.103(d)(3)：All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.

[112] FAR33.103(d)(4)：In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest. Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement.

[113] FAR33.104(a)(1)：A protester is required to furnish a copy of its complete protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer, so it is received no later than 1 day after the protest is filed with the GAO. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day.

聯邦採購規則關於向採購機關提出異議之期限，可分為兩種：一、異議提出者係基於招標文件明顯之錯誤而提出異議者，應於開標前或截止收件期限之前提出。二、如異議非因招標文件之錯誤而提出者，應於知悉或可得而知異議之事由起十日之期間內提出，並以知悉或應知悉事實之日起算[114]。

（二）聯邦主計署（GAO）：

如異議人於向聯邦主計署（GAO）提出異議前，已於採購機關階段依前述規定適時提出異議，則只要異議人在知悉或可得知悉對其不利之採購機關裁定之日起十日期間內向 GAO 提起異議，GAO 即應受理之。但採購機關就向 GAO 提起異議之期限，另訂有較為嚴格之規定者，不在此限，依採購機關之期限規定辦理之。又，若異議人在招標階段即已依法向採購機關提起異議，異議人亦僅需在知悉或可得知悉對其不利之採購機關裁定之日起十日期間內向 GAO 提起異議即可，不受前述招標階段之異議應於開標前或等標期限屆滿前提出之限制[115]。異議應適時提出，否則將被駁回[116]，GAO 如認為異議有理由，或認為該項異議將對採購程序造成重大影響者，仍得對逾期提出之異議加以斟酌[117]。

第二款　對於異議之處理方式

第一目　程序審查

一、採購機關：

（一）異議不備要件：

異議之提出，應以書面為之，且須載明下列事項，若異議之提出未符合下述要件者，將予以駁回[118]：(1) 提出異議者之姓名、地址、傳真及電話號碼；(2) 招標

[114] FAR33.101 (e)：Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed.

[115] 4 CFR Sec.21.2. (a)(3)：If a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action will be considered, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (a)(2) of this section, unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to an agency, any subsequent protest to GAO will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.

[116] 4 CFR Sec.21.2. (b)：Protests untimely on their face may be dismissed.

[117] 4 CFR Sec.21.2. (c)：GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.

[118] FAR33.103 (d)(1)：Protests shall be concise and logically presented to facilitate review

文件（邀標函）或合約編號；(3) 詳細說明異議之事實、法律依據及對異議者所造成之損害；(4) 相關佐證資料文件；(5) 異議之聲明事項（即要求採購機關做出裁定之內容)；(6) 請求救濟或賠償方式之陳述；(7) 證明提出異議者乃異議事項之利害關係人之相關文件；(8)證明異議係在法定期間內提出之相關文件[119]。

（二）異議要件完備：

受理異議之採購機關應盡其最大之努力，於收到異議之日起三十五日內解決該項異議。在法律規定與機關程序允許之範圍內，提出異議者，得以更換及補強所提出之異議文件[120]。

二、聯邦主計署（GAO)：

（一）異議不備要件：

對於異議之提出仍須以書面為之，並載明異議人、異議事由、請求救濟或賠償方式[121]，異議人應於向 GAO 提出異議後一日內，繕具完整之副本及所有附件，送交採購機關於招標文件中所指定收受異議之人或處所，如招標文件中未予指定，則送交契約官[122]。惟採購機關或契約官在其準備報告之前已對異議之事由有所認知，則縱異議者未於向 GAO 提出異議後一日內繕具完整之副本及所有附件，送交採購機關於招標文件中所指定收受異議之人或處所（或契約官)，亦不予駁回[123]

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by the agency. Failure to substantially comply with any of the requirements of paragraph(d)(2) of this section may be grounds for dismissal of the protest.

[119] FAR33.103 (d)(2)：Protests shall include the following information：
(i)Name, address, and fax and telephone numbers of the protester
(ii) Solicitation or contract number.
(iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.
(iv) Copies of relevant documents.
(v) Request for a ruling by the agency.
(vi) Statement as to the form of relief requested.
(vii) All information establishing that the protester is an interested party for the purpose of filing a protest.
(viii) All information establishing the timeliness of the protest

[120] FAR33.103 (g)：Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information.

[121] 4 CFR Sec.21.1. (c).

[122] 4 CFR Sec.21.1. (e)：The protester shall furnish a complete copy of the protest, including all attachments, to the individual or location designated by the agency in the solicitation for receipt of protests, or if there is no designation, to the contracting officer. The designated individual or location (or, if applicable, the contracting officer) must receive a complete copy of the protest and all attachments not later than 1 day after the protest is filed with GAO. The protest document must indicate that a complete copy of the protest and all attachments are being furnished within 1 day to the appropriate individual or location.

[123] 4 CFR Sec.21.1. (i)：A protest may be dismissed for failure to comply with any of the requirements of this section, except for the items in paragraph (d) of this section. In addition, a protest shall not be dismissed for failure to comply with paragraph (e) of this section where the contracting officer has actual knowledge of the basis of protest, or the agency, in the

（二）異議要件完備：

當異議向聯邦主計署提出後，且所提出之要求是具體且合理的，採購機關應盡其最大努力提出與本案有關之正確且具建設性之說明文件，並保存之[124]。聯邦主計署應於收到異議之日起一百日內，如使用快速程序則於六十五日內，須對異議案件作出處理建議。假如聯邦主計署嘗試對修改後之異議作處理建議，或修改之異議除原本之異議內容外更增加了異議之項目，而該項異議不影響其處理期限，聯邦主計署可採取快速處理程序來作出建議[125]。

第二目　實質處理

一、採購機關：

（一）暫停採購程序：

異議案件係於採購案件決標前受理者，該採購案得暫時不予決標，而於異議經採購機關處理完後再行決標。但如該採購案之決標係基於緊急及迫不得已之理由或是基於政府之最大利益之考量下所做出之決定，則不受限制。此項例外規定，須經由契約官員之上級長官機關依相關程序規定下所指定之另一官員之核准，始得行之[126]。

（二）通知各競標廠商：

採購案因採購機關為暫停決標程序之決定而暫停，採購官員應即通知有權參與競標的各投標人，而於必要時，於投標廠商標單有效期間屆滿前，得請求其延長標單之有效期間，以避免須重新招標而損及所有投標廠商之權益[127]。

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preparation of its report, was not prejudiced by the protester's noncompliance.

[124] FAR33.104(a)(3)(ii): When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file.

125 FAR33.104(f)：GAO decision time. GAO issues its recommendation on a protest within 100 days from the date of filing of the protest with the GAO, or within 65 days under the express option. The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option.

[126] FAR33.103(f)(1): Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

[127] FAR33.103(f)(2): If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to paragraph(f)(1) of this section.

（三）契約官員決定停止履約行為：

機關係於採購案決標後十日內受理異議者，或是異議提出者申請展延決標之要求後五日之內，契約官員應立即停止該採購案之履約行為，至採購機關處理該項異議後方得繼續履行，除非繼續履行採購契約係基於緊急及迫不得已之情形，或是基於政府最大利益之考量下所做出之決定，則不受該項規定之限制。該項停止履行契約之決定，亦應由契約官員之上級長官或機關依相關程序規定下所指定之另一官員之核准，始得行之[128]。

二、聯邦主計署（GAO）：

（一）決標前異議之處理程序

1、暫停採購程序之進行及禁止決標

採購機關接到聯邦主計署通知，有相關當事人直接向其提出異議，該項採購契約應不予決標[129]，採購程序暫時停止後，除非採購機關依前述規定，並通知聯邦主計署，不得任意決標[130]。

2、契約官員通知有資格得標之廠商

當異議因反對決標之進行，且該項採購案之決標可能因異議而撤銷時，契約官員應通知因異議所做出判斷而有資格得標之廠商。若適當的話，這些投標廠商之投標文件應可延長其有效期間，以免因異議程序而使標單失效，須再行投標[131]。

（二）決標後異議之處理程序

[128] FAR33.103（f）(3)：Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

[129] FAR33.104（b）(1)：When the agency has received notice from the GAO of a protest filed directly with the GAO, a contract may not be awarded…….

[130] FAR33.104（b）(2)：A contract award shall not be authorized until the agency has notified the GAO of the finding in paragraph(b)(1) of this section.

[131] FAR33.104（b）(3)：When a protest against the making of an award is received and award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose offers might become eligible for award of the protest. If appropriate, those offerors should be requested, before expiration of the time for acceptance of their offer, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extensions of offers, consideration should be given to proceeding under paragraph(b)(1) of this section.

1、暫停締結或履行契約及相關必要措施

當採購機關收到聯邦主計署異議程序進行之通知，在決標後十日內或異議者提出快速程序五日內，契約官員應立即暫時停止契約履行或撤銷該項契約，除非聯邦主計署所做出之停止採購契約履行將影響美國重大利益[132]。當聯邦主計署做出暫停採購契約履行或撤銷決標契約時，契約官員應嘗試以最有利於政府之原則，與利害關係人協商出一互信協定，以免產生其他爭議[133]。

2、得不暫停契約履行之情形

當採購機關收到聯邦主計署異議程序進行之通知，而已逾越決標後十日之期限，契約官員得不須暫停契約履行或終止決標契約，除非契約官員確信該項決標將因異議案失效，或延遲收受採購物品或服務將不會影響聯邦政府之利益[134]。假如採購機關決定決標或繼續履行契約，契約官員應提出書面證明其他相關文件於聯邦主計署，且告知異議者及其他利害關係人[135]。

（三）要求簽發保護令

GAO 得依職權或任一方當事人之聲請，簽發保護令以保護採購資訊被揭露。所謂需受保護之資訊，係指為他人所獨占、具機密性、資料來源具敏感性及其他一旦洩漏將導致競爭對手佔優勢之一切資訊。保護令中應建立一套關係人得依聲請獲取該需受保護之資訊、認證及保護該機密資訊之程序，及提出刪除需受保護資訊之修改後文件之程序[136]。

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[132] FAR33.104(c)(1):When the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded contract, except as provided in paragraphs (c)(2) and (3) of this section.

[133] FAR33.104(c)(4):When it is decided to suspend performance or terminate the awarded contract, the contracting officer should attempt to negotiate a mutual agreement on a no-cost basis.

[134] FAR33.104(c)(5):When the agency receives notice of a protest filed with the GAO after the dates contained in paragraph(c)(1), the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

[135] FAR33.104(d):*Findings and notice.* If the decision is to proceed with contract award, or continue contract performance under paragraphs (b) or (c) of this section, the contracting officer shall include the written findings or other required documentation in the file. The contracting officer also shall give written notice of the decision to the protester and other interested parties.

[136] 4CFR Sec.21.4.(a):At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of

（四）召開聽證會

GAO 得依職權或異議人之申請，就異議案召開聽證會。惟若係異議人聲請召開時，異議人應敘明有召開聽證會必要性之理由[137]。

（五）GAO 審議結果

若 GAO 裁決認定採購機關之招標行為或其他要求、招標行為或其他要求之撤銷、已決標之結果或決標結果之提議內容，有違反法令之處，應建議招標機關採取下列措施之一或二者以上並用[138]：

1、暫停依採購契約行使合約之選擇權利。

2、終止採購合約。

3、重新進行招標程序。

4、以全新之招標條件進行招標程序。

5、依法令之規定進行決標。

6、其他 GAO 建議採行之必要措施。

如採購案負責主管認為，若有提出異議時，基於政府最大之利益考量仍應繼續進行履約時，GAO 則不得對採購機關做出終止採購合約、重新決標或重新招標之建議[139]。GAO 在建議採購機關應採行之補救措施時，應考量一切有關於該採購案之情狀，包括採購不足之嚴重性、對其他當事人或對整體採購競爭制度之損害程度、當事人之善意及誠信、履約之程度、政府所需負擔之費用、採購案之急迫性及該建議對採購機關行政任務之影響[140]。

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documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protester through counsel, it is the responsibility of protester's counsel to request that a protective order be issued and to submit timely applications for admission under that order.

[137] 4CFR Sec.21.7. (a)：At the request of a party or on its own initiative, GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why a hearing is needed to resolve the protest.

[138] 4CFR Sec.21.8. (a)：If GAO determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation, it shall recommend that the agency implement any combination of the following remedies:(1) Refrain from exercising options under the contract;(2) Terminate the contract;(3) Recompete the contract;(4) Issue a new solicitation;(5) Award a contract consistent with statute and regulation; or(6) Such other recommendation(s) as GAO determines necessary to promote compliance.

[139] 4 CFR Sec.21.8. (C)：If the head of the procuring activity determines that performance of the contract notwithstanding a pending protest is in the government's best interest, GAO shall make its recommendation(s) under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

[140] 4 CFR Sec.21.8. (B)：In determining the appropriate recommendation(s), GAO shall, except as

（六）建議採購機關賠償費用

採購機關之招標、決標或決標結果有違反法令者，GAO 得建議採購機關賠償異議人提出與進行異議程序之費用，包括異議人聘請代理人、顧問及專家證人之費用，及準備投標之費用[141]。採購機關對異議人所提之異議已決定改正其違失之行為，GAO 得僅建議採購機關賠償異議人為提出與進行異議程序之費用，包括異議人聘請代理人、顧問及專家證人之費用，但不包括異議人準備投標之費用[142]。

（七）GAO 裁決之救濟

當事人對於 GAO 裁決不服者，得檢具用以作為撤銷或更改裁決之具體事實及理由，向 GAO 提出覆議之要求。覆議之要求，須於知悉或可得而知覆議之事實或理由後十日內提出，否則 GAO 得不予受理。惟再審之請求，並不影響決標或契約之履行[143]。

三、向聯邦補償法院（the U.S. Court of Federal Claims）提起訴訟

招標廠商或其他利害關係人得向聯邦賠償法院提起訴訟，就得起訴之主體，亦同於前述美國聯邦政府採購規則所規定得提出異議之主體，即直接之經濟利益因決標或採購機關未決標而受到影響之實際或可能之投標人之利害關係人[144]。有關提起訴訟之事由規定如下[145]：

（一）利害關係人對採購機關所公布或寄發與投標廠商之招標公告內容有異議。

（二）利害關係人對採購案之決標或擬予決標之行為有異議。

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specified in paragraph (c) of this section, consider all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the agency's mission.

[141] 4CFR Sec.21.8. (d): If GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the agency pay the protester the costs of:(1) Filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees; and(2) Bid and proposal preparation.

[142] 4CFR Sec.21.8. (e): If the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees.

[143] 4CFR Sec.21.14. Request for reconsideration. (a) The protester, any intervenor, and any Federal agency involved in the protest may request reconsideration of a bid protest decision. GAO will not consider a request for reconsideration that does not contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

[144] 曹志仁，從美國聯邦採購規則論我國政府採購法之爭議處理制度，國立政治大學法律學研究所碩士論文，2002 年 7 月，頁 153。

[145] 周達麒，政府採購招標爭議廠商救濟機制之比較研究-以行政體系內部之救濟機制為重心，私立東吳大學法律學研究所，2003 年，頁 85。

（三）利害關係人認為採購之過程有違反法令或規章之情形。

第二項　政府採購協定於美國採購救濟制度之實踐

一、協商解決採購紛爭：

現行政府採購協定第二十條及 2012 年修正政府採購協定第十八條規定，若供應商投訴採購案有違反本協定者，締約國應鼓勵供應商與採購機關以協商解決紛爭，美國聯邦政府採購規則規定，採購機關應於契約官做成正式裁決前，盡其最大努力協商解決爭議，採購機關亦應提供一套快速且程序簡便的異議處理程序[146]，或利用爭議解決替代方案（Alternative），或透過中立的第三者，可避免採購爭議之延宕並適時解決爭議。

二、建立異議及申訴之採購爭端救濟管道

美國聯邦政府採購規則規定，因採購決標或未決標而受影響之實際投標人或可能之投標人，得向採購機關或聯邦主計署提出異議，以體現現行政府採購協定第二十條第二項及 2012 年修正政府採購協定第十八條規定，締約國應提供無歧視、適時且透明之採購申訴程序。

三、由公正客觀之獨立機構審查

美國聯邦政府採購規則規定，有利害關係之當事人可要求契約官層級以上的獨立單位審查其異議，招標文件並應載明此一獨立審查之規定，以使投標廠商知悉[147]，亦符合現行政府採購協定第二十條第六項及 2012 年修正政府採購協定第十八條第四款規定，申訴案件應由公正客觀之獨立機構審理之規範要求。

四、程序公開進行並得陳述意見

美國聯邦主計署得依職權或異議人之申請，就採購異議案召開聽證會。惟若係異議人申請召開應敘明召開之理由[148]，與現行政府採購協定第二十條及 2012 年修正政府採購協定第十八條規定，程序能公開進行並能陳述意見之規範要求一致。

五、採取雙軌救濟途徑

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[146] FAR 33.103（b）Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.（c）The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

[147] FAR 33.103（d）（4）前揭註 112 參照。

[148] 4CFRSec.21.7.（a）前揭註 137 參照。

依據美國聯邦政府採購規則規定,提出採購異議之利害關係人得向辦理政府採購之招標機關或聯邦主計署提出異議,現行政府採購協定二十二條第三項規定,提起救濟之供應商除向公正且獨立之單位提起申訴外,締約國亦得請求爭端解決機構設立小組,就爭端事項提出建議或做出裁決,此亦屬於政府採購雙軌救濟制度。

六、異議廠商對招標機關之求償權

現行政府採購協定第二十條及 2012 年修正政府採購協定第十八條規定,申訴廠商得允許廠商,對違反本協定情事之改正或遭受損失或損害之賠償,要求準備投標或申訴成本之損害賠償,於美國政府採購救濟,GAO 得建議採購機關賠償異議人為提出與進行異議程序之費用,包括異議人聘請代理人、顧問及專家證人之費用,及準備投標之費用[149]。

七、暫停採購程序之進行

美國聯邦政府採購規則規定,對於政府採購案之爭議,無論係向採購機關或向聯邦主計署異議,於採購案決標前異議者,均得暫時不予決標並暫停採購程序之進行,此亦體現政府購協定所規定申訴程序得採取快速臨時措施,得令購案暫停進行以保全商機,但應將公共利益及其所生之不利益納入考量。

第二節　歐盟採購指令之救濟制度

歐盟為建立相互保護、相互開放及相互依存之自由經濟市場,實現成員國間經濟一體與政治同盟之目標,對於政府採購市場採取相互開放及消除障礙政策,而形成獨具特色之政府採購體系,目前歐盟政府採購指令由四個公共採購指令及二個救濟指令組成,四個公共指令分別是:一、公共服務指令(The Service Directive92/50/EEC);二、公共工程指令 The Works Directive93/31/EEC);三、公共供應指令(The Supplies Directive93/36/EEC);四、公用事業指令(The Utilities Directive93/38EEC)。兩個救濟指令分別是:一、公共救濟指令(The Public Sector Remedies Directive89/665/EEC);二、公用事業救濟指令(The Utilities Remedies Directive92/13/EEC)。另由於政府採購實體規範不斷發展,為實踐政府採購救濟制度並提升公共契約救濟審查程序之效率,於 2007 年增修上述兩個救濟指令,形成

[149] 4CFR Sec.21.8.(d)前揭註 141 參照。

（2007/66/EC）[150]，新增確認合約無效及替代性懲罰措施兩種新救濟措施，於救濟程序中，根據各國國內法之不同規定，提出罰金或延遲契約履行之替代性懲罰措施，進一步改善歐盟政府採購救濟制度。歐盟政府採購指令之爭議處理機制之基本原則有：

一、歐盟採購救濟指令一致性

以往歐盟政府採購指令並無救濟之程序規定，僅具實體規定，故無法有效運行救濟制度[151]，致使歐盟各會員國政府採購無法實際依據公共採購指令規定進行採購救濟程序，為使各成員國履行歐盟採購救濟指令，歐盟單獨制訂政府採購救濟指令，以補足無程序性規範之不完整性，並確保歐盟採購救濟指令之一致性。

二、及時、有效且完整之救濟體系

政府採購救濟制度之目的在爭端發生後，權益受害之一方能及時有效解決紛爭，歐盟為制定更為完善之政府採購救濟制度，單獨規定政府採購救濟指令，並訂定特定救濟措施，保證政府採購制度有效遵守，故對於救濟主體權利義務、投訴期限、投訴後之救濟結果以及違反救濟指令之處置等，均訂有規範，而形成一個獨立完整之救濟體系。

三、調整法律適用關係

歐盟政府採購救濟主管機關包括：歐盟管轄機構、歐盟法院、成員國契約審查機關、各成員國國內法院。投訴主體對象包括：得標者、未得標之投標者，及未參予投標之第三者，異議申訴之主體範圍頗為廣泛。救濟程序而言，包括調解機制、證人公證程序、成員國國內獨立審查機制、契約審查機制及司法機關對政府採購行為之審查機制。因此歐盟採購救濟指令，規範特定救濟主體、客體及程序規定具有調整並實踐政府採購指令實體適用關係，完備政府採購救濟制度，保障供應廠商合法權益，以實現政府採購所欲達成之目標[152]。

第一項　異議制度

歐盟救濟體系分為兩種途徑：一是行政救濟體系，由相關行政機關對採購行為審查後，依據相關法律規定做出決定與判斷，並採取相關措施以維護採購受損者之權益；一

[150] amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts)(2007/66/EC)。
[151] Directive89/665/EEC 序言。
[152] 王周歡，政府採購救濟機制初探，中國政府採購，2002 年，頁 26-29。

是司法救濟體系，指權利受害者直接向有管轄權之法院提起訴訟或是由歐盟委員會向歐洲法院提起訴訟，依訴訟程序對被害人進行救濟。

第一款　提出異議之要件

一、異議主體：

對於提出異議之主體資格，指在政府採購過程中權利受損害所有相關人員，或自認其本身受有損害之人。對於歐盟政府採購行政救濟體系之救濟管道，可分為歐盟層次之救濟方式及成員國國內之救濟方式。

二、受理異議機關

（一）歐盟之救濟受理機關：

歐盟政府採購救濟之受理機關為歐盟委員會，委員會委員由各成員國共同協議產生，任期 5 年，委員會應完全獨立行使職權[153]，歐盟委員會之功能在監督並管理採購政策，並受理成員國不遵守歐盟法律之投訴，要求成員國更正違反歐盟法律規定之行為，歐盟委員會另可對於會員國之違法行為，本於職責向歐盟法院提出申訴[154]。歐盟部長理事會及歐洲理事會，分別表示歐盟部長理事會係由成員國授權政府部長級代表組成，歐洲理事會係國家元首或政府高階官員舉行高峰會之機構。歐洲議會其重要職責在審議預算並監督執行[155]。

（二）成員國之救濟受理機關：

歐盟各成員國依據 Directive89/665/EEC 及 Directive92/13/EEC 制定各內國之政府採購救濟制度，並要求各成員國需成立獨立審查機構，以有效監督政府採購之進行，該審查機構不一定須具司法性質，但須受司法機關審查[156]。

第二款　對於異議之處理方式

第一目　程序審查

歐盟政府採購指令對於異議之處理方式，區分為歐盟層次及成員國層次：

一、歐盟層次之救濟方式：可分為歐盟委員會本於監督權主動提起救濟程序，及權利侵害之人及相關人申請救濟程序兩類救濟程序。

[153] Denys Simon 著，王玉芳、李濱、越海豐譯，歐盟法律體系（le systemejuridique communautair），北京大學出版社，2007 年，頁 182。
[154] 曹國富，中國加入 WTO 政府採購協定與國內改革的機遇，以歐盟經驗為背景的研究，2007 年，頁 33。
[155] Denys Simon 著，王玉芳、李濱、越海峰譯，歐盟法律體系（le systemejuridique communautair），北京大學出版社，2007 年，頁 182。
[156] （89/665/EEC）第一章。

（一）歐盟委員會本於監督權主動提起救濟程序：歐盟委員會於監督政府採購過程中，發現成員國法律、政府採購行為、發布之招標公告等，有明顯違反歐盟政府採購制度及規範者，即可直接通知成員國令其改正。而歐盟之成員國接受通知後，若認其為違反行為，則須改正之，若認無違反行為，亦須提出無須改正之合理理由[157]。

（二）權利受侵害之人及相關人申請救濟程序：

1、任何投標廠商自認其自身權益遭受侵害，均可直接向歐盟委員會提出申訴，另可同時向國內法院提出救濟。

2、經雙方當事人同意，歐盟委員會依據 Directive92/13/EEC 提供調解人名單，進行調解，調解人依據歐盟政府採購法律促成雙方達成協議，並向歐盟委員會報告調解結果。惟須事先於調解前提供一廣泛調解名單，使調解難度增加，影響調解制度之實際效用，故 2007 年指令（2007/66/EC）將此制度刪除。

二、成員國層次行政救濟程序：歐盟成員國依據指令 89/665/EEC 及 92/13/EEC，須訂定自身內國之政府採購救濟規範，成員國須確保違反採購指令而受到權利侵害，有救濟管道與救濟方式，並應成立審查機關，改正採購違法行為，刪除招標文件中差別待遇之條件，確認契約無效等措施及決定對於因違反採購指令而受損害之人給予損害賠償[158]。

第二目　實質處理

一、歐盟各成員國行政救濟之處置措施：

對於政府採購權利受損害之人，歐盟各成員國須建立完備救濟制度，以保障受侵害權利人之權益，其具體措施有：

（一）得採取臨時措施中止或暫停採購程序之進行，以改正採購違法行為。

（二）撤銷違法採購措施或決定，如廢除歧視性招標規格規範、刪除歧視性招標文件。

（三）向採購審查機構提出損害賠償之請求。

（四）對於侵害歐盟政府採購法律之行為，確認契約無效且進行實質審查[159]。

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157 （89/665/EEC）第一章。
158 （2007/66/EC）第一條。
159 （2007/66/EC）於（89/665/EEC）修訂增加第 2D 條。

（五）基於公共利益或考量其他經濟利益之損失，得採取替代性懲罰措施，如罰金或縮短契約等措施[160]。

二、歐盟政府採購司法救濟之處置措施：

另外，歐盟政府採購上有建立採購爭端之司法救濟體系，與行政救濟體系相同，亦可分為歐盟層次司法救濟及成員國內層次司法救濟。

（一）歐盟層次司法救濟體系：

指歐盟委員會依職權或廠商之申訴，要求違背政府採購指令之成員國改正時，如該成員國不改正其違法之採購行為，則歐盟委員會有權將該案件送交歐洲法院，申請歐洲法院發出強制令之程序。

（二）成員國層次司法救濟體系：

指內國採購之審查機關違反採購相關規定，當事人有權向司法機關請求救濟之程序，各成員國之司法救濟體系與其他國家司法救濟體系並無大差異，但歐盟層次之司法救濟體系具有獨特外部監督機制。

為限制採購機關之行政權力，歐盟司法體系設計較為完善之政府採購監督機制，該司法監督之鮮明特點具體表現，從歐共體委員會訴丹麥案，對於政府採購機關行政權利的司法監督，分述如次[161]：

1、歐盟政府採購指令法律效力高於成員國法律：

歐盟政府採購指令對各成員國中央政府、地方政府、公共部門及相關公營事業都具有法律效力。依據歐洲聯盟條約，歐盟成員國必須將採購指令適用於本國，內國之規範實質內容須與指令保持一致，若內國既有政府採購法規與指令有矛盾，成員國必須修改本國法規。

2、投訴主體多元化：

歐盟採購指令對政府採購投訴主體作較為寬泛規定，擴大採購監督之功能，對於招標過程中採購機關的違法行為，成員國政府、組織、廠商及個人，均可向本國法院或歐盟委員會申訴，若採購違法行為發生在成員國內部，則由該成員國司法機關管轄，若採購違法行為發生在成員國之間，則由歐盟委員會或歐洲

[160] （2007/66/EC）於（89/665/EEC）修訂增加第 2F 條。
[161] 李波，從歐共體委員會訴丹麥案看歐盟對政府採購機關行政權利的司法監督，中國政府採購，2002 年，頁 40-42。

法院管轄，若成員國法院對某一訴訟有疑問，則可向歐盟申請要求解釋，或將案件提交歐洲法院審理。

3、司法機關不主動監督政府採購爭端：

僅廠商遭歐盟委員會提出訴訟時才進入司法程序，消極管轄避免過度干預，有利於提高政府採購效率，同時也有利於司法部門集中精神處理投訴案件。

4、司法救濟措施多樣化：

歐洲法院得採取臨時措施，要求改正採購違法行為或暫停採購程序之進行，並廢除歧視性招標文件及採購契約，及裁定違法當事人向受到損害當事人賠償損失。

第二項　政府採購協定於歐盟救濟制度之實踐

一、建立即時、有效且完整之救濟體系

歐盟為建立更為完善之政府採購，特別單獨規範之政府採購救濟指令，形成一個獨立且完整之救濟體系，與政府採購協定第二十條及 2012 年修正政府採購協定第十八條所定，各締約國應建立適時、透明及有效性之採購申訴制度相符合。

二、建立獨立政府採購爭端解決之審查機構

歐盟政府採購指令之受理採購異議機關，有歐盟委員會、各成員國法院及歐洲法院等，以有效監督政府採購之進行，該審查機構雖非一定須司法機關，但須受司法機關審查，亦符合政府採購協定第二十條第六項及 2012 年修正政府採購協定第十八條第四項規定，受理政府採購申訴機構應由公正客觀之獨立機構審查，非法院審查者則應受司法監督之規範。

三、採取雙軌之救濟管道

歐盟政府採購之救濟具有兩種途徑，任何投標廠商若認為其採購權益受損害，可直接向內國採購契約審查機關提起救濟，或同時向歐盟委員會提出申訴，與政府採購協定二十二條第三項規定，除向公正且獨立之單位提起申訴外，締約國亦得請求爭端解決機構設立小組，就爭端事項提出建議或做出裁決之雙軌救濟制度相符。

四、暫停採購程序之進行

歐盟成員國對於採購救濟，得採取臨時中止措施或暫停採購程序之進行，以改正違法之採購行為，如廢除歧視性招標規格規範或刪除歧視性招標文件，此種快速臨時

措施，俾改正違反本協定情事及保全商機，亦體現政府採購協定第二十條及 2012 年修正政府採購協定第十八條所定之規範。

五、內國政府採購救濟法令須與協定規範一致

歐盟各成員國依據歐洲聯盟條約，必須將歐盟政府採購指令適用於各成員國之內國政府採購，且須將內國之政府採購法之實質規範內容與歐盟採購指令保持一致，若二者有矛盾，歐盟政府採購指令之效力優於各成員國之內國法，於政府採購協定第二十四條第五項及 2012 年修正政府採購協定第二十二條第四項亦有各締約國之國內法令、規章及行政程序，須符合政府採購協定之相關規定。

第三節　大陸政府採購救濟制度

中國人民共和國招標投標法（以下簡稱大陸招投標法）於 2000 年 1 月 1 日實施，該法第二條規定，在中華人民共和國境內進行招標投標活動，適用本法，故包括政府機關、國營事業等，於中華人民共和國境內進行招標投標活動，亦適用該法成為招標人，大陸招投標法主要規範招投標行為。大陸於 2003 年 1 月 1 日公布制定「中華人民共和國政府採購法」(以下簡稱大陸政府採購法)，與大陸招投標法相較，大陸政府採購法主要規範政府採購行為，屬於特殊招標行為，第六章就供應商之質疑與投訴事項做出專章規定，此係針對大陸政府採購招標階段爭議之救濟方式及程序作出明確規定，該法第五十二條至五十八條除規定政府採購招標階段之爭議得採取詢問、質疑、投訴、申請行政復議或提起行政訴訟等救濟方式外，並分別對供應商就有關政府採購事項進行詢問、質疑、投訴之方式、途徑與時限，採購人或採購代理機構以及政府採購監督管理部門之答復與處理投訴等作出規定，其中質疑是投訴之必經步驟，投訴是申請復議或提起行政訴訟的必經步驟[162]。另大陸財政部另於 2004 年 8 月 11 日復訂定公布政府採購供應商投訴處理辦法，自 2004 年 9 月 11 日施行，明確規定政府採購救濟途徑中之質疑前置程序[163]，以為具體處理投訴之依據，對於供應商之書面質疑，採購機關應予以迅速調查並依限回復，對採購機關於採購過程中存在之問題即時糾正，以維護供應商應有之權益。

第一項　異議制度

[162] 陳海萍，關於我國政府採購救濟模式的幾個問題，法制論叢，第 18 卷第 4 期，2003 年 7 月，頁 68-69。

[163] 政府採購供應商投訴處理辦法第 7 條規定：供應商認為採購文件、採購過程、中標和成交結果使自己的合法權益受到損害的，應當首先依法向採購人、採購代理機構提出質疑。對採購人、採購代理機構的質疑答復不滿意，或者採購人、採購代理機構未在規定期限內作出答復的，供應商可以在答復期滿後 15 個工作日內向同級財政部門提起投訴。

有關大陸政府採購爭議類型，依其辦理採購不同階段，大致可分為招標前爭議、招標爭議、履約爭議及不良廠商爭議，分別採取不同之救濟方式與途徑，大陸政府採購法第六章規範招標階段之內部行政救濟機制，實際僅須區分契約成立前與契約訂定後之爭議來討論救濟程序，如係契約訂定前所生爭議，則應適用詢問、質疑、投訴、行政復議或行政訴訟等程序以為救濟；如係契約訂定後所生爭議，則應適用一般民事救濟制度[164]。對於大陸政府採購法第六章規定「質疑」與「投訴」章節，即屬於行政機關內部異議之救濟程序。

第一款 提出異議之要件

依據大陸政府採購法第六章首先於第五十一條規定：「供應商對政府採購活動事項有疑問的，可以向採購人提出詢問，採購人應當及時作出答復，但答復的內容不得涉及商業秘密。」此雖非供應商質疑或投訴規定，但供應商「詢問」有助於釐清採購行為及採購招標文件相關爭議。

一、「質疑」之異議主體：

大陸政府採購法第五十二條規定：「供應商認為採購文件、採購過程和中標、成交結果使自己的權益受到損害的，可以在知道或者應知其權益受到損害之日起七個工作日內，以書面形式向採購人提出質疑。」故提出質疑之主體為「供應商」，依同法第二十一條規定，「供應商」是指向採購人提供貨物、工程或者服務的法人、其他組織或者自然人，惟仍應限於採購權益遭受損害或應知或可得而知其權益遭受損害之供應商，始得提起質疑。

二、「質疑」之異議事由：

依前述大陸政府採購法第五十二條規定，供應商提出質疑之事由為採購文件、採購過程和中標、成交結果中之違法行為，致其採購權益遭受損害，得要求招標機關依限回復。

三、受理「質疑」之機關：

依大陸政府採購法第五十二條規定，供應商於權益受損害或可得而知其權益受損害七個工作天內，以書面向採購人提出質疑；另同法第五十四條規定：「採購人委託採購代理機構採購的，供應商可以向採購代理機構提出詢問或者質疑，採購代理機構應當依

[164] 陳泰源，兩岸政府採購爭議處理比較研究，中國文化大學法律學研究所碩士論文，2008 年 6 月，頁 76。

照本法第五十一條、第五十三條的規定就採購人委託授權範圍內的事項作出答復。」故質疑之受理機關為採購人，如採購人係委託採購代理機構採購者，供應商亦可向採購代理機構提出質疑。

四、提出「質疑」之期限：

大陸政府採購法第五十二條規定：「供應商認為採購文件、採購過程和中標、成交結果使自己的權益受到損害的，可以在知道或者應知其權益受到損害之日起七個工作日內，以書面形式向採購人提出質疑。」故供應商須於知道或應知其權益受到損害之日起，「七個工作日內」，以書面提出質疑。

第二款　對於異議之處理方式

依據大陸政府採購法第五十三條規定：「採購人應當在收到供應商的書面質疑後七個工作日內作出答復，並以書面形式通知質疑供應商和其他有關供應商，但答復的內容不得涉及商業秘密。」故招標機關於收到廠商之書面質疑後，七個工作天做出答復，必以書面形式通知質疑供應商和其他有關供應商。

第一目　程序審查

對於供應商之質疑，採購人應先審查其質疑是否具備合法要件，如是否於期限內提出、是否以書面提出，質疑之主體是否為採購權益受損之供應商等，若質疑之要件不備，可補正者應定期命其補正，若逾期未為補正者，應不予受理。

第二目　實質處理

依據大陸政府採購法第五十三條及第五十四條規定，採購人或採購代理機構於收到供應商書面質疑七個工作天內，應就供應商之質疑事項或就採購人委託授權範圍內做出答復，並以書面通知，但答覆內容不得涉及商業秘密，以免對採購行為產生不良影響，或損害其他供應商之權益。

第二項　　申訴制度

大陸政府採購法第五十五條規定：「質疑供應商對採購人、採購代理機構的答復不滿意或者採購人、採購代理機構未在規定的時間內作出答復的，可以在答復期滿後十五個工作日內向同級政府採購監督管理部門投訴。」同法第五十六條規定：「政府採購監督管理部門應當在收到投訴後三十個工作日內，對投訴事項作出處理決定，並以書面形式通知投訴人和與投訴事項有關的當事人。」故大陸政府採購法之「投訴」制度，是指

質疑供應商對於採購人或採購代理機構之答覆不滿意，或未於期限內答覆，可於答覆期滿後十五個工作日內，向同級政府採購監督管理部門提出申訴。

第一款　提出申訴之要件

供應商提出投訴，依大陸政府採購法第五十五條規定，限於已於期限內提出質疑之供應商，因此未提出質疑之供應商不能進行投訴，故大陸政府採購法係採「質疑前置主義」。依照大陸「政府採購供應商投訴處理辦法」第十條規定：「投訴人提起投訴應當符合下列條件：（一）投訴人是參與所投訴政府採購活動的供應商；（二）提起投訴前已依法進行質疑；（三）投訴書內容符合本辦法的規定；（四）在投訴有效期限內提起投訴；（五）屬於本財政部門管轄；（六）同一投訴事項未經財政部門投訴處理；（七）國務院財政部門規定的其他條件。」

一、投訴人必須是參與其所投訴之政府採購之供應商。

二、須先提出質疑並對質疑答復不滿意或未於期限內答復：

大陸「政府採購供應商投訴處理辦法」第七條規定：「供應商認為採購文件、採購過程、中標和成交結果使自己的合法權益受到損害的，應當首先依法向採購人、採購代理機構提出質疑。對採購人、採購代理機構的質疑答覆不滿意，或者採購人、採購代理機構未在規定期限內作出答覆的，供應商可以在答覆期滿後十五個工作日內向同級財政部門提起投訴。」故供應商提出投訴限於已先提出質疑，而對採購人或採購代理機構之質疑答復不滿意，或未於規定期限內作出答復者。

三、須向同級政府採購監督管理部門投訴

依據大陸政府採購法第十三條規定：「各級人民政府財政部門是負責政府採購監督管理的部門，依法履行對政府採購活動的監督管理職責。」故同級政府採購監督管理部門為「各級人民政府財政部門。」。

四、須提交投訴書並按採購人、採購代理機構及與投訴有關之供應商提供投訴書副本

大陸「政府採購供應商投訴處理辦法」第八條規定，投訴書應載明下列主要內容：（一）投訴人和被投訴人的名稱、地址、電話等；（二）具體的投訴事項及事實依據；（三）質疑和質疑答覆情況及相關證明材料；（四）提起投訴的日期、投訴書應當署名。

五、須於期限內提出

對於採購人或採購代理機構之質疑答復不滿意，或未於規定期限內答復，投訴人須

在答復期滿後「十五個工作天」內向同級政府採購監督管理部門投訴，另大陸「政府採購供應商投訴處理辦法」第七條亦規定：「供應商認為採購文件、採購過程、中標和成交結果使自己的合法權益受到損害的，應當首依法向採購人、採購代理機構提出質疑。對採購人、採購代理機構的質疑答覆不滿意，或者採購人、採購代理機構未在規定期限內作出答覆的，供應商可以在答覆期滿後十五個工作日內向同級財政部門提起投訴。」亦有相同規定。

六、不收取投訴費用

大陸「政府採購供應商投訴處理辦法」第十一條規定，財政部門處理投訴不得向投訴人與被投訴人收取任何費用。但因處理投訴發生之鑑定費用，應當按照誰錯誰負擔之原則，由過錯方負擔；雙方都有過錯，由雙方合理負擔。

七、須同一投訴事項未經財政部門處理。

第二款　對於申訴之處理方式

依據大陸政府採購供應商投訴處理辦法第十一條規定，財政部門收到投訴書後，應當在五個工作日內就是否符合投訴條件進行審查。

第一目　程序審查

一、不符合投訴條件者：

（一）投訴書內容不符合規定的，告知投訴人修改後重新投訴。

（二）投訴不屬於本部門管轄的，轉送有管轄權的部門，並通知投訴人。

（三）投訴不符合其他條件的，書面告知投訴人不予受理，並應當說明理由。

二、符合投訴條件者：

（一）自財政部門收到投訴書之日起即為受理。

（二）發送投訴書副本：

大陸政府採購供應商投訴處理辦法第十一條規定：「財政部門應當在受理投訴後三個工作日內向被投訴人和與投訴事項有關的供應商發送投訴書副本。」

（三）以書面形式向財政部門作出說明，並提交相關證據、依據和其他有關材料：

大陸政府採購供應商投訴處理辦法第十二條規定。

（四）書面審查為原則：

大陸政府採購供應商投訴處理辦法第十四條規定：「財政部門處理投訴事項原則上採取書面審查的辦法。財政部門認為有必要時，可以進行調查取證，也可以組織投訴人和被投訴人當面進行質證。」

（五）配合調查之義務：

大陸政府採購供應商投訴處理辦法第十五條規定：「對財政部門依法進行調查的，投訴人、被投訴人以及與投訴事項有關的單位及人員等應當如實反映情況，並提供財政部門所需要的相關材料」。第十六條規定：「投訴人拒絕配合財政部門依法進行調查的，按自動撤回投訴處理；被投訴人不提交相關證據、依據和其他有關材料的，視同放棄說明權利，認可投訴事項。」

第二目　實質審議判斷

一、投訴處理決定之期限：

依據大陸政府採購法第五十六條及投訴處理辦法第二十條規定，政府採購監督管理部門應當在收到投訴後三十個工作日內，對投訴事項作出處理決定，並以書面形式通知投訴人和與投訴事項有關的當事人。政府採購監督管理部門對供應商之投訴逾期未作處理者，依據大陸政府採購法第八十一條規定，政府採購監督管理部門對供應商的投訴逾期未作處理的，給予直接負責的主管人員和其他直接責任人員行政處分。

二、投訴審查後之決定：

財政部門對於供應商之投訴審查後，依據投訴處理辦法第十七條規定，對投訴事項分別作出下列處理決定：一、投訴人撤回投訴者，終止投訴處理；二、投訴缺乏事實依據者，駁回其投訴；三、投訴事項經查證屬實者，分別按照政府採購供應商投訴處理辦法有關規定處理。

三、投訴審查後有明顯不公或歧視：

財政部門經審查，認定採購文件具有明顯傾向性或者歧視性等問題，給投訴人或者其他供應商合法權益造成或者可能造成損害的，依據投訴處理辦法第十八條規定，按下列情況分別處理：

（一）採購活動尚未完成：責令修改採購文件，並按修改後的採購文件開展採購活動。

（二）採購活動已經完成，尚未簽訂政府採購合同：決定採購活動違法，責令重新開展採購活動。

（三）採購活動已經完成，並已簽訂政府採購合同：決定採購活動違法，由被投訴人按照有關法律規定承擔相應的賠償責任。

四、投訴審查後認為有違法行為：

財政部門經審查，認定採購文件、採購過程影響或者可能影響中標、成交結果的，或者中標、成交結果的產生過程存在違法行為，依據投訴處理辦法第十九條規定，按下列情況分別處理：

（一）政府採購合同尚未簽訂：分別根據不同情況決定全部或者部分採購行為違法，責令重新開展採購活動。

（二）政府採購合同已經簽訂但尚未履行：決定撤銷合同，責令重新開展採購活動。

（三）政府採購合同已經履行：決定採購活動違法，給採購人、投訴人造成損失的，由相關責任人承擔賠償責任。

五、得暫停採購活動：

大陸政府採購法第五十七條規定：「政府採購監督管理部門在處理投訴事項期間，可以視具體情況書面通知採購人暫停採購活動，但暫停時間最長不得超過三十日。」另投訴處理辦法第二十二條亦規定：「財政部門在處理投訴事項期間，可以視具體情況書面通知被投訴人暫停採購活動，但暫停時間最長不得超過三十日。被投訴人收到通知後應當立即暫停採購活動，在法定的暫停期限結束前或者財政部門發出恢復採購活動通知前，不得進行該項採購活動。」對於暫停採購程序之臨時措施，審查機關尚須考量是否具有公共利益之必要性、是否會對其他利益相關者造成影響、在可獲得擔保時採取中斷採購措施，及設定暫停採購程序最長三十天之時間限制，以保證不致過於妨礙政府採購進程[165]。

六、投訴決定不服申請行政復議或提起行政訴訟：

大陸政府採購法第五十八條規定：「投訴人對政府採購監督管理部門的投訴處理決定不服或者政府採購監督管理部門逾期未作處理的，可以依法申請行政復議或者向人民法院提起行政訴訟。」另投訴處理辦法第二十四條亦規定：「投訴人對財政部門的投訴處理決定不服或者財政部門逾期未作處理的，可以依法申請行政復議或者向人民法院提起行政訴訟。」此投訴決定為一行政決定非最終裁決，投訴人不服投

[165] 曹富國，中華人民共和國政府採購法釋義，機械工業出版社，2002 年 9 月初版，頁 282-283。

訴決定，可循行政及司法救濟途徑依法申請復議或提起行政訴訟，投訴人可依法先申請行政復議，對行政復議不服，再依法向人民法院提起行政訴訟，亦可不經過行政復議而直接向人民法院提起行政訴訟[166]。

第三項　政府採購協定於大陸政府採購救濟制度之實踐

大陸政府採購法係參酌 WTO 政府採購協定而訂定，相關政府採購爭議救濟制度亦須符合政府採購協定之要求，依大陸對 WTO 之承諾，原應於 2003 年底開始加入政府採購協定之談判，由於大陸政府採購法制作業及政府採購制度尚在建立中，且國內商業與消費市場正處於適應國際自由貿易之過渡時期，因此大陸仍難簽署政府採購協定。惟世界經濟相互開放並互相依存，利用國際競爭提高自我競爭力，政府採購市場逐步開放已是世界經濟之趨勢[167]，因此大陸政府採購有必要利用政府採購協定之爭端解決機制，合法有效解決政府採購所生之爭端，以健全政府採購爭端解決機制。

一、供應商之質疑前置程序：

政府採購協定第二十條第二項及 2012 年修正政府採購協定第十八條規定，締約國應提供適時、透明及有效之程序，使供應商對違反本協定之採購案提出申訴救濟，惟政府採購協定另有諮商程序，亦可不經諮商程序逕行提出申訴。而大陸政府採購法則須先經質疑程序，不符質疑之答覆或逾期未回覆，始可投訴，此質疑作為投訴之前置程序，與政府採購協定規定有差異。

二、賦予供應商之質疑權：

政府採購協定規定締約國對採購案有認為違反該協定而影響其權益者，得提出異議；而大陸政府採購法則認為採購文件、採購過程和中標、成交結果中之違法行為，致其採購權益遭受損害，始得提出質疑。

三、賦予供應商申訴權：

大陸政府採購法限於採購權益受損之供應商，且須經質疑程序，與政府購協定由供應商認為採購案違反本協定而影響其權益，即可提出申訴，略有差異。

四、設有申訴受理機構：

[166]扈紀華主編，中華人民共和國政府採購法釋義及實用指南，中國民主法治出版社，2002 年 7 月第 1 次印刷，頁 198。

[167] 黃淑嬌，大陸政府採購下政府採購爭議救濟制度之探討，東吳大學法律學系碩士在職專班中國大陸法律組碩士論文，2007 年 6 月，頁 92-95。

為保證申訴處理結果之公正性，政府採購協定要求申訴案件應由法院或與購案結果毫無關係之公正且獨立之審查單位審理。而大陸政府採購法有關受理投訴之機構為政府採購監督管理部門，實際上為各級人民政府財政部門。

五、賦予司法審查機制：

政府採購協定第二十條第六項及 2012 年修正政府採購協定第十八條第四項規定，申訴案件應由公正客觀之獨立機構審理，非屬法院審查者應受司法監督；大陸政府採購法投訴人對於投訴決定不符或逾期未為回覆，除申請行政復議外，尚可向人民法院提起行政訴訟。

第四節　政府採購協定與各國政府採購救濟制度之比較

美國聯邦採購規則、歐盟政府購指令及大陸政府採購法，分別對於政府採購爭端解決之救濟制度定有規範，於 WTO 政府採購協定規範之爭議救濟制度中，除解決國際紛爭之爭端解決機制外，對於各締約國之內國政府採購爭議亦定有相關異議及申訴程序，有關政府採購協定於美國、歐盟及大陸等國家之政府採購爭端解決救濟制度之實踐，對於建立無歧視、適時及有效之申訴制度，賦予投標廠商相關利害關係人救濟權，建立獨立之審查機構，及採取臨時中止措施，以暫停採購程序等面向，各國均有已所規範，惟 WTO 政府採購協定之救濟制度，亦有與美國聯邦採購規則、歐盟政府採購指令及大陸政府採購法規範之政府採購爭議救濟制度有所差異之處，茲就申訴前置程序、提起救濟之主體、事由、提起期限、審理機關及審理效力，比較各國之規範差異。

第一項　異議或申訴制度之比較

第一款　申訴前置程序

政府採購協定規定供應商對於違反採購協定之採購案為投訴時，可先與締約國之採購機關進行磋商，亦得不經磋商逕行提起申訴，即磋商及申訴二者得同時進行，故磋商並非申訴之前置程序，比較美國、歐盟及大陸政府採購相關規定：

一、美國聯邦採購規則：

FAR 要求當事人向採購機關提出異議前，應在契約官之層級盡其最大之努力，以公開、真誠協商以解決紛爭，故其定有相關協商機制，採購機關尚且能利用爭端解決替代方案（ADR），以便宜且快速解決採購紛爭。美國聯邦採購規則雖定有事先協商機制，其採購利害關係之廠商亦得同時向採購機關或聯邦主計署提出異議及申訴，

故其協商亦非異議或申訴之前置程序。

二、歐盟採購指令：

任何投標廠商自認其採購權益受損，除可直接向歐盟委員會提出申訴，亦得同時向國內法院提起救濟，歐盟採購指令亦無申訴前置程序之規定。

三、大陸政府採購法：

大陸政府採購法則規範為投訴時須先向採購人提出質疑，對採購人之質疑答復不滿意或其逾期未為答復始可投訴，亦即將質疑作為投訴之前置程序。

第二款　提出之主體

WTO 政府採購協定規定供應商對採購案有違反該協定而影響其權益之情形，可提出申訴，亦即只要是與採購案有利害關係之供應商均可提出申訴。比較美國、歐盟及大陸政府採購相關規定：

一、美國聯邦採購規則：

提出異議之主體為利害關係人，即投標廠商、因決標或未決標之投標人或可能之投標人，故除參與投標之廠商外，其他具經濟上利害關係之人亦得為異議之主體。

二、歐盟政府採購指令：

凡是政府採購過程中權利受損害所有相關人員、成員國政府、組織、廠商及個人，或自認其本身權利遭受損害之人，均得提起採購救濟，投訴主體較為廣泛，擴大政府採購監督之功能。

三、大陸政府採購法：

認為採購文件、採購過程與中標、成交結果使自己的權益受到損害時，始可先經質疑後投訴，除限制投訴事由之範圍外，另侷限提起投訴供應商，以先前提起質疑之供應商為限，與 WTO 政府採購協定規定相較，其申訴主體與範圍顯得過窄。

第三款　提出之期間

政府採購協定對於締約國其國內所設之申訴制度，於該協定第二十條第二項規定，供應商應在知悉異議之時或合理情況下可得而知之時起一定期間內，開始其申訴程序並通知採購機關，前述期間不得少於十天。另締約國間對於採購爭議事件，成立爭端解決小組，自小組成員組成日起至提交最終爭端解決報告予爭端當事方之期間，依據 DSU 第十二條規定，原則上不得超過六個月。比較美國、歐盟及大陸政府採購相關規定：

一、美國聯邦採購規則：

對於採購機關之異議，若係基於招標文件明顯錯誤而提出異議，應於開標前或截止收件前提出，若非基於招標文件明顯錯誤而提出異議者，則應於知悉或可得而知異議之事由起十日之期間內提出；異議人向聯邦主計署（GAO）提出異議，於異議人知悉或可得知悉對其不利之採購機關裁定之日起十日內向 GAO 提起異議，GAO 即應受理之。就美國內國所設之救濟制度異議期間，符合政府採購協定之規範。

二、歐盟政府採購指令：

歐盟政府採購救濟相關指令，政府採購過程中權利受損害所有相關人，可向歐盟委員會提出申訴。在契約簽定前，有權採取臨時補救措施，包括暫停決標程序，或撤銷違反規則的決定，例如：移除歧視性規格或取消決標。有些歐盟會員國對公用事業案例，以日計罰款來替代補救措施。另在契約已簽定的情形下，判予受害廠商損害賠償。此外，歐盟會員國若未遵守歐盟法(EC Law)下的義務，對疑似違法行為採取適當糾正之措施，歐盟執委會可向歐洲法院（European Court of Justice）提起爭議訴訟，歐洲法院將對該項疑似違法行為作出明確裁決。

三、大陸政府採購法：

有關供應商對於採購文件、採購過程和中標、成交結果使自己的權益受到損害，應於知悉其權益受損之日起七日內提出，政府購協定相較大陸政府採購法之規定，利害關係之供應商在一定時間內開始申訴程序，期限不得少於十日，其提出異議救濟之期間較短。

第四款　審理機關

政府採購協定要求申訴案件應由法院或與購案結果毫無關係之公正且獨立之審查單位審理，非屬法院審查單位者，則應受司法審查或具備一定公開程序，以保證申訴處理結果之公正性。比較美國、歐盟及大陸政府採購相關規定：

一、美國聯邦採購規則：

美國政府採購受理異議機關為採購機關或聯邦主計署，採購機關並非與採購案毫無關係之公正且獨立之審查機構，但招標機關或其他利害關係人得向聯邦賠償法院提起訴訟，故其採購爭議之審議判斷仍受司法審查。

二、歐盟政府採購指令：

歐盟政府採購異議受理機關為歐盟委員會及歐洲法院，且歐盟各成員國依據 Directive89/665/EEC 及 Directive92/13/EEC 要求各成員國需成立獨立審查機構，以有效監督政府採購之進行，該審查機構不一定須具司法性質，但須受司法機關審查，歐盟政府採購指令與 WTO 政府採購協定之規定一致。

三、大陸政府採購法：

大陸政府採購法雖對供應商之詢問、質疑、投訴、行政復議與行政訴訟設計一套制度，但有關受理投訴之機構即政府採購監督管理部門，實際上為各級人民政府財政部門，並非屬於公正、獨立之審查單位，事實上大陸政府採購監督管理部門大多扮演政府採購人之角色，在角色重疊之情形下，難樹立利益遭到損害之供應商提出申訴之信心[168]。

第二項　審理決定之比較

第一款　審理決定之措施

政府採購協定對於供應商之申訴程序，得採取快速臨時措施，以改正違反本協定情事及保全商機，並得令採購案暫停進行。但應將公共利益納入考量，亦得請求違反本協定之改正或遭受損失或損害之賠償，惟限於準備投標或申訴之成本。比較美國、歐盟及大陸政府採購相關規定：

一、美國聯邦採購規則：

無論對於採購機關或聯邦主計署（GAO）提出異議，均得於受理異議後，暫停政府採購程序之進行，並通知各競標廠商，若異議有理由，則應重行進行招標程序，對於採購機關之採購程序違反法令者，GAO 得建議採購機關賠償異議人為提出與進行異議程序之費用，包括異議人聘請代理人、顧問及專家證人之費用，及準備投標之費用。惟若採購機關已決定改正其違失行為，GAO 僅得建議採購機關賠償異議人為提出與進行異議程序之費用，但不包括異議人準備投標之費用[169]，相較政府採購協定請求損害賠償，限於準備投標或申訴之成本規定不同。

二、歐盟政府採購指令：

對於歐盟政府採購指令規定，於各成員國內國提出採購救濟，亦得採取臨時措施中

[168] 姜暉，WTO（政府採購法協議）與我國（政府採購法）比較研究，當代法學，2003 年第 7 期，頁 141。
[169] 前述 4CFR Sec.21.8.（e）參照。

止或暫停採購程序之進行，並得向採購機關提出損害賠償之請求，另對於公共利益或考量其他經濟利益之損失，亦得採取罰金或縮短契約等替代性懲罰措施。相較政府採購協定之規定，對於暫停採購程序之進行及損害賠償之請求，規範相當，但對於其他替代性懲罰措施，政府採購協定則未為規範。

三、大陸政府採購法：

政府採購受理申訴之採購監督部門，在處理投訴事項期間，可以視具體情況書面通知採購人暫停採購活動，但暫停時間最長不得超過三十日，以避免過度影響政府採購程序之進行，另對於採購程序違法損害賠償之請求權，未若政府採購協定規定，以準備投標之費用及申訴成本之費用為限之規定。

第二款　審議決定之司法審查

依據政府採購協定，對於採購申訴案件應由與採購案無關公正客觀之獨立第三者機構審查，非屬法院審查者，應受司法監督，故供應商對於審查結果不服，仍得要求違反該協定之採購行為進入司法審查程序。比較美國、歐盟及大陸政府採購相關規定：

一、美國聯邦採購規則：

招標機關或因決標或未決標而受影響之利害關係人，本於採購機關所公布之招標公告內容有異議、對採購案之決標或擬予決標之行為有異議、或認為採購之過程有違反法令或規章等，均得向聯邦補償法院提起訴訟，符合政府採購協定有關申訴案件須受司法審查之規定。

二、歐盟政府採購指令：

歐盟政府採購爭端之司法救濟體系，除歐盟委員會對於成員國不改正違法採購行為，得將採購案件送交歐洲法院，申請歐洲法院發出強制令外，當事人亦得於內國尋求司法機關救濟，相較政府採購協定申訴案件應受司法審查之規定，歐盟政府採購指令之司法救濟體系具有獨特外部監督機制。

三、大陸政府採購法

投訴人對政府採購監督管理部門或財政部門的投訴處理決定不服或逾期未作處理，可依法申請行政復議或者向人民法院提起行政訴訟。此係投訴人不服投訴決定，可循行政及司法救濟途徑依法申請復議或提起行政訴訟，亦符合政府採購協定應受司法監督之規定。

有關政府採購協定爭端解決機制於各國政府採購救濟制度之比較，整理如後附表一。

政府採購協定爭端解決機制於各國政府採購救濟制度之比較表				
各國機制 / 救濟制度	GPA	美國聯邦採購規則	歐盟政府採購指令	大陸政府採購法
前置程序	磋商並非申訴之前置程序，二者得同時進行	協商亦非異議或申訴之前置程序	可直接提出申訴，亦得同時提起救濟，無申訴前置程序之規定	質疑為投訴之前置程序，須先向採購人提出質疑始可投訴
提出主體	與採購案有利害關係之供應商均可提出申訴	利害關係人，或其他具經濟上利害關係之人	自認其本身權利遭受損害之人	權益受到損害時，始可先經質疑後投訴
提出期間	知悉異議之時開始其申訴程序，前述期間不得少於十天	於知悉或可得而知異議之事由起十日之期間內提出	權利受損害所有相關人，於十日之期間內向歐盟委員會提出申訴	於知悉其權益受損之日起七日內提出
審理機關	應由法院或與購案結果毫無關係之公正且獨立之單位審理	採購機關或聯邦主計署	歐盟委員會及歐洲法院	各級人民政府財政部門
審理決定	採取快速臨時措施並得令採購案暫停進行	暫停政府採購程序之進行	得採取臨時措施中止或暫停採購程序之進行	暫停採購活動，但暫停時間最長不得超過三十日
司法審查	非屬法院審查者，應受司法監督	向聯邦補償法院提起訴訟	將採購案件送交歐洲法院	可依法申請行政復議或者向人民法院提起行政訴訟

表一：GPA 與各國政府採購救濟制度之比較（資料來源：自行繪製整理）

第五章　政府採購協定與我國政府採購法救濟制度之比較與研析

政府採購協定針對廠商與締約方政府間之爭議處理，區分為締約方之內國救濟程序及締約方政府間之爭議處理之救濟程序兩個層面。廠商之申訴案件由締約方之國內處理，其結果如果違反政府採購協定（GPA）之規定，則由國內爭議層次提昇為締約方間之國際爭議層次，則轉而由爭端解決機構（Dispute Settlement Body,簡稱 DSB）及其所成立之小組（Panel）處理。而政府採購協定於第二十四條第五項及 2012 年修正政府採購協定第二十二條第四項均規定，本協定之政府應確保在本協定對其開始生效之前，其國內一切法律、規章、行政程序及適用於附件所列機關之規則、程序與實務均已符合本協定之規定。我國已成為政府採購協定之簽署國，因此我國政府採購法應以政府採購協定為基礎，將須遵守之相關規定全納入政府採購協定，尤應檢視相關爭端解決機制，是否符合政府採購協定爭端解決之相關規範，以避免兩者產生適用上之衝突與矛盾。

有關政府採購協定於我國行政法院司法實務案例上之適用關係，援引政府採購協定成為判決或裁定依據者：

一、參酌「政府採購協定」訂定異議及申訴程序

美商・柏誠國際股份有限公司台灣分公司參與國立故宮博物院「國立故宮博物院南部院區新建工程委託專案管理服務」限制性採購招標案，及日商清水工程營造股份有限公司與中國石油股份有限公司工程等爭議案，高等及最高行政法院援引政府採購法第 74 條之立法理由謂：「政府採購行為一向被認定係私經濟行為，廠商與機關之間如有爭議，本應循民事程序途徑解決，惟因廠商於招標、審標、決標階段，與機關並無契約關係，難有可供訴訟提起之訴因，故為增加廠商之救濟及保護，並兼顧政府採購之時效性需求，爰參酌政府採購協定第 20 條之規定，訂定異議及申訴程序。」而採購法 85 條係參酌世界貿易組織(WTO)政府採購協定(GPA)第 20 條第 7 項第(C) 款訂定，「對違反本協定情事之改正或遭受損失或損害之賠償。」[170]。

二、快速有效原則訂定異議「不變期間」

福茂國際股份有限公司參與中華電信股份有限公司臺灣北區電信分公司「交通大樓多媒體簡報室暨國際會議廳、集會堂建築裝修及音視訊工程」採購案，及台灣羅德史瓦

[170] 臺北高等行政法院 96 年度訴字第 2857 號判決、91 年度訴字第 108 號判決、90 年度停字第 109 號裁定、最高行政法院 102 年度判字第 339 號判決。

茲有限公司陸軍保修指揮部飛彈光電基地勤務廠「頻譜分析儀」採購等案，高等行政法院及最高行政法院引述，政府採購法第 75 條異議期間之規定，旨在確保招標結果之穩定，並提高招標作業之效率，以符合世界貿易組織政府採購協定所揭櫫「快速有效程序」原則之要求（參照政府採購法第 75 條立法理由），揆其性質為不變期間，招標機關不得任意伸縮，一旦逾期異議即生失權效果[171]。

三、「投標及備標之成本」訂定申訴請求之金額

崇越科技股份有限公司參與高雄市政府「中區污水處理廠第 4 期工程—南前處理、擴充海水電解及其他設施工程」採購招標案，及賀伯臺參與經濟部智慧財產局「98 年度發明專利公開前審查暨分類作業委外案」採購等案，高等行政法院及最高行政法院援引政府採購法第 85 條第 3 項所規定「必要費用」，係指廠商已支付直接且必要之備標及申訴成本：按「依前述規定，廠商得向招標機關請求償付者為『必要費用』。惟法律並未規定何謂必要費用。經查上開規定之立法說明謂：『第 3 項明定申訴經認定招標機關有違失情事，而其無法改正時，廠商得向其為金錢求償之範圍。此係參照政府採購協定第 20 條關於申訴程序應有就廠商所受損失或損害予以償付之機制，並得將償付限定於準備投標或申訴之成本之規定訂定。』，按政府採購法第 1 條之立法理由謂『本法所稱標購，其名稱及內涵，乃參酌世界貿易組織之 1994 年政府採購協定』。足見，我國政府採購法係以 WTO 之政府採購協定為藍本制定，第 85 條第 3 項規定之立法說明，亦表明係根據政府採購協定之機制，並得將償付限定於準備投標或申訴之成本，其原文為 which may be limited to costs for tender preparation or protest，不論立法說明中翻譯為成本，或條文用語所指之必要費用，解釋上均應以直接且必要者為限」[172]。

第一節　政府採購救濟制度之比較

政府採購協定相關爭端解決機制，區分為締約國之內國救濟程序及締約國間國際救濟程序，內國救濟程序中，對於廠商向採購機關提出諮商、提出申訴、申訴期間及申訴案件之審理，均訂有關規範；對於締約國間尋求國際救濟程序，亦有爭端當事方間之諮商、斡旋、調解及調停、政府採購委員會協助解決紛爭、設立爭端解決小組等相關規範。

[171] 臺北高等行政法院 99 年度訴字第 1000 號裁定、94 年度訴字第 3093 號判決、最高行政法院 101 年度判字第 612 號判決、最高行政法院 97 年度裁字第 2816 號裁定。

[172] 臺北高等行政法院 101 年度訴字第 805 號判決、99 年度訴字第 1644 號判決、99 年度簡字第 37 號判決、98 年度停字第 19 號裁定、最高行政法院 97 年度判字第 976 號判決、最高行政法院 95 年度判字第 440 號。

我國政府採購法之救濟程序，對於異議及申訴之主體資格、提出期間、受理機關、審理方式及審議決定之效力，亦定有規範，藉由比較政府採購協定及政府採購法爭端解決機制規定，以建立我國完備之政府採購救濟體系。

第一項　諮商制度

一、政府採購協定

第二十條第一項及新修正第十八條規定，締約方應鼓勵廠商與採購機關以諮商方式解決採購爭議，採購機關應公正且適時審查採購爭議，且諮商程序不得影響後續申訴程序之進行，另對於締約國間國際爭端解決程序，亦於WTO「爭端解決規則及程序瞭解書」（DSU）第四條規定，各會員國應確保諮商程序之進行，被要求諮商之國家若未於一定期間內回覆或展開諮商，指控國得要求成立爭端解決小組，以審議並決定採購紛爭。

二、我國政府採購法

政府採購法第六章爭端處理，規定廠商之異議及申訴程序，對於廠商提出異議及申訴之前，並無相關諮商規定，僅於政府採購法第四十一條規定，廠商對於招標文件之內容有疑義，應於招標文件規定之日期前，以書面向招標機關請求釋疑，此一釋疑程序僅具有變更或補充招標文件之內容，及招標機關應另行公告並視需要延長等標期之效果，與諮商程序雖非強制但能快速、有效解決政府採購爭議[173]有別。

第二項　救濟主體

一、政府採購協定

利害關係廠商（interested supplier）應在知悉或可得而知對採購案得聲明不服之原因事實之時起，一定期限內向採購機關提出申訴，政府採購協定第二十條第二項至第八項及新修正第十八條規定，係要求締約國應提供一不歧視、即時、透明及有效之程序，確保廠商於採購過程中對可能違反協定致受有損害之情形提出申訴，該程序屬於締約國為廠商提供之國內救濟途徑。

二、我國政府採購法

政府採購法於第七十五條規定，廠商若認為招標機關辦理採購違反法令、條約或協定，致廠商權利或利益受有損害，得提起異議，故主張採購權利或利益受有損害之廠商，始有提起採購救濟之權，相較政府採購協定規定利害關係之廠商均得為救濟之主體，其

[173] 張祥暉，論政府採購法之爭議處理機制，國防管理學院法律系碩士論文，1999年5月，頁44。

主體資格之規範較為廣泛，我國政府採購法規定得提起採購救濟之主體資格，限縮適用範圍，較無法達成採購紛爭解決之目的。

第三項　提出期限

一、政府採購協定

政府採購協定第二十條第五項及修正第十八條第三項規定，有利害關係之廠商於知悉或可得而知聲明不服之期間內，提起申訴，其期限不得少於十日，此係提供廠商快速且有效之救濟途徑，若未於期限內提出申訴，採購機關已完成部分或全部之採購作業，要求採購機關回復或暫停採購程序，對其他利害關係人將造成一定程度之不利益[174]。

二、我國政府採購法

政府採購法第七十五條規定，提出異議之期限，分別對招標文件、招標文件之釋疑、採購過程及結果提出異議，雖有不同之期限規定，但均符合政府採購協定期限不得少於十日之規定，以保障廠商之異議權；另對於申訴期限之規定為，廠商得於收受異議處理結果或期限屆滿之次日起十五日內提起申訴，為免採購程序懸而未決，對於未於期限內提出申訴者，應為申訴不受理之決定。亦符合政府採購協定不得少於十日之規定。

第四項　審理機關

一、政府採購協定

對於內國之救濟程序，政府採購協定第二十條第六項及修正第十八條第四項、第五項規定，申訴案件應由公正客觀與購案無關之獨立機構審理，若非屬法院審查者，應受司法機關監督；而對於締約國間國際救濟途徑，則成立爭端解決小組，審議並決定採購案件之爭議事件。

二、我國政府採購法

廠商認為招標機關辦理採購違反法令，致損害其權利或利益者，得以書面向招標機關提出異議，故受理異議之機關為招標機關；另招標機關對於異議處理之結果不服，或逾期未為處理，得以書面向有管轄權之採購申訴審議委員會提出申訴，並副知招標機關，故我國申訴制度係採「異議前置主義」。有關我國政府採購法申訴審議程序之規定，似有意朝政府採購協定第二十條第六項所定申訴審理者之形式設計，亦即由非屬法院之

[174] 羅昌發，國際貿易法：世界貿易組織下之法律新秩序，元照出版有限公司，2002 年 2 月，初版 4 刷，頁 816。

審查單位負責審理，但其審理結果仍應受司法審查[175]。

第五項　審理程序

一、政府採購協定

政府採購協定對於締約國內國之採購申訴救濟程序，要求採公開程序進行，得賦予參與程序者陳述意見之機會、委任代理人、參與全部程序，審議機關作成審查意見或終局決定應以書面為之，並得提出證人[176]。

二、我國政府採購法

招標機關對於廠商之異議申請，應於收受異議之日起十五日內，進行程序審查及實質審理，並將處理結果以書面通知提出異議之廠商，政府採購法第七十五條定有明文，對於異議不符法定程式，如未以書面異議、異議之書面未載明相關事項、或異議之廠商在我國無營業所等，其情形可補正者，應定期間命廠商補正，逾期不補正者，應不予受理，並以書面通知異議之廠商[177]，機關處理異議，得通知廠商到場陳述意見。對於廠商向採購申訴審議委員會提出申訴，亦應進行程序審查及實質審理，若申訴案件不符合程式者，除限期補正外，申訴審議委員應為不受理之決議[178]，若無不受理之情形，則由申訴審議委員會組成預審會議，進行實質審查[179]。申訴會得依職權或申請，通知廠商到場陳述意見[180]，如申訴廠商未到場，申訴自得僅就書面審議，並委託專業鑑定及通知相關人士或請機關、廠商提供相關文件、資料[181]。相較政府採購協定採公開審理及公開進行程序，我國採購申訴審議委員會得以書面進行審議，得不進行言詞辯論[182]，且未有參與程序之規定，另亦未有得申請證人之規制，均與政府採購協定之規範要求不一致。

第六項　審理決定

一、政府採購協定

依據政府採購協定規定，申訴程序得採取快速臨時措施，該措施得令採購案暫停進行，若申訴有理由，採購機關應變更採購決定或另為適法之處置，對於違反本協定所遭

[175] 林鴻銘，政府採購法草案的廠商救濟途徑檢討，月旦法學，第 31 期，1997 年 12 月，頁 68。
[176] 政府採購協定第二十條第六項參照。
[177] 政府採購法施行細則第一 0 五條參照。
[178] 政府採購法七十九條及採購申訴審議規則第十一條參照。
[179] 採購申訴審議規則第十三、十四條參照。
[180] 採購申訴審議規則第十五條參照。
[181] 政府採購法八十條參照。
[182] 黃立，政府作為消費者，政大法學評論—台灣與德國採購法制之比較，政大法學評論第 92 期，2006 年 8 月，頁 290。

受之損失，申訴廠商並得請求損害賠償，惟賠償費用限於準備投標或申訴之成本。

二、我國政府採購法

招標機關處理廠商之異議，如認為異議有理由，得自行撤銷或變更原處理結果或暫停採購程序之進行[183]，招標機關處理異議為不受理之決定時，仍得評估其事由，自行撤銷或變更原處理結果或暫停採購程序之進行[184]，故若難以明確認定廠商之異議是否有理由，亦得暫停採購程序之進行[185]。對於廠商向採購申訴審議委員會提出申訴，若認為廠商提出之申訴有理由，招標機關亦應自行撤銷或變更原處理結果或暫停採購程序之進行[186]，申訴會指明招標機關原採購行為有違反法令之處，考量公共利益、相關廠商利益及其他有關情況，並得建議招標機關處置方式，或招標機關得不依該建議而另為適法之處置[187]，但仍償付廠商準備投標、異議及申訴所支出之必要費用[188]。

第七項　司法審查

一、政府採購協定

對於申訴案件應由公正客觀之獨立機構審理，非屬法院審查者應受司法監督，故司法最終仍須監督申訴案件之審議結果，以維護救濟制度超然與公正性。

二、我國政府採購法

採購申訴審議委員會對於申訴案件審議判斷之效力，視同訴願決定，有拘束招標機關之效力，如申訴廠商對申訴會作成之審議判斷不服，得於審議判斷書送達之次日起二個月內，向高等行政法院提起行政訴訟[189]。故我國政府採購法對於申訴審議之決定，應受司法審查，與政府採購協定規定之要求相符。

有關政府採購協定與我國政府採購法救濟制度之比較，整理如後附表二。

[183] 政府採購法八十四條參照。
[184] 政府採購法施行細則第一０五條之一參照
[185] 蘇明通，政府採購法草案之廠商異議及申訴制度，中信通訊，第 206 期，1997 年 4 月，頁 18-19。
[186] 政府採購法八十四條參照。
[187] 政府採購法第八十二條第一項、第八十五條第一項及採購申訴審議規則第二十一條規定。
[188] 政府採購法八十五條及其施行細則第一０六條參照。
[189] 採購申訴審議規則第二十二條參照。

政府採購協定與我國政府採購法救濟制度之比較表		
救濟機制 救濟制度	GPA	我國政府採購法
諮商	締約方應鼓勵廠商與採購機關以諮商方式解決採購爭議	並無相關諮商規定
申訴前置程序	磋商並非申訴之前置程序，二者得同時進行	異議為申訴前置程序
提出主體	利害關係廠商（interested supplier）	主張採購權利或利益受有損害之廠商，始有提起採購救濟之權
提出期限	利害關係之廠商於知悉或可得而知聲明不服之期間內，提起申訴，其期限不得少於十日	廠商得於收受異議處理結果或期限屆滿之次日起十五日內提起申訴
審理機關	應由法院或與購案結果毫無關係之公正且獨立之單位審理	受理異議之機關為招標機關，對於異議處理之結果不服，向有管轄權之採購申訴審議委員會提出申訴
審理程序	採公開程序進行，得賦予參與程序者陳述意見之機會、委任代理人、參與全部程序，審議機關作成審查意見或終局決定應以書面為之，並得提出證人	通知廠商到場陳述意見，申訴僅就書面審議，並委託專業鑑定及通知相關人士或請機關、廠商提供相關文件、資料
審理決定	採取快速臨時措施並得令採購案暫停進行	亦得暫停採購程序之進行
司法審查	由公正客觀第三方審理，非屬法院審查者，應受司法監督	對於申訴案件審議判斷視同訴願決定，不服得向高等行政法院提起行政訴訟

表二：GPA 與我國政府採購法救濟制度之比較（資料來源：自行繪製整理）

第二節　政府採購救濟原則之比較

第一項　不歧視原則（Non-Discrimination）

一、政府採購協定

政府採購協定前言對於國外之產品或服務，不得以保護國內產品或服務或國內供應商之目的，加以制定、採用或採行，亦不得對國外產品或服務或國外供應商彼此間有所歧視；另於第二十條第二項申訴程序，亦再次重申締約國應提供無歧視之程序，使供應商得以對違反本協定之採購案提出申訴，即申訴程序中，提出申訴之廠商，締約國間不得因國別不同而有所歧視，必須予以一視同仁之對待[190]。

二、我國政府採購法

第一條之立法理由即開宗明義揭示，為建立政府採購制度，依公平、公開之採購程序，提升採購效率與功能，確保採購品質，爰制定本法。第六條亦規定機關辦理採購，應以維護公共利益及公平合理為原則，對廠商不得為無正當理由之差別待遇。於第六章爭議處理，規定有關招標、審標及決標之爭議，得依法提出異議及申訴，因此，維護廠商之投標權利及依法處理廠商之採購爭議案件，亦為不歧視原則之展現。

第二項　適時性原則（Timely）

一、政府採購協定

政府採購協定第二十條第七項（a）及修正第十八條第七項規定，快速臨時措施之採行，其目的在確保違反本協定之採購案提供申訴廠商救濟適時性，並確保商機，申訴受理機關得令採購案暫時停止進行。另為保全商機或其他商業利益，申訴程序在正常情況下應適時完成，尤其以小組報告採認時間較 WTO 架構下 DSU 所規範時間較短二個月，亦是採購爭端解決適時性原則之展現。

二、我國政府採購法

對於採購異議及申訴案件，招標機關均得以考量公益或相關廠商之利益，暫停採購程序，採購申訴審議規則第十七條亦規定，預審委員審議申訴案件，認有必要者，經提報申訴委員會議決議後，得通知招標機關暫停採購程序，是保障採購廠商救濟實益，採

[190]張祥暉，政府採購法修法後之問題探討-以九十一年二月修訂版本為核心，台灣本土法學雜誌第 47 期，2003 年 6 月，頁 45。

購申訴審議委員會應於收受申訴書之次日起四十日內完成審議，並將判斷以書面通知廠商及機關，必要時得延長四十日[191]，亦為政府採購協定適時性之彰顯。

第三項　透明化原則（Transparent）

一、政府採購協定

關於政府採購之法律、規章、程序與實務應予透明化，於政府採購協定前言已述及，另要求締約國應將其申訴程序以書面公開，並使申訴廠商能普遍獲得上開資訊，亦於政府採購協定第二十條第三項及新修正第十八條定有規定，另同條第六項（a）程序之參與者得陳述意見（c）程序之參與者應可參與全部程序（d）程序之公開，均為透明化原則之落實。

二、我國政府採購法

對於異議及申訴程序，爭議廠商得以書面提出異議及申訴，採購申訴審議委員會得依職權或申請，通知申訴廠商、機關到指定場所陳述意見，並得委任代理人出席，但對於採購申訴得僅就書面審議之[192]，相較政府採購協定程序公開之規定，較未達透明化原則之要求。

第四項　有效性原則（Effective）

一、政府採購協定

對於廠商提出之申訴，除應儘量採取諮商方式以解決爭議，對於解決爭端之程序，應盡所有努力，以最大之可能，加速進行，該協定第二十二條第六項及修正第二十條已定有明文，另協定二十條第七項（c）及修正第十八條第七項規定，對違反本協定情事之改正或遭受損失或損害之賠償規定，亦是確保申訴制度有效之實現。

二、我國政府採購法

欠缺諮商解決紛爭之程序，惟對於異議或申訴有理由，招標機關除得自行撤銷、變更原處分結果，亦得不予開標、不予決標或撤銷決標、終止或解除契約，並得請求必要之費用，相較政府採購協定之規定，雖欠缺諮商程序，但仍有申訴程序有效性原則之規範。

第三節　政府採購協定與各國之比較並於我國之實踐

[191] 政府採購法第七十八條第二項參照
[192] 政府採購法第八十條參照。

第一項　諮商、異議及申訴制度之比較與實踐

第一款　諮商制度

政府採購協定對於供應商投訴違反本協定情事者，締約國應鼓勵該供應商與採購機關，以「諮商」方式預先解決紛爭，於美國聯邦政府採購規則業已規定，採購機關應於契約官做成正式裁決前，盡其最大努力解決紛爭，如提出解決替代方案(Alternative)，或透過中立客觀第三者，以解決採購紛爭；但此種諮商制度於大陸及我國政府採購救濟制度異議或申訴前，並無事先協調、協商方式解決採購紛爭之制度規範。

第二款　無異議前置制度

政府採購協定並無異議前置程序之規定，廠商與採購機關之諮商與申訴得同時提起同時進行，此種「異議前置程序」於美國聯邦採購規則及歐盟政府採購指令規範亦均無相類似規定，即採購利害關係人均得同時向採購機關或其他受理申訴機關提出異議及申訴；但大陸政府採購法規定質疑為投訴之前置程序，與我國政府採購救濟制度「異議前置程序」有相類似規定。

第三款　提出主體

政府採購協定對於採購案違反協定而影響其權益者，亦即與採購案有利害關係之供應商，均得提起申訴，此種投訴主體廣泛，並進而達到擴大政府採購救濟制度之功能，於美國聯邦採購規則及歐盟政府採購指令規範中，均有相同規定，政府採購協定於此得以具體實踐；但大陸及我國政府採購申訴主體限於主張或實際採購權益受到損害之廠商，始得提出救濟，其申訴主體適用範圍較為狹窄與限縮。

第四款　審理程序

政府採購協定對於廠商提出之申訴審理程序，要求採公開程序進行，並賦予參與程序者陳述意見之機會，於美國聯邦採購規則及歐盟政府採購指令規範中，均有程序公開進行並得陳述意見之機會；但我國政府採購法雖有通知廠商到場陳述意見之規定，但未有參與程序，及採書面審議，並非依政府採購協定所要求公開程序進行審理。

第二項　審議決定之比較與實踐

第一款　審理決定

政府採購協定第二十條及修正第十八條規定，對於違反本協定所遭受之損害，申訴廠商得要求損害賠償，惟以準備投標及申訴成本為限，另採購機關對於廠商之申訴，得

令採購案暫停進行，以採取快速臨時措施並保全商機，但應將公共利益納入考量。於此對於美國聯邦採購規則、歐盟政府採購指令、大陸及我國政府採購法，均有損害賠償及暫停採購案進行之規範，美國及歐盟對於得請求損害賠償之內容及範圍，與政府採購協定規定不一致，另大陸暫停採購程序之時間最長不得超過三十日。而我國政府採購法亦有得暫停採購程序及償付廠商準備投標、異議及申訴支出必要費用之規定。

第二款　審議決定之司法審查

政府採購協定規定申訴之審理機關應由法院審理，若非由法院審理亦應由與政府採購結果無利害關係且公正、客觀之獨立機構審理，且審理結果應受司法審查，於此美國聯邦採購規則、歐盟政府採購指令、大陸及我國政府採購法均符合政府採購協定所要求之規定。

有關政府採購協定爭端解決機制於各國政府採購救濟制度之實踐並比較我國政府採購救濟制度，經整理如後附表三。

政府採購協定救濟制度於各國政府採購爭端解決機制之實踐並比較我國政府採購救濟制度表

各國機制 / 救濟制度	GPA	美國聯邦採購規則	歐盟政府採購指令	大陸政府採購法	我國政府採購法
諮商	應鼓勵廠商與採購機關以諮商方式解決採購爭議	提出解決替代方案，或透過中立客觀第三者，以解決採購紛爭	以諮商方式解決紛爭	無諮商規定	無諮商規定
異議前置	無異議前置程序，二者得同時提起	亦無異議前置程序	可直接提出申訴，亦得同時提起救濟	質疑為投訴之前置程序	異議為申訴之前置程序
提出之主體	與採購案有利害關係之供應商均可提出申訴	利害關係人，或其他具經濟上利害關係之人	自認其本身權利遭受損害之利害關係人	權益受到損害時，始可先經質疑後投訴	主張採購權益受損害之廠商，始可提起
審理程序	採公開程序進行，並賦予參與程序者陳述意見之機會	程序公開進行並得陳述意見之機會	程序公開進行並得陳述意見之機會	以書面審查	未有參與程序，並採書面審議
審理決定	採取快速臨時措施並得令採購案暫停進行	暫停政府採購程序之進行，	得採取臨時措施中止或暫停採購程序之進行	暫停採購活動，但暫停時間最長不得超過三十日	得暫停採購程序及償付廠商投標費用
司法審查	由公正客觀第三方審理，非屬法院審查者，應受司法監督	向聯邦補償法院提起訴訟	將採購案件送交歐洲法院	可依法申請行政復議或者向人民法院提起行政訴訟	審議判斷視同訴願決定得提起行政法院救濟

表三：GPA 救濟制度於各國之實踐並比較我國救濟制度（資料來源：自行繪製整理）

第四節　政府採購協定與我國政府採購法救濟制度之研析

第一項　　採購法救濟程序與GPA規範一致者

第一款　設有申訴審議機制

GPA第二十條及修正第十八條以下規定締約國應提供無歧視、適時、透明化且有效之程序，使供應商得以對涉及彼等權益且有違本協定情事之購案提出申訴應設有申訴審議機制；此規範於我國政府採購法第六章第七十四條以下，已規定廠商與機關間關於招標、審標、決標之爭議，得依本章規定提出異議及申訴。

第二款　申訴程序已書面列明

GPA第二十條第三項及修正第十八條第一項規定，締約國應以書面列明其申訴程序並使其得以普遍取得。於此於我國政府採購法第七十五業已規定，廠商對於機關辦理採購，認為違反法令或我國所締結之條約、協定（以下合稱法令），致損害其權利或利益者，得於下列期限內，以書面向招標機關提出異議。

第三款　陳述其意見並委任代表人參與

GPA第二十條第六項及修正第十八條第六項規定，做成意見或決定前，程序之參與者得陳述其意見，程序之參與者得派遣代表或有人陪同。於此我國政府採購法第七十七第二項規定，申訴得委任代理人為之，代理人應檢附委任書並載明其姓名、性別、出生年月日、職業、電話、住所或居所，第八十第二項規定採購申訴審議委員會得依職權或申請，通知申訴廠商、機關到指定場所陳述意見。

第四款　設置採購申訴審議機構

GPA第二十條第六項及修正第十八條第四項規定，申訴案件應由法院或與購案結果毫無關係之公正且獨立之審查單位審理，該審查單位成員於指派期間內應不受外界之影響。於此我國政府採購法第七十六條規定，廠商對於公告金額以上採購異議之處理結果不服，或招標機關逾前條第二項所定期限不為處理者，得於收受異議處理結果或期限屆滿之次日起十五日內，依其屬中央機關或地方機關辦理之採購，以書面分別向主管機關、直轄市或縣（市）政府所設之採購申訴審議委員會申訴。地方政府未設採購申訴審議委員會者，得委請中央主管機關處理。

第五款　異議或申訴有理由得暫停採購程序

GPA 第二十條第七項及修正第十八條第七項規定，申訴程序應允許快速臨時措施，俾改正違反本協定情事及保全商機，該措施得令購案暫停進行。我國政府採購法第八十四條規定，廠商提出異議或申訴者，招標機關評估其事由，認其異議或申訴有理由者，應自行撤銷、變更原處理結果，或暫停採購程序之進行。

第六款　申訴審議結果應受司法審查

GPA 第二十條第六項及修正第十八條第五項規定，申訴案件非屬法院之審查者，應受司法審查。我國政府採購法第八十三條規定，採購申訴審議委員會之審議判斷，視同訴願決定，申訴廠商對於審議判斷不服，得循行政訴訟救濟途徑，提起行政訴訟並於行政法院審理。

第二項　採購法救濟程序與 GPA 規範不一致者

第一款　欠缺制度化之諮商程序

依 GPA 第二十條第一項及修正第十八條第二項規定，若一供應商投訴購案有違反本協定情事時，締約國應鼓勵該供應商與採購機關諮商以解決爭議。惟依政府採購法第六章爭議處理章，對於提出異議及申訴之前，並無訂定爭議廠商與招標機關之諮商制度，且第八十五條之一規定，機關與廠商因履約爭議未能達成「協議」，得提出調解或仲裁，如何協議並無規定，故欠缺制度化的諮商程序。

第二款　無「非違反協定之控訴」之救濟程序

GPA 第二十二條第二項及新修正第二十條第二項訂有明文，不論是否違反政府採購協定，得提起「非違反協定之控訴」。但依政府採購法第七十五條規定，廠商對於機關辦理採購，認為違反法令或我國締結之條約、協定，致損害其權利或利益者，得於期限內，以書面提出異議，故我國政府採購法限於招標機關違反法令或條約、協定，始得提出救濟。

第三款　無異議前置程序

GPA 規定，廠商或締約國之控訴，並無須先經「異議」程序，對於招標機關之處置違反其權益之結果不服，均得提起申訴。我國政府採購法規定，機關辦理採購如有違反法令，致損害廠商之權利或利益者，政府採購法設計之救濟程序採「異議前置制度」，即廠商須先向招標機關提出異議，如對招標機關處理異議結果不服，或招標機關逾越法定期限不為處理者，始得向採購申訴審議委員會申訴。

第四款　申訴主體範圍較窄

GPA 規定，對於違反協定而影響採購權益，即與採購案有關之利害關係人，均得提起申訴，範圍較為廣泛。而我國政府採購法則規定違反法令、條約或協定，致損害其權利或利益者，始得於期限內以書面提出申訴，範圍較為限縮。

第五款　未採公開審理程序

GPA 第二十條第六項及修正第十八條第五、六項規定，申訴程序應由法院公開審理，若非由法院公開審理，應由公正、客觀第三者審理，並須有參與程序、指派代理人、陳述意見、提出證人等公開程序之進行。而我國政府採購法第八十條規定，雖有陳述意見及囑託鑑定之規定，惟其採購申訴得僅就書面審議之，未採公開審理程序。

第六款　「暫停採購程序」規範不明確

依據 GPA 第二十條第七項及修正第十八條第七項規定，採行措施令購案暫停進行，應考量公共利益之不利後果，並應書面說明不採行暫停購案措施之正當理由。依政府採購法第八十四條之規定，招標機關如認廠商之異議為有理由，且無特殊情形者，應撤銷、變更原處理結果，或暫停採購程序之進行，以改正或取消招標機關違法之採購行為，並避免造成政府損失之擴大，並保全採購廠商之商機，惟是否應一律暫停採購程序，則有未明之處。

第七款　申訴無實益

審議判斷主文對於申訴有理由其記載方式多樣，包括：「申訴有理由」、「招標機關之事項，違反政府採購法規定」、「申訴有理由，招標機關應另為適法之處分」、「原異議處理結果撤銷，由招標機關另為適法之處置」、「有關…事項，申訴有理由，其餘申訴無理由」[193]，除撤銷原異議處理結果外，若招標機關不依採購申訴審議委員會建議辦理者，依據政府採購法第八十五條第二項規定，招標機關僅得報請上級機關核定，上級機關再以書面向採購申訴審議委員會及廠商說明理由，採購申訴審議委員會之判斷結果，對於招標機關而言，若不遵守該審議判斷，上級機關僅得以書面向採購申訴審議委員會說明理由，因此，救濟制度欠缺政府採購協定規範之有效性及拘束性。

[193] 參見行政院公共工程委員會，政府採購法申訴案例彙編（一），2000 年。

第六章　結論與建議

政府採購協定序言宗旨在於為建立政府採購制度，依公平、公開之採購程序，提升採購效率與功能，確保採購品質，著重政府採購公平、公正之公共利益，與民事法律著重雙方私人利益之平衡規範目的不同，尤其涉及爭端解決機制之建立與調和，更有確保政府採購規範公平、迅速且有效之執行為之目的，為達成政府採購效能、提升採購品質及國際經貿實力加強之重點核心之所在，我國政府採購法於制定之初，為便於日後與國際接軌，並為成為政府採購協定之簽署國預作準備，參酌政府採購協定之規定訂定政府採購法，雖經立法院通過，總統公布，卻仍然與政府採購協定之規定有所差異，本文從政府採購協定適用主體、適用客體及其爭端解決機制著手，論述 WTO 架構下 GPA 爭端解決機制，論及我國政府採購協定之救濟制度，另從美國聯邦政府採購規則、歐盟採購指令及大陸政府採購法救濟制度，論述政府採購協定於各國之實踐，再與 WTO 架構下 GPA 爭端解決機制及我國政府採購救濟制度做出比較，從中尋求兩者一致性及不一致性之適用關係，尤其政府採購協定之國際經貿規範，更具有經貿主權意味，一旦發生爭議，不論是締約國或非締約國，各廠商或我國採購機關，對其相關權益影響均極為重大，不可不慎，謹建議如下：

一、以諮商方式解決政府採購紛爭

我國政府採購法並無以諮商方式解決政府採購爭議，應可參酌政府採購協定之規定，建立異議及申訴前之協商制度，經由事先爭議廠商與採購機關之協商，有助爭端事先解決，並避免爭訟資源浪費，俾與政府採購協定（GPA）規範一致，使協商制度更為公開透明，以機先解決爭議。

二、增加異議或申訴之原因與事由

目前我政府採購法僅規範，招標機關違反法令、條約或協定，致廠商權利或利益遭受損害，始得提出異議及申訴，建議增加向招標機關提出異議或申訴之原因與事由，擴及未違反法令或條約、協定，廠商政府採購權益直接或間接遭受損害，即得提起救濟，符合政府採購協定「未違反協定之控訴」法定要件，即得向招標機關提出救濟，擴大行政自我預先審查功能與範圍，期事先紛爭解決，並與政府採購協定第二十二條第二項及修正第二十條第二項之規範接軌。

三、廢除異議前置失權效規定

政府採購協定並無諮商、異議及申訴前置程序之規定，得先後或同時提起救濟，建議廢除異議前置失權效規定，蓋採行異議程序之目的，本是為了提供招標機關自我檢討的機會，但廠商向招標機關提出異議，鮮少有機關認為異議有理由，並自行撤銷或變更原處理結果，若先前未異議即失去提出申訴之權利，恐無法保障採購廠商救濟權利，且若異議及申訴不停止採購程序之進行，將造成招標程序終結，並進入得標及履約階段，此際已無申訴之實益，故建議廢除異議前置失權效規定，賦予異議或申訴得分別提起或同時提起，以加速程序進行並保障採購廠商應有之權益，並能符合政府採購協定之規範要求。

四、放寬異議及申訴主體資格

我國政府採購法異議及申訴之主體，限於招標機關違反法令致損害其權利或利益者，始得提出異議及申訴，建議放寬異議及申訴主體之適用範圍，蓋政府採購異議或申訴提出之初，對於是否真正採購權益受損恐無法提出明確證明，基於採購商機之時效性要求，及擴大解決採購紛爭，故應參酌政府採購協定之規定，以招標機關對採購之決定，影響廠商採購權益之相關利害關係人，即得具有提出申訴之主體資格，並能符合政府採購協定之規範要求。

五、採公開審議程序

我國政府採購法對於採購爭議之異議及申訴，係採取書面審議之方式進行，不符合政府採購協定應將審議程序公開之要求，建議採購申訴審議應採公開進行程序，以維護政府採購審議公平、公開審理，並保障申訴廠商之採購權益，避免造成書面審議失去公平判斷之可能，故應參酌政府採購協定之規定，若非由法院審理而由中立第三者審理，應採公開審議進行程序。

六、明確規範暫停採購程序事由

我國政府採購法雖有招標機關認為廠商之異議或申訴有理由得自行撤銷或變更原處理結果，或暫停採購程序之進行，但對於是否暫停採購程序之進行，規範並不明確，建議應明確規範得「暫停採購程序」之事由，並考量採購案件之時效性，避免事後因無法改正而影響異議人之權益，雖然為應緊急情況或公共利益之必要，或其事由無影響採購之虞者，毋須停止購案進行，但為防止招標機關擴大解釋並濫用，應以書面說明不採行暫停購案程序之理由。

七、改正採購爭議審議委員會審議判斷

對於申訴有理由者，建議參酌訴願法第八十一條之規定，申訴審議委員應以決定撤銷原採購行為之全部或一部，並得視事件之情節，逕為變更之決定或發回原招標機關另為處分，避免產生上級機關訴願決定拘束力不足情事，以符合政府採購協定救濟有效性之要求。

茲將研提建議意見，提出我國政府採購法修正條文及現行條文相關修法建議，並表列如後附表四。

政府採購法建議修正條文與現行條文修正對照表		
修正條文	現行條文	修正理由
第七十四條 廠商與機關間關於招標、審標、決標之爭議，得先經協商解決，另得依本章規定提出異議及申訴。	第七十四條 廠商與機關間關於招標、審標、決標之爭議，得依本章規定提出異議及申訴。	一、增列「得先經協商解決」文字。 二、參酌政府採購協定第二十條及修正版第十八條之規定，建立異議及申訴前之協商制度，經由事先爭議廠商與採購機關之協商，有助爭端事先解決，並避免爭訟資源浪費。
第七十五條 廠商對於機關辦理採購，認為損害其權利或利益者，得於下列期限內，以書面向招標機關提出異議。	第七十五條 廠商對於機關辦理採購，認為違反法令或我國所締結之條約、協定（以下合稱法令），致損害其權利或利益者，得於下列期限內，以書面向招標機關提出異議。	一、刪除「違反法令或我國所締結之條約、協定（以下合稱法令）」文字。 二、增加向招標機關提出異議或申訴之原因與事由，擴及未違反法令或條約、協定，廠商政府採購權益直接或間接遭受損害，即得提起救濟，符合政府採購協定「未違反協定之控訴」法定要

		件，即得向招標機關提出救濟，擴大行政自我預先審查功能與範圍，期事先紛爭解決，並與政府採購協定（GPA）第二十二條第二項及修正第二十條第二項之規範接軌。
第七十六條 廠商對於公告金額以上採購，依其屬中央機關或地方機關辦理之採購，以書面分別向主管機關、直轄市或縣（市）政府所設之採購申訴審議委員會申訴。	第七十六條 廠商對於公告金額以上採購異議之處理結果不服，或招標機關逾前條第二項所定期限不為處理者，得於收受異議處理結果或期限屆滿之次日起十五日內，依其屬中央機關或地方機關辦理之採購，以書面分別向主管機關、直轄市或縣（市）政府所設之採購申訴審議委員會申訴。	一、原條文刪除「異議之處理結果不服，或招標機關逾前條第二項所定期限不為處理者，得於收受異議處理結果或期限屆滿之次日起十五日內」文字。 二、廢除異議前置失權效規定，賦予異議或申訴得分別提起或同時提起，以加速程序進行並保障採購廠商應有之權益，並能符合政府採購協定之規範要求。

第八十條 採購申訴採公開審議程序，但機密採購得僅就書面審議之。	第八十條 採購申訴得僅就書面審議之。	一、修正條文增列「採公開審議程序，但機密採購」文字。 二、原條文採購申訴得僅就書面審議之規定，應屬例外規定，參酌政府採購協定第二十條第六項及修正第十八條第五、六項規定，申訴程序原則應依公開程序進行，以維護政府採購審議公平、公開審理，並保障申訴廠商之採購權益，機密採購之申訴始得僅就書面審議，以符實際。
第八十四條 廠商提出異議或申訴者，招標機關評估其事由，認其異議或申訴有理由者，應自行撤銷、變更原處理結果。為改正招標機關之違法行為，得暫停採購程序之進行，但為應緊急情況或公共利益之必要，或其事由無影響採購	第八十四條 廠商提出異議或申訴者，招標機關評估其事由，認其異議或申訴有理由者，應自行撤銷、變更原處理結果，或暫停採購程序之進行。但為應緊急情況或公共利益之必要，或其事由無影響採購之虞者，不在此限。	一、增訂「為改正招標機關之違法行為」。 二、增訂第二項「不暫停採購程序應以書面說明理由」文字。 三、明確規範得「暫停採購程序」之事由，以改正或取消招標機關違法之採購行為，並避免造成政府損失之

之虞者，不在此限。 不暫停採購程序應以書面說明理由。		擴大，保全採購廠商之商機。對於毋須停止購案進行，為防止招標機關擴大解釋並濫用，應以書面說明不採行暫停採購案程序之理由。
第八十五條 申訴有理由者，申訴審議委員應以決定撤銷原採購行為之全部或一部，並得視事件之情節，逕為變更之決定或發回原招標機關另為處分。 審議判斷指明原採購行為違反法令者，招標機關應另為適法之處置。採購申訴審議委員會於審議判斷中建議招標機關處置方式，而招標機關不依建議辦理者，應於收受判斷之次日起十五日內報請上級機關核定，並由上級機關於收受之次日起十五日內，以書面向採購申訴審議委員會及廠商說明理由。	第八十五條 審議判斷指明原採購行為違反法令者，招標機關應另為適法之處置。採購申訴審議委員會於審議判斷中建議招標機關處置方式，而招標機關不依建議辦理者，應於收受判斷之次日起十五日內報請上級機關核定，並由上級機關於收受之次日起十五日內，以書面向採購申訴審議委員會及廠商說明理由。	一、修正條文增訂「申訴有理由者，申訴審議委員應以決定撤銷原採購行為之全部或一部，並得視事件之情節，逕為變更之決定或發回原招標機關另為處分。」文字。 二、採購申訴審議委員會之判斷結果，招標機關若不遵守該審議判斷，上級機關僅得以書面向採購申訴審議委員會說明理由，與政府採購協定（GPA）規範之有效性及拘束性原則有違，參酌訴願法第八十一條規定，申訴有理由者，申訴審議委員應以決

		定撤銷原採購行為之全部或一部，並得視事件之情節，逕為變更之決定或發回原招標機關另為處分。

表四：政府採購法建議修正條文與現行條文修正對照表（資料來源：自行繪製整理）

我國既已成為政府採購協定簽署國，除應善盡促進國際經貿自由化之責，強化國際經貿競爭力外，更有透過瞭解我國現行法律規範與政府採購協定差異，修訂及整合國內政府採購法之必要，尋求我國法律體系下實施政府採購協定的最佳途徑，體現政府採購協定救濟制度之重要地位，實現權利保障之具體功能，掌握其政府採購協定核心精神，並融入我國政府採購制度，以促進政府採購協定價值目標之實現。

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附錄一：現行 WTO 政府採購協定（GPA）（中譯文）

前　言

本協定當事國（以下簡稱「締約國」）。

咸認關於政府採購之法律、規章、程序及實務方面，須有一有效之多邊權利與義務架構，俾促成世界貿易更高度之自由與擴展，並改善世界貿易行為之國際架構：

咸認關於政府採購之法律、規章、程序及實務，對於國外或國內之產品、服務及國外或國內之供應商間，不得以保護國內產品或服務或國內供應商之目的，加以制定、採用或採行，亦不得對國外產品或服務或國外供應商彼此間有所歧視：

咸認關於政府採購之法律、規章、程序與實務應予透明化；

咸認對通知、協商、監視及爭端解決有必要建立國際程序，俾能確保有關政府採購規範之公平、迅速且有效之執行，並儘量維持權利與義務之平衡；

咸認對開發中國家，尤其是低度開發國家之發展、財政及貿易需求須予考慮：

咸欲依照一九八七年二月二日所修正之一九七九年四月十二日之政府採購協定第九條第六項第二款之規定，在互惠之基礎上擴展並改進該協定，以及擴大該協定之範圍，以將服務合約包括在內；

咸欲鼓勵非本協定當事國之政府能接受並加入本協定；

業已依照此等目的而進行進一步之談判；

茲協議如下：

第一條：適用範圍

一、本協定適用於有關本協定附錄一[註1]所列機關之任何採購之任何法律、規章、程序或實務。

二、本協定適用於任何以契約方式進行之採購，包括購買或租賃或租購，而不論有無附帶購買選擇權，且包括兼含產品與服務於一採購之情形。

三、就適用本協定之採購，若有機關要求未列於附錄一之企業依照特別要求決標時，該等要求準用本協定第三條之規定。

四、本協定適用於不低於附錄一所標示之相關門檻金額之任何採購合約。

第二條：合約價值之估算

一、基於執行本協定之目的，合約價值之計算[註2]以下列規定為準。

二、估算合約價格時應將各種形式之報酬，包括任何溢價、費用、佣金及應收利息列入考量。

三、各機關對估算合約價值方法之選用及任何將採購需求分割之方法，不得出於意圖規避本協定之適用。

四、若單一採購需求卻以數個合約決標，或就單一需求之個別部分以數個合約決標，其估算合約價值之基礎如下：

（ａ）前一會計年度或前十二個月內所簽同類循環合約之實際金額，但儘可能按其後十二個月內預期之數量與金額之變更予以調整；或

（ｂ）首次合約之後之會計年度或首次合約後之十二個月內所有循環性合約之估算金額。

五、就租賃或租購產品或服務之合約，或就未列明總價之合約，其估算基礎應為：

（ａ）若為定期合約，且其有效期間為十二個月或少於十二個月時，應按合約期限內之總合約金額計算；若有效期間超過十二個月時，則按總金額加估計之殘值計算；

（ｂ）若為不定期合約，則以每月分期金額乘以四十八計算。若有任何疑義時，則使用上述第（ｂ）款之計算方式。

六、若預定之採購列有選擇條款之需求時，其估算應按其所包括選購在內之最大准許採購之總值計算。

第三條：國民待遇及不歧視

一、就本協定適用範圍內關於政府採購之一切法律、規章、程序及實務，各締約國應立即且無條件對提供締約國之產品或服務之其他簽署國之產品、服務及供應商，賦予不低於下述之待遇：

（ａ）賦予國內產品、服務及供應商之待遇；及

（ｂ）賦予任何其他締約國之產品、服務及供應商之待遇。

二、就本協定適用範圍內關於政府採購之一切法律、規章、程序及實務，各簽署國應確保：

註1：對各締約國而言，附錄一分為五個附件：

－附件一載有中央政府機關。

－附件二載有中央以下次一級政府機關。

－附件三載有依本協定規定辦理採購之所有其他機關。

－附件四列舉適用本協定之服務，而不論其係以正面表列或負面表列方式為之。

－附件五列舉適用本協定之工程服務。

各締約國之附件中均標示有相關之門檻金額。

註2：本協定適用於在依第九條發布公告時，其合約金額被估算等於或高於門檻金額之任何採購合約。

（ａ）其機關不得基於外國分支關係或外國所有權之程度，而對一本地設立之供應商，賦予較低於另一本地設立之供應商之待遇；
（ｂ）其機關不得基於所供應貨物或服務之生產國，而對在本地設立之供應商予以歧視；但以該生產國依第四條規定該生產國屬本協定締約國為限。

三、除本協定適用範圍內關於政府採購之一切法律、規章、程序及實務之外，上述第一項及第二項之規定不適用於任何對進口或與進口有關所課徵之關稅或稅費、課徵上述關稅與稅費之方法，其他進口規定及手續及影響服務貿易之措施。

第四條：原產地規則

一、各締約國不得對適用本協定之政府採購所自其他締約國進口之產品或服務，採取有別於在交易當時自同一締約國進口相同產品或服務所適用於一般貿易之原產地規則。

二、在世界貿易組織設置協定(以下簡稱世貿組織協定)附件１Ａ所包含之原產地規則協定之工作計畫下，就貨品原產地規則之調和達成結論之後，及服務業貿易之談判結束後，各締約國應斟酌工作計畫及談判結果對上述第一項之規定予以修訂。

第五條：對開發中國家之特殊及差別待遇

目的

一、各締約國於實施本協定時，應依本條規定，切實考慮到開發中國家，尤其是低度開發國家對發展、財政及貿易方面之下列需求：
（ａ）保障彼等能收支平衡，並能有足以實施經濟發展計畫之相當準備金；
（ｂ）促進國內產業之建立或發展，包括發展鄉村或落後地區之小型與農舍工業，以及其他經濟部門之經濟發展；
（ｃ）扶助完全或大部分依賴政府採購之產業部門；
（ｄ）鼓勵彼等透過開發中國家間之地區性或全球性協定，發展其經濟，惟需此等措施經提交世貿組織部長會議(以下簡稱世貿組織)，而未被否決。

二、在符合本協定規定之情形下，各簽署國所制定與實施影響政府採購之法律、規章及程序，應有助於增加自開發中國家之進口，並考量低度開發國家及經濟發展仍處於甚低階段之國家之特殊問題。

適用範圍

三、為確使開發中國家在符合彼等發展、財政與貿易需求之情形下，得以遵循本協定，上述第一項所列之目的，於就開發中國家適用本協定之範圍進行談判時，應切實予以考量。已開發國家於擬定適用本協定之範圍時，應設法將該等採購項目包括開發中國家有興趣出口之產品及服務在內之機關納入。

議定之除外項目

四、在本協定下之談判，開發中國家得與其他參與者針對個案特殊狀況，就列入適用清單中之某些機關、產品或服務，談判可相互接受之對國民待遇原則之例外事項。在上述談判中，第一項第(ａ)款至第(ｃ)款所列考量因素應予以切實考慮。開發中國家參加第一項第(ｄ)款所述開發中國家間之地區性或全球性協定者，亦得針對個案特殊狀況，談判其適用清單之除外事項，尤其應考量該地區性或全球性協定對政府採購之規定，特別是適用共同產業發展計畫之產品或服務。

五、本協定生效後，開發中國家之締約國得依本協定第二十四條第六項有關修訂清單之規定，針對彼等之發展、財政及貿易需求，修改其適用清單，或針對個案特殊狀況，並考量第一項第(ａ)款至第(ｃ)款之規定，對其適用清單中所列某些機關、產品或服務所應遵循之國民待遇原則，要求政府採購委員會(以下簡稱委員會)給予例外。開發中國家之締約國於本協定生效後，亦得針對個案特殊狀況，並考量第一項第(ｄ)款之規定，依照其參加之開發中國家間地區性或全球性措施，就其適用清單中所列某些機關、產品或服務，要求委員會給予例外。開發中國家之締約國向委員會提出有關修改清單之請求時，應檢附有關文件或檢附審酌該項請求所需之資料。

六、上述第四項、第五項規定，準用於本協定生效後加入本協定之開發中國家。

七、上述第四項、第五項、第六項中所述之議定除外項目，應按本條第十四項之規定予以檢討。

對開發中國家締約國之技術協助

八、已開發國家締約國於受到要求時，應提供一切其認為適當之技術協助予開發中國家締約國，以解決彼等在政府採購方面之問題。

九、對開發中國家締約國之間所提供之協助應基於不歧視之基礎為之，並特別針對：
—與特定合約決標有關之特定技術問題之解決；及
—在此協助之下，由一締約國所提出，而由另一締約國所同意處理之任何其他問題。

十、上述第八項、第九項所稱之技術協助，應包括將開發中國家締約國之供應商所製作之資格文件及投標書翻譯為機關所指定之世界貿易組織之官方語文。但已開發國家締約國若認為翻譯工作為沈重負擔者，不在此限，惟應就此種情形，於開發中國家締約國向已開發國家簽署國或其機關提出要求時，對其提出說明。

資訊中心

十一、已開發國家締約國應個別或共同建立資訊中心，以因應開發中國家締約國對資訊所為之合理要求，特別是關於政府採購法律、規章、程序與實務、已發佈之購案公告、本協定所涵蓋機關之地址、及已採購或將採購產品或服務之性質與數量，包括有關未來招標之可供參考資料等。委員會亦得設立一資訊中心。

對低度開發國家之特殊待遇

十二、基於一九四七年版關稅暨貿易總協定締約國於一九七九年十一月廿八日所作「對

開發中國家之差別及優惠待遇、互惠與更全面參與之決議」(BISD265/203-205)第六項之規定，在對開發中國家締約國所授與之任何普遍性或特定性優惠措施之中，應對低度開發國家簽署國及該等國家內之供應商，就產自此等國家之產品或服務，給予特殊待遇。各締約國亦得就非締約國之低度開發國家內供應商，就產自此等國家之產品或服務，給予本協定之一切優惠。

十三、已開發國家締約國於受到要求時，應對低度開發國家內有意投標者，在提出投標書及挑選已開發國家之機關及低度開發國家內之供應商均可能有興趣之產品或服務方面，給予其認為適當之協助，並協助彼等能符合與預定採購之產品或服務有關之技術規定與標準。

檢討

十四、委員會應逐年檢討本條之運作與效果，並根據締約國所提報告，每三年作一次主要檢討，以評定其效果。做為每三年檢討之一部分，並使本協定，尤其是第三條，之各項規定得以充分實施，且考量開發中國之發展、財政及貿易狀況，委員會應檢視依本條第四項至第六項規定所設之排除項目，是否應予修正或展延。

十五、在依照第二十四條第七項規定所作進一步之回合談判中，每一開發中國家締約國均應基於其經濟、財政及貿易狀況，考慮擴大其適用清單之可能性。

第六條：技術規格

一、採購機關所擬定、採用或適用之技術規格，其所標示之擬採購產品或服務之特性，諸如品質、性能、安全及大小、符號、術語、包裝、標誌及標示，或生產程序及方法及評估其符合與否之程序要求，在目的及效果上均不得造成國際貿易之不必要障礙。

二、採購機關所定之技術規格應在適宜之狀況下：

（ａ）依性能，而非設計或描述性之特性而定；且

（ｂ）根據國際標準；若無國際標準時，則根據國家技術規定[註3]、認可之國家標準[註4]或建築規則。

三、不得要求或提及特定之商標或商名、專利、設計或型式、特定來源地、生產者或供應者。但無法以充分精確或明白之方式說明標示要求，且已在招標文件內註明諸如「或同等品」字樣者，不在此限。

四、各機關不得以足以構成妨礙競爭之方式，尋求或接受在特定採購中有商業利益之廠商之建議，以擬定該採購之規格。

第七條：招標程序

一、各締約國應確保其機關之招標程序均以不歧視之方式實施，且符合第七條至第十六條之規定。

二、各機關不得使用足以構成妨礙競爭之方式，對任一供應商提供與特定採購有關之資料。

三、就本協定而言：

（ａ）公開招標程序係指所有有興趣之供應商均得投標之程序；

（ｂ）選擇性招標程序係指符合依第十條第三項及本協定其他規定，且經機關邀請之供應商始得投標之程序；

（ｃ）限制性招標程序係指僅在符合第十五條所定條件之情形下，機關與供應商個別洽商之程序。

第八條：供應商之資格

各機關於審查供應商之資格時，不得對其他締約國供應商之間，或在國內與其他締約國供應商之間，實施差別待遇。資格審查程序應符合下列規定：

（ａ）任何參加投標之條件，應於適當期間前，先行公告，俾使有興趣之供應商得以展開，並在不違反有效率的執行採購程序之前提下，完成資格審查程序。

（ｂ）參加投標之條件，應以為確認廠商履行合約所必需之能力為限。供應商應具備之參加投標條件，包括財務保證、技術資格及證明供應商財務、商業與技術能力所必要之資料，以及資格之確認，其適用於其他締約國供應商者，不得較適用於國內供應商之條件不利，且不得對其他締約國之供應商之間，實施差別待遇。供應商之財務、商業與技術能力，應根據該供應商之全球性商業活動以及其在採購機關所在領域之活動加以判斷，並考慮供應組織間之法律關係。

（ｃ）審查供應商資格之程序與時間，不得被用作排除其他締約國供應商於合格供應商名單之外，或就特定購案不考慮該等供應商之方法。凡符合特定購案投標條件之國內或其他締約國供應商，機關均應認其為合格供應商。申請參加特

註3：就本協定而言，所稱技術規定係指列明產品或服務之特性或其相關製程與生產方法之文件，包括適用之強制性行政規定之文件。該文件亦得包括或僅列出適用於產品、服務、製程或生產方法之專門術語、符號、包裝、標誌或標示之要求。

註4：就本協定而言，所稱標準係指經認可之單位核准，並供普遍及經常使用但不具強制性，就產品、服務或相關製程與生產方法載明其規則、準則或特性所定之文件。該文件亦得包括或僅列出適用於產品、服務、製程或生產方法之專門術語、符號、包裝、標誌或標示之要求。

定購案投標，但尚未經審查合格之供應商，如有足夠之時間完成資格審查程序，仍應被列入考慮。

（ｄ）備有常年合格供應商名單之機關，應確保供應商得隨時提出資格申請，並於合理之短時間內將合格者列入名單。

（ｅ）於第九條第一項所定之公告發布後，若有尚未合格之供應商要求參加購案之投標時，機關應立即開始資格審查程序。

（ｆ）各機關應將其決定通知各申請成為合格供應商之供應商。各機關如終止使用常年合格供應商名單，或將供應商自名單中除名，均應通知相關供應商。

（ｇ）各締約國應確保：

1. 每一機關及其組成單位均應遵從相同之資格審查程序，但經證實確有採行不同程序之需要者不在此限；且

2. 不同機關間資格審查程序之差異性，應力求減至最低程度。

（ｈ）上述第（ａ）款至第（ｇ）款之各項規定並不禁止各機關採取措施，將任何有破產或作假情事之供應商，予以排除，但以符合本協定之國民待遇及不歧視規定者為限。

第九條：參與預定購案之邀標

一、除第十五條(限制性招標)另有規定外，機關應依第二項、第三項規定，就所有預定購案，於本協定附錄二所列之適當刊物上、公告邀標。

二、邀標得以如第六項所述購案之通告方式為之。

三、附件二、三所載各機關得使用第七項所定之計畫購案通告，或以第九項所定之資格制度通告，做為邀標公告。

四、以計畫購案通告做為邀標公告之機關，隨後應邀請所有曾表示興趣之供應商，根據至少包括第六項在內之資料，確認其興趣。

五、以資格制度通告做為邀標公告之機關，應依第十八條第四項所載之考慮因素，適時提供資料，俾使所有曾表示興趣者有合適機會自行評估其參與採購之興趣。此等資料應包括第六項及第八項所定通告中所載之資料，但以有該等資料者為限。提供予一有興趣供應商之資料，應以不歧視之方式提供予其他有興趣之供應商。

六、本條第二項所述購案之通知，應載明下列資料：

（ａ）採購之性質與數量，包括進一步採購之任何選擇權，可能時，並含辦理該選擇權之預估時間；若為循環性採購合約時，則為採購之性質與數量，可能時，並含後續採購產品或服務之預估招標公告時間；

（ｂ）採購程序究係公開或選擇性或涉及協商；

（ｃ）物品或服務之開始交付或完成交付之日期；

（ｄ）提交要求參與投標之申請書或列入合格供應商名單或收受投標書之地址及期限，以及應使用之一種或多種語文；

（ｅ）辦理決標或提供規格資料及其他文件之機關之地址；

（ｆ）供應商應具備之經濟及技術條件、財務保證及資料；

（ｇ）招標文件之售價及付款條件；

（ｈ）機關邀標究係買賣、租賃或租購之方式，或具有二種以上之方式。

七、本條第三項所述之計畫採購通知，應儘量載明第六項規定之資料。在任何情形下並應包括第八項所定資料，以及：

（ａ）聲明各有興趣之供應商應向機關表明其對購案之興趣；

（ｂ）向機關索取進一步資料時之連絡點。

八、就每一預定購案，各機關均應以世界貿易組織官方語文之一發布至少包括下列資料之摘要公告：

（ａ）合約標的；

（ｂ）提交投標書或提交要求參與投標之申請書之期限；及

（ｃ）申領與合約有關之文件之地址。

九、如採用選擇性招標程序，備有常年合格供應商名單之機關，應逐年於本協定附錄三所列刊物之一，公告下列事項：

（ａ）列出各種名單擬採購之產品或服務之具體項目或其類別，包括其標題。

（ｂ）供應商欲列入該等名單所應符合之條件，以及各機關查証各項條件之方法；及

（ｃ）名單之有效期限及展期之手續。

上述公告如作為本條第三項所規定之邀標公告之用，該公告

應另載明下列資料：

（ｄ）有關產品或服務之性質。

（ｅ）該公告即為構成參與邀標之聲明。

但若此一資格制度之有效期間為三年以下，且該有效期間定於該公告中，同時明定不再另外公告時，僅於該制度開始施行時公告一次即可，此一資格制度不得以規避本協定規定之方式使用之。

十、任一購案自發布邀標後，以迄該公告或招標文件所定開標或接受投標書期限前，如必須修訂或重新發布公告時，應比照原文件公告通路發布修訂案或重新發布。就特定預定購案給予某一供應商之重要資料，應於適當時間內，同時發給所有其他有關之供應商，俾彼等研究該項資料以便因應。

十一、各機關在本條所定之公告中或刊登公告之刊物中，應明示該購案係適用本協定所涵蓋之購案。

第十條：選擇程序

一、為於選擇性招標程序中確保最有效之國際競爭，各機關應就各預定購案，在符合有效執行採購制度之前提下，邀請最大數目之國內供應商及其他締約國之供應商投標，並以公平及不歧視之方式選擇供應商參加此一程序。
二、備有常年合格供應商名單之機關，得自該等名單中挑選供應商並邀請其投標。任何挑選應給予名單內之供應商均享有公平之機會。
三、要求參與特定購案之供應商，如有尚未經資格審查合格者，應准予投標並被列入考慮，但以有足夠時間依第八、九兩條完成資格審查程序者為限。准予參加投標之額外供應商家數，僅得以有效執行採購制度予以限制。
四、要求參與選擇性招標程序之意思表示得以電報交換、電報或電話傳真提出。

第十一條：投標與交付期限

一般規定

一、(ａ)任何規定之期限應使國內供應商及其他締約國之供應商有適當時間，於投標截止日期前準備及提交投標書。各機關於訂定任何此種期限時，應在符合其本身合理需要之情形下，考慮諸如預定購案之複雜性、預估分包之程度，以及投標商自國內外地點郵寄投標書所需之正常時間等因素。
(ｂ)締約國應確保其機關於訂定截止收受投標書或要求參與投標之申請書之最後日期時，應顧及發布公告之遲延。

期限

二、除第三項另有規定外，
(ａ)於公開招標程序，其收受投標書之期限，自第九條第一項所述公告發布日起，不得少於四十天；
(ｂ)於選擇性招標程序，且在不使用常年合格供應商名單時，提交要求參與投標申請書之時限，自第九條第一項所述公告發布日起，不得少於二十五天；而收受投標書之期限，自發出招標書之日起，不論如何均不得少於四十天；
(ｃ)於使用常年性合格供應商名單之選擇性招標程序，其收受投標書之期限，自初次發出招標書之日起，不得少於四十天，而無論初次發出招標書之日是否與第九條第一項所述之公告日期相同。
三、於下列情形，上述第二項所定之期間得予縮短：
(ａ)若已另行公告達四十天，且該公告不超過十二個月以前，並且載明至少下列事項者：
1.第九條第六項所述之資料之儘可能可以提供者；
2.第九條第八項所述之資料；
3.聲明有興趣之供應商應對機關表明其對此一購案有興趣；及
4.向機關索取進一步資料時之連絡點；則收受投標書之四十天期限，得縮短為長度足以投標之期間。該期間原則上不少於二十四天，但絕對不得少於十天；
(ｂ)若為第九條第六項內所述循環性採購合約之第二次或後續公告，收受投標書之四十天期限，得縮短為不少於二十四天；
(ｃ)在機關正式確認之緊急情況下，相關期限不切實際者，第二項所述期限得以縮短，但不論如何，自第九條第一項所述公告發布日起，絕對不得少於十天；
(ｄ)第二項第(ｃ)款所述之期間，就附件二及三中所列機關之採購，得由該機關與選定之供應商共同議定之。無協議時，該機關得定長度足夠投標之時間，但絕對不得少於十天。
四、在符合機關本身合理需求之情形下，任何交付日期均應考慮諸如購案之複雜性、預期分包之程度、以及生產、出倉、自供應點運送及提供服務之實際所需時間之因素。

第十二條：招標文件

一、於招標程序中，如機關允許以數種語文提出投標書，則其中之一應為世界貿易組織之官方語文中之一種。
二、提供給各供應商之招標文件，除不必有第九條六項第(ｇ)款所定者外，應載明彼等提交投標書所需之一切必要資料，包括須載明於預定購案公告中之資料以及下列資料：
(ａ)收受投標書之機關之地址；
(ｂ)索取補充資料之地址；
(ｃ)投標書及投標文件應使用之一種或數種語文；
(ｄ)收受投標書之截止日期與時間，以及投標書應有之有效期間；
(ｅ)有權在開標現場之人員，及開標之日期、時間與地點；
(ｆ)供應商應具備之經濟與技術要求、財務保證與資料或文件；
(ｇ)所需產品或服務或任何要求之完整說明，包括技術規格、應達成之合格證明、必要之計畫、圖說及說明資料；
(ｈ)決標之標準，包括除價格外審查投標書時考慮之任何因素，以及評估標價時應含之成本項目，諸如運輸、保險及檢驗費用，以及如係其他締約國之產品或服務時之進口關稅與其他進口費用、稅捐以及付款幣別；
(ｉ)付款條件；
(ｊ)任何其他條款或條件；
(ｋ)如有第十七條所示之條款及條件，則依第十七條之規定來自實施該條程序之非協定締約國之投標書，在何種條件下將予接受。

各機關提供招標文件

三、(ａ)於公開招標程序中，各機關應依參與此一程序之所有供應商之要求，對其提供招標文件，並應對其就與招標文件有關且合理之要求說明事項，迅速予以答覆。
(ｂ)於選擇性招標程序中，各機關應對所有申請參加投標之供應商，提供招標文件，並應對其就與招標文件有關且合理之要求說明事項，迅速予以答覆。
(ｃ)參加招標程序之供應商合理要求相關資料時，機關應迅速答覆，但以該項資料不致使該供應商於決標程序取得較其他競標者更有利之地位者為限。

第十三條：投標書之提交、收受與開標及決標
一、投標書之提交、收受與開標及決標均應符合下列規定：
(ａ)投標書通常應以書面直接遞送或郵寄，如准許以電報交換、電報或傳真方式投標時，投標書內容應包括審標所需之一切資料，特別是投標商所提之確定價格，以及投標商同意招標書內各項條款及規定之聲明，投標商必須立刻以信函或遞送一份經簽字之電報交換、電報或傳真以確認其投標書。不得以電話之方式提出投標。以電報交換、電報或傳真提出之投標書，其內容如與截止投標期限後所收到任何文件之內容不符時，應以該電報交換、電報或傳真之投標書為準；及
(ｂ)在開標至決標期間，所給與投標商改正其非故意造成之形式上之錯誤之機會，不得產生任何歧視做法。

投標書之收受
二、投標書若純因機關之不當處理所致延誤，而於規定期限後始送達招標文件所指定之辦公場所，不應使該供應商受到處罰。若相關機關所定之程序有所規定，投標書亦得在其他特殊情況下予以考慮。

開標
三、各機關經由公開或選擇性招標程序所徵求得之全部投標書，應依可確保開標規律性之程序及條件辦理收受及開標。投標書之收受與開標並應符合本協定之國民待遇及不歧視規定。開標資料應由有關機關保管，俾供其上級主管機關於必要時得依本協定第十八條、第十九條、第二十條及第二十二條所定程序予以使用。

決標
四、(ａ)凡列入決標考慮之投標書，於開標當時，必須符合公告或招標文件所定之基本要求，且投標之供應商須符合參加投標之條件。若機關所收到之投標書之報價，不正常的低於其他投標商所報者時，得對該投標商進行查詢，以確保其能符合參加投標之條件，且有能力履行合約條款。
(ｂ)除機關為公共利益計，不擬訂約外，如認定某一投標商有充分能力承做該合約，且其投標書，無論係國內產品或服務或係其他締約國之產品或服務，為最低標，或依公告或招標文件規定之特殊審標標準，視為最有利標時，該機關即應決標予該投標商。
(ｃ)決標應按招標文件中所定標準及基本要求為之。

選擇權條款
五、利用選擇權之條款時，不得藉以規避本協定之規定。

第十四條：協商
一、於下列情形，締約國得讓其機關採用協商措施：
(ａ)依第九條第二項所述之公告(洽供應商參與預定購案程序)之邀請已就購案表明此一意向；或
(ｂ)審標時發現依公告或招標文件中所定特定審標標準，無投標書顯為最有利之投標書者。
二、協商措施主要應用以認定投標書之優缺點。
三、機關對投標書應予保密，尤其不得提供任何資料以幫助特定參加者將其投標書提升至其他參加者之水準。
四、機關於協商時，不得對不同供應商有所歧視，尤其應確保：
(ａ)對任何參加者之排除，均應依照公告及招標文件中所定之標準為之；
(ｂ)對標準及技術要求之一切修訂，均應以書面發給尚在協商之列之所有參加者；
(ｃ)所有尚在協商之列之參加者均應有機會按照經修改之需求，提送更新或修訂之文件；且
(ｄ)協商結束後，應准許所有尚在協商之列之參加者按照共同之限期提送最後之投標書。

第十五條：限制性招標
一、第七條至第十四條用以規範公開及選擇性招標程序之規定，於下列情形不須適用，但以採行限制性招標並非為要避免可能之最大競爭，或對其他締約國之供應商構成歧視，或對國內生產者或供應商構成保護者為限：
(ａ)經公開招標或選擇性招標程序，無人投標，或有圍標情事，或投標書不符合招標之基本要求，或不符合依本協定所規定之參與條件；但以原定招標要求於後來決標之合約中未予重大改變者為限；
(ｂ)因涉及藝術品或專屬權之保護，諸如專利權或著作權，或因技術理由該產品或服務無人競爭，而僅能由某一特定供應商供應，且並無合理之其他選擇對象或替代者存在時；
(ｃ)因機關無法預見之非常緊急事故，致產品或服務無法經由公開或選擇性招標程序適時獲得，而有確實之必要者；

（ｄ）由原供應商供應之額外交付，做為現有之物品或設施之更換零件，或係供現有物品、服務或設施擴充所需，且如更換供應商，將迫使機關購買不能符合與現有設備或服務互換性需求之設備或服務；[註5]

（ｅ）當一機關因委託他人進行研究、實驗、探索或原創性之發展，而購買依該特定合約所發展之原型或初次製造之產品或服務。但於該合約履行完畢後，再採購該類產品或服務時，則應依第七條至第十四條之規定辦理；[註6]

（ｆ）當未列入原始合約，但仍在原來招標文件目的範圍內之額外工程服務，因未能預見之情況，而為完成該工程服務合約所需，且機關有必要將該額外工程服務發包給原來之承包商，否則若將額外工程服務合約與原始合約分開發包，將有技術或經濟上之困難，並會對機關帶來重大不便。但額外工程服務發包合約之總金額，不得超過原主合約金額之百分之五十；

（ｇ）一基本計畫下包含重複性類似工程服務之新的工程服務案件發包，但應以該計畫之原始合約係依第七條至第十四條規定發包，且機關於最初工程服務預定購案之公告中，已說明日後此等新的工程服務案件，可能以限制性招標程序發包；

（ｈ）自商品市場採購之產品；

（ｉ）在稍縱即逝之極為有利之條件下採購。本規定係針對非屬一般供應商之廠商所為之非經常性清貨或於清算或破產時對資產之處分，而不包括向一般供應商所為之例行性採購；

（ｊ）將合約決標給設計比賽中之優勝者，但該項比賽之辦理須符合本協定之原則，尤其是第九條所定邀請合格供應者參加比賽以贏取合約之公告，並由獨立之審查團判定勝負。

二、機關應就依第一項規定決標之各合約編製書面報告，該報告內容應包括採購機關名稱、採購物品或服務之金額與種類、原產地，並說明其所適用之本條條件。該報告應由有關機關保管，以備遇有第十八、第十九、第二十及第二十二條所定程序之需要時，供其上級主管機關使用。

第十六條：補償交易

一、機關在資格審查及選擇可能之供應商、產品或服務，或者在審標及決標時，不得強制要求、尋求或考慮補償交易。[註7]

二、然而，基於包括與發展有關之一般政策之考量，開發中國家在加入時，得談判使用補償交易之條件，諸如使用本國品項之要求。該等要求僅能作為參加購案程序之資格審查之用，而不得作為決標之標準。有關條件應客觀、明確、且不得歧視。其條件應訂明於本協定之附錄一中，並得包括受本協定拘束之合約實施補償交易之明確限制。存有該等條件時，應通知委員會，並應列入預定購案之公告及其他文件中。

第十七條：透明化

一、各締約國應鼓勵其機關標示其對待非本協定締約國供應商投標書之各項條件，包括任何與競爭性招標程序或提出異議程序所不同之處。但以該等非本協定締約國為了達成彼等決標之透明化，而有做到下列各點者為限：

（ａ）依本協定第六條(技術規格)標示其合約；

（ｂ）發布第九條所述之購案公告，包括在第九條第八項(預定購案摘要公告)所述之以世界貿易組織官方語文之一所發布之公告內，標示其對待本協定締約國供應商之投標書之條件；

（ｃ）願意確保在一件購案期間通常不會變更其採購規定；若此等更改無可避免時，則應確保有令人滿意之補救方法。

二、非本協定締約國政府若遵循第一項第（ａ）至第（ｃ）款之條件，即有權在通知各締約國後，以觀察員身分參加委員會。

第十八條：機關之資訊與檢視義務

一、機關依本協定第十三條至第十五條辦理之合約，應於決標後七十二天內，在本協定附錄二所列適當刊物上，發布公告說明下列事項：

（ａ）決標合約之產品或服務之性質與數量；

（ｂ）決標機關之名稱與地址；

（ｃ）決標日期；

（ｄ）得標者之名稱與地址；

（ｅ）決標金額或決標時列入考慮之最高及最低標；

（ｆ）在適當情況下，查閱依第九條第一項所發出之公告之方法，或使用第十五條程序之正當理由；及

註5：根據共識，所稱「現有設備」，包括軟體在內，但以該軟體之初次採購係適用本協定者為限。

註6：初次製造產品之原創性發展，得包括限量生產或供應，以便獲得實地測試之結果，並展示該產品或服務達到品質要求標準，可以進入大量生產或供應階段，但不包括為建立商業生存力或回收研發成本之大量生產或供應。

註7：政府採購中之補償交易係指藉本國品項、技術授權、投資要求、相對貿易或類似之要求，以鼓勵當地發展或改善收支平衡帳之措施。

（ｇ）所使用之招標程序。

二、各機關受到締約國供應商之要求時，應迅速提供：

（ａ）其採購實務與程序之說明；

（ｂ）關於供應商所提出之資格申請被駁回、現有資格被終止、以及未能獲選之理由之相關資訊；及

（ｃ）對未得標投標商，關於彼等之投標書未獲選之理由、獲選之投標書之特點及相對優點、以及得標者之名稱之相關資訊。

三、機關應迅速通知參加投標之供應商關於決標之決定，如有要求以書面方式通知時，則以書面通知。

四、若上述第一項及第二項第（ｃ）款所列某些決標資訊之揭露，會妨礙法律之執行、違反公共利益、影響特定公、民營企業之合法商業利益，或可能損害供應商間之公平競爭時，機關得決定不予揭露。

第十九條：締約國之資訊與檢視義務

一、與適用本協定之政府採購有關之任何法律、規章、司法裁判、通用之行政規定及程序(包括標準合約條款)，締約國應迅速刊登於附錄四所列適宜之刊物，俾使其他締約國及供應商了解其內容。締約國應隨時準備於受到要求時，向其他締約國解釋其政府採購程序。

二、未得標投標商之政府如為本協定締約國，得在不影響第二十二條規定之前提下，索取與決標有關之其他必要資料，以確認該購案確係以公平公正之方式辦理。為此，採購方之政府應就得標之投標書之特點與相對優點及合約價格提供資料。通常此等後來取得之資料，得由未得標投標商之政府決定予以揭露，但應謹慎為之。但揭露此類資料有妨害未來競標之虞時，除非經洽商並取得提供資料之締約國之同意，否則不得予以揭露。

三、與適用本協定之機關之購案及其個別合約決標有關可以提供之資料，應依請求，提供予任一其他締約國。

四、提供予任一締約國之機密資料，如會妨礙法律之執行、違反公共利益，或影響特定公、民營企業之合法商業利益、或可能損害供應商間之公平競爭時，非經提供該資料締約國之正式授權，不得予以揭露。

五、締約國應就其辦理適用本協定之購案之統計資料，逐年彙集並提供予委員會，該等報告應包括所有適用本協定之機關所決標之合約之下列資料：

（ａ）就附件一所列機關，已決標合約所估計之在門檻金額以上及以下者之全球統計，並按機關別分別列明。就附件二、三所列機關，已決標合約所估計之在門檻金額以上之全球統計，並按機關類別分別列明。

（ｂ）就附件一所列機關，決標合約金額在門檻金額以上案件之件數及總值之統計資料，並依統一分類制度按機關及產品與服務之類別分列。就附件二、三所列機關，決標合約金額在門檻金額以上案件之估計金額之統計資料，依機關類別及產品與服務類別分列。

（ｃ）就附件一所列機關，依第十五條每種情形所決標之合約之件數與總值，按機關及產品與服務類別分列之統計資料。就附件二、三所列機關類別，依第十五條每種情形所決標之超過門檻金額之合約之總值之統計資料。

（ｄ）就附件一所列機關，依相關附件所載不適用本協定之條件所決標之合約之件數及總值，按機關分列之統計資料。就附件二、三所列機關類別，依相關附件所載不適用本協定之條件所決標之合約總值之統計資料。在可取得此等資料之前提下，各締約國應提供其機關採購產品及服務之原產國之統計資料。為確保該等統計資料可供比較，委員會應對統計方法制定指導原則。為確保對適用本協定之採購之有效監督，委員會得經一致同意，就上述第（ａ）款至第（ｄ）款有關提供統計資料，分列及分類之性質與程度之規定，予以修訂。

第二十條：申訴程序

諮商

一、若一供應商投訴購案有違反本協定情事時，締約國應鼓勵該供應商與採購機關諮商以解決爭議。在此情形下，該採購機關應以不損及按申訴程序取得改正措施之方式，對投訴事項予以公正且適時之考量。

申訴

二、締約國應提供無歧視、適時、透明化且有效之程序，使供應商得以對涉及彼等權益且有違本協定情事之購案提出申訴。

三、締約國應以書面列明其申訴程序並使其得以普遍取得。

四、締約國應確保與適本協定之購案有關之所有辦理過程之文件應保留三年。

五、得要求有利害關係之供應商在知悉異議之原因事實之時起或合理情況下可得而知之時起一定期限內，開始其申訴程序並通知採購機關。但前述期限不得少於十天。

六、申訴案件應由法院或與購案結果毫無關係之公正且獨立之審查單位審理，該審查單位成員於指派期間內應不受外界之影響。非屬法院之審查單位應受司法審查或具備下列審查程序：

（ａ）做成意見或決定前，程序之參與者得陳述其意見；

（ｂ）程序之參與者得派遣代表或有人陪同；

（ｃ）程序之參與者應可參與全部程序；

（ｄ）程序能公開進行；

（ｅ）意見或決定應以書面為之並陳述其意見或決定之基礎；

（ｆ）得以提出證人；

（ｇ）一切文件向審查單位公開。

七、申訴程序應允許下列事項：

（ａ）快速臨時措施，俾改正違反本協定情事及保全商機。該措施得令購案暫停進行。但申訴程序得規定於決定是否採取此等措施時，得就避免其對包括公共利益在內之有關利益所生之不利後果，予以列入考量。於此情況時，應以書面說明不採取此等措施之正當理由；

（ｂ）對申訴正當性評估及達成決定之可能性；

（ｃ）對違反本協定情事之改正或遭受損失或損害之賠償。賠償得限於準備投標或申訴之成本。

八、為保全商機或其他商業利益，申訴程序在正常情況下應適時完成。

第二十一條：機構

一、應設一政府採購委員會，由本協定各締約國指派代表組成。委員會應自選其主席與副主席，並視需要召開會議，但每年至少應集會一次，俾使締約國就與本協定之運作或促進本協定目標有關之任何事項有磋商之機會，並執行締約國交付之其他任務。

二、委員會得設工作小組或其他附屬機構以執行委員會交付之任務。

第二十二條：諮商與爭端解決

一、世界貿易組織協定之「爭端解決規則及程序瞭解書」(以下簡稱「爭端解決瞭解書」)之規定，應適用於本協定，但下述另有規定者除外。

二、若任何締約國認為其依本協定直接或間接可得利益遭取消或減損，或本協定目標之達成因其他締約國未能覆行其於本協定下之義務，或因其他締約國採取任何措施而受阻，不論該等措施是否與本協定之規定牴觸，該締約國得以書面向其所認定之相關締約國提出意見或建議，以謀問題之圓滿解決。該締約國上述行動，應迅速依下述規定，通知依爭端解決瞭解書所組成之爭端解決機構(以下簡稱爭端解決機構)。其相對締約國應對該締約國提出之意見或建議予以慎重之考慮。

三、爭端解決機構有權設立小組，採納小組及上訴機構之報告，就爭端事項提出建議或做出裁決，監視裁決及建議之實施及授權終止本協定下之減讓及其他義務之中止，或於違反本協定之措施不可能撤銷時，授權就救濟措施進行諮商。僅具備世界貿易組織會員身分之本協定締約國，始得參與爭端解決機構就本協定之爭端所採取之決定或行動。

四、除爭端之當事國於小組成立後二十天內另有合意外，小組之委任條件為：「依本協定及(其他爭端當事國引用之協定名稱)之相關規定，審查由(當事國名稱)以文件(編號)提交爭端解決機構認定之事項，並做成判斷，以協助爭端解決機構依本協定就該事項做成建議或決定。若爭端之一當事國引用本協定之規定，以及爭端解決瞭解書附錄一所列之其他一個或多個協定，則第三項之規定僅適用於小組報告中有關本協定之解釋及適用之部分。

五、爭端解決機構所設，以審查本協定下之爭端之各小組，應包括在政府採購領域夠格之人士。

六、解決爭端之程序，應盡所有努力，以最大之可能，予以加速進行。縱有爭端解決瞭解書第十二條第八項及第九項之規定，小組應嘗試自其組成及委任條件被同意起四個月內，向爭端當事國提出最終報告。若有遲延，亦不得超過自其組成及委任條件被同意起七個月。是故，應盡所有努力將爭端解決瞭解書第二十條第一項及第二十一條第四項所定之期限減少二個月。此外，縱有爭端解決瞭解書第二十一條第五項之規定，於當事國間對於遵循建議或決定所應採行之措施是否存在及與適用之協定是否符合而有歧見時，小組應嘗試於六十天內提出其決定。

七、縱有爭端解決瞭解書第二十二條第二項之規定，任何基於該瞭解書附錄一所列之協定，但本協定除外，所生之爭端，均不得導致依本協定所為之減讓或其他義務之中止，而本協定所生之爭端亦不得導致依該瞭解書附錄一所列之其他協定下之減讓或其他義務之中止。

第二十三條：本協定除外事項

一、本協定內之任何規定不得解釋為禁止任何締約國，為保護其基本安全利益，而對採購武器、彈藥或戰爭物資，或對國家安全或國防目的所不可或缺之採購，採取任何其認為必要之行動或不公開任何資料。

二、本協定內之任何規定不得解釋為禁止任何締約國基於保護公共道德、秩序或安全、人類及動植物生命或健康、智慧財產權所必要；或與殘障人士、慈善機構或服刑人生產之產品或服務有關，而實施或執行之措施。但以該等措施之適用方式，不致成為對具有相同條件之國家予以武斷或不合理歧視之手段，或成為對國際貿易隱藏性限制者為限。

第二十四條：最後規定

一、接受與生效

就適用範圍已載明於本協定附錄一之附件一至五，且於一九九四年四月十五日以前簽署接受本協定，或於前述日期前以尚待批准之方式先行簽署本協定並嗣後於一九九六年一月一日前批准之政府[註8]而言，本協定自一九九六年一月一日起生效。

[註8]：本協定所稱「政府」，視為包括歐洲共同體之主管機關。

二、加入

非本協定締約國，但為世界貿易組織會員國或於世界貿易組織協定生效前為一九四七年關稅暨貿易總協定締約國之政府，得依該政府與締約國間之協議，加入本協定。加入之手續，於該政府向世界貿易組織秘書長提交一份載明前述協議條件之文件時完成。對加入之政府而言，本協定應於加入後第三十天生效。

三、過渡安排

（ａ）香港及韓國得延緩本協定規定之適用至一九九七年一月一日為止。但第二十一條及第二十二條不在此限。彼等若在一九九七年一月一日之前開始適用本協定規定，則其開始適用之日期應於三十天前通知世界貿易組織秘書長。

（ｂ）於本協定生效日起至香港適用本協定為止之期間內，香港與其他締約國間之權利義務，應依一九七九年四月十二日在日內瓦簽署，且於一九八七年二月二日修訂之政府採購協定（簡稱一九八八年協定）之實質性[註9]規定定之，包括其附件；惟其他締約國於一九九四年四月十五日當日應為「一九八八年協定」之締約國。附件若有修訂則以修訂後者為準。基於此一目的，此等規定於茲以引述方式納入為本協定之一部分，其效期至一九九六年十二月三十一日。

（ｃ）於同為「一九八八年協定」締約國之本協定締約國間，本協定之權利義務取代「一九八八年協定」所規定者。

（ｄ）本協定第二十二條應至世界貿易組織協定生效時始生效。在此之前，「一九八八年協定」第七條之規定應適用於本協定下之諮商及爭端解決，且基於此一目的，此等規定於茲以引述方式納入為本協定之一部分。前述規定應在本協定委員會主持下適用之。

（ｅ）於世界貿易組織協定生效前，所稱世界貿易組織之機構應視同係指關稅暨貿易總協定下之相關機構，所稱世界貿易組織秘書長及秘書處應視同係分別指一九四七年關稅暨貿易總協定締約國大會秘書長及秘書處。

四、保留

對本協定之任何規定，不得有所保留。

五、國內立法

（ａ）各接受或加入本協定之政府，應確保在不晚於本協定對其開始生效之日，其國內一切法律、規章、行政程序及適用於附件所列各機關之規則、程序與實務均已符合本協定之規定。

（ｂ）各締約國與本協定有關之法律與規章及其施行如有變更，應通知委員會。

六、修正或變更

（ａ）修正或將一機關由一附件移轉至另一附件、或在特殊情形下與本協定附錄一至四有關之其他變更，應通知委員會，並就前述變更對本協定所議定適用範圍之可能影響，檢附相關資料。若修正、移轉或其他變更純屬形式或性質輕微，而於通知後三十天內無人提出異議時，即生效力。至於其他情形，委員會之主席應立即召開委員會會議。委員會應考量此等提議及任何補償性調整措施之請求，以維持權利義務間之平衡及此等通知前本協定所議定適用範圍間之對等性。若未能達成協議，則該事項得依本協定第二十二條之規定處理。

（ｂ）一締約國若欲行使權利，以政府對一機關之控制或影響力已有效地消除為由，而將該機關自本協定附錄一中除去，則該簽署國應通知委員會。該等變更應於委員會下次會議結束次日起生效，但以前述會議舉行日期不早於通知日起之三十天之內，且無人提出異議者為限。若有異議，該事項係依本協定第二十二條所定之諮商及爭端解決程序處理之。在考量附錄一之變更要求及任何衍生之補償性調整措施時，應將消除政府控制或影響所產生開放市場之效果，做有利之考量。

七、檢討、談判及未來之工作

（ａ）委員會應參酌本協定之目的，逐年檢討本協定之實施與運作情形，且每年就此等檢討所涵蓋期間內之各項發展，通知世界貿易組織理事會。

（ｂ）本協定各締約國至遲應於本協定生效後第三年年終前，以及其後定期性的進行談判，俾在兼顧第五條所載與開發中國家有關之規定下，改進本協定及在互惠基礎上儘可能擴大其適用範圍。

（ｃ）各締約國應致力避免引進或延長扭曲公開採購之歧視性措施及實務，並應在第二款所述談判中，設法取消在本協定生效日仍存留之該等措施及實務。

八、資訊技術

為避免本協定構成技術進步之不必要障礙，締約國應定期於委員會諮商有關政府採購使用資訊技術之發展，並於必要時協商修訂本協定。前述諮商，應特別針對確保使用資訊技術，藉以透過透明化程序促進公開、不歧視及有效率之政府採購目的，且確保適用本協定之合約均予明確標示，而所有有關於特定合約之可提供資料均能予以標示。若一締約國擬做更新，應盡量考量其他締約國對任何潛在問題所表示之意見。

九、修訂

締約國得考量執行本協定所得之經驗而修訂本協定。前述修訂若依委員會所訂程序經各締約國同意，應於一締約國接受後，始對該簽署國生效。

[註9]：指「一九八八年協定」之所有規定，但前言、第七條及第九條除外，惟第九條第五項第（ａ）款及第（ｂ）款及第十項仍應包括在內。

十、退出

（a）任一締約國均得退出本協定。此一退出，自世界貿易組織秘書長收到該締約國退出之書面通知之日起，屆滿六十天始生效。任一締約國為此通知時，得請求立即召開委員會會議。

（b）若本協定之任一締約國未於世界貿易組織協定生效後一年內，成為世界貿易組織之會員，或停止為其會員，應停止為本協定之締約國，並自同日生效。

十一、本協定於特定締約國間之排除適用

任何兩締約國之一，若於接受或加入本協定時，不同意本協定之相互適用，則本協定不適用於該兩締約國之間。

十二、附註、附錄與附件

本協定所有之附註、附錄與附件均為構成本協定不可分之一部分。

十三、秘書處

本協定應由世界貿易組織秘書處提供服務。

十四、保存

本協定應存放於世界貿易組織秘書長。秘書長應儘速向本協定各簽署國提供一份經簽證之本協定副本，及依本條第六項所為之每一修正或變更、依第九項所為之每一修訂，以及依第一項及第二項所為之每一接受及加入，以及依第十項所為之每一退出。

十五、登記

本協定應依「聯合國憲章」第一〇二條規定辦理登記。

本協定於一九九四年四月十五日於馬拉開希以英文、法文及西班牙文作成一份，除本協定附錄另有規定外，各種文本均屬有效。

附註

本協定及其附錄中所用「國家」一詞包括簽署本協定之個別關稅領域。就簽署本協定之個別關稅領域而言，在本協定內使用「國民」一詞予以表示者，則除另有規定外，應視為亦適用該獨立關稅領域。

第一條第一項

鑒於與附條件援助有關之一般性政策考量，包括開發中國家就解除此類援助條件之目的，祇要其係由締約國所採行，本協定不適用於對開發中國家提供附條件援助所辦理之購案。

附錄二：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. (See footnote 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 II 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.

Footnote 1: For 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.

Article II

Valuation of Contracts

1. The following provisions shall apply in determining the value of contracts (See footnote 2) 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.

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 installment 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.

Footnote 2: This 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.

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 II, 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 regulations, (See footnote 3), recognized national standards (See footnote 4), 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.

Footnote 3: For 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.

Footnote 4 :For 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.

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 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 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 VIII 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 VIII, XIX, XX and XXII.

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 services (See footnote 5);

(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 XIV (See footnote 6);

(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 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.

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

Footnote 6: Original 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.

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. (See footnote 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.

Footnote 7: Offsets 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.

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 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 XIX
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 governments (See footnote 8) 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 substantive (See footnote 9) 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 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.

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

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

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.

附錄三、政府採購協定（主文）修正版 2012.4.2.

前言

本協定當事國（以下簡稱「締約國」），

咸認政府採購相關事宜，須建立有效之多邊架構，俾促成世界貿易更高度之自由與擴展，並改善國際貿易行為之架構；

咸認政府採購方面，不得基於保護國內財物或服務或國內廠商之目的，擬定、採用或適用相關措施，亦不得歧視或差別對待國外財物、服務或國外廠商；

咸認政府採購之廉正與可預測性為有效管理公共資源、締約國經濟表現、多邊貿易運作所不可或缺之一部分；

咸認本協定之執行程序應賦予充分彈性，以符合各締約國之特殊環境；

咸認各個開發中國家，尤其是低度開發國家之發展、財政和貿易需求等，須一併列入考慮；

咸認政府採購措施透明化之重要性，以及根據聯合國反腐敗公約等國際規範，以透明且中立方式進行政府採購，以及避免利益衝突及貪污行為之重要性；

咸認使用電子化方式進行適用本協定之採購之重要性，並鼓勵採用電子採購；

咸欲鼓勵非本協定締約國之世界貿易組織會員均能接受、加入本協定；

已依照一九九四年四月十五日於馬爾喀什簽署之政府採購協定（以下稱「一九九四協定」）第二十四條第七項第(b)、(c)款之規定，進行進一步協商以達成上述目標；

茲由各方協議如下：

第一條　定義

為本協定之目的：

(a) 商業財物與服務，係指在商業市場上一般售出或提供販售，且通常由非政府之買方、非為政府目的採購之財物與服務；

(b) 委員會係指依第二十一條第一項所設立之政府採購委員會；

(c) 工程服務係指依聯合國中央貨品分類（CPC）第五十一章，藉各種方法以完成土木或建築工事為目的之服務；

(d) 國家包括簽署本協定之個別關稅領域。就簽署本協定之個別關稅領域而言，在本協定內使用「國」一詞予以表示者，除另有規定外，視為同時適用該關稅領域；

(e) 日係指日曆天；

(f) 電子競價係指運用包括電子化方式的重複過程，使廠商可提出最新報價，或標案審查標準中可量化部分之新數值，以得到投標者的排名或重新排名；

(g) 書面係指可閱讀、重製或之後可傳播之文字或數字，且可能包含以電子格式傳送或儲存之資訊；

(h) 限制性招標係指採購機關與其選擇之廠商洽商之採購方式；

(i) 措施係指法律、規章、程序、行政規則或實務，或採購機關於適用本協定之採購之任何行為；

(j) 常年合格廠商名單係指採購機關已認定符合該名單之參與條件，且採購機關有意使用逾一次之名單；

(k) 採購公告係指採購機關發布，邀請有意之廠商申請參與及/或投標之公告；

(l) 補償交易係指藉自製率、技術授權、投資要求、相對貿易或類似之要求，以鼓勵當地發展或改善締約國收支帳狀況之條件和承諾；

(m) 公開招標程序係指所有有興趣之廠商均得投標之程序；

(n) 人係指自然人或法人；

(o) 採購機關係指締約國附錄一之附件一、二或三所載機關；

(p) 合格廠商係指採購機關認可，符合參加條件之廠商；

(q) 選擇性招標係指限採購機關邀請之合格廠商始得投標之採購方式；

(r) 除另有規定者外，服務亦包含工程服務；

(s) 標準係指經認可之單位核准，並供普遍及經常使用但不具強制性，就財物、服務或相關製程與生產方法載明其規則、準則或特性所定之文件。亦得包括或僅列出適用於財物、服務、製程或生產方法之專門術語、符號、包裝、標誌或標示等規定；

(t) 廠商係指提供或能提供財物或服務之人或一組人；及

(u) 技術規格係指下述之招標規定：

　(i) 載明擬採購財物或服務之特性，例如品質、性能、安全性及大小，或生產或提供之程序與方法；或

　(ii) 用於財物或服務上之術語、符號、包裝、標誌與標示相關規定。

第二條　適用範圍

協定之適用

1. 適用本協定採購之任何措施，不論相關採購是否全部或部分以電子化方式進行。

2. 為本協定之目的，適用本協定之採購係指基於政府目的之採購：

(a) 包括下列所述之財物、服務，或任何下列二者之結合：

　(i) 各締約國註明於附錄一附件者；及

　(ii) 非為商業販售或轉售而採購，或非為製造或提供可供商業販售或轉售之財物或服務之目的而進行之採購；

(b) 以契約方式進行之採購，包括：購買；租賃；以及租購或分期付款購買，不論有無附帶承購選擇權；

(c) 依第七條刊登公告時，按第六項至第八項估算之契約金額等於或高於締約國附錄一附件所定之門檻；

(d) 由採購機關所進行；及

(e) 非屬第三項或締約國於附錄一附件內所排除者。

3. 除締約國於附錄一附件內另有規定者外，本協定不適用於：

(a) 購買或租賃土地、既有建築物，或其他不動產或其上之權利；

(b) 非契約之協議，或締約國以任何形式提供之協助，包括合作協定、補助金、貸款、注資、保

證與財務獎勵措施；
(c) 財務代理或存託服務之採購或收購、受管制金融機構之清算及管理服務，或涉及公債發售、贖回、發行之服務，包括貸款或政府債券、票券與其他證券；
(d) 公共僱傭契約；
(e) 下述性質之採購：
(i) 為提供國際援助之特定目的，包括開發援助；
(ii) 依照關於軍隊派駐，或關於某一計畫簽署國聯合執行之國際協定所要求之特定程序或條件；或
(iii) 依照國際組織之特殊程序或條件，或接受國際資助、貸款或其他協助，其適用程序或條件異於本協定者。

4. 各締約國應於附錄一之附件載明下述資訊：
(a) 於附件一載明採購行為受本協定規範之中央政府機關；
(b) 於附件二載明採購行為受本協定規範之中央以下次一級政府機關；
(c) 於附件三載明採購行為受本協定規範之所有其他機關；
(d) 於附件四載明適用本協定之財物採購；
(e) 於附件五載明適用本協定之服務採購，但不包括工程服務；
(f) 於附件六載明適用本協定之工程服務採購；及
(g) 於附件七載明任何總附註。

5. 就適用本協定之採購，採購機關要求未納入締約國附錄一附件之人依照特別規定進行採購時，該等規定應準用本協定第四條。

價值估算

6. 為確認是否為適用本協定之採購而進行價值估算時，採購機關：
(a) 不得為使一採購完全或部分規避本協定之適用，將一採購分為數個採購，亦不得為此目的選擇或使用特定的估算方式；且
(b) 估算應包括採購期間內估計最大總值，不論是否由一個或一個以上之廠商得標，並將下述各種形式之報酬列入考量，包括：
(i) 溢價、費用、佣金與利息；及
(ii) 採購如提供各種選擇之可能性，則應計算各選項之總值。

7. 如為單一採購需求簽訂數個契約，或將契約分為數個部分（以下稱「循環性契約」），其估算契約最大總值之基礎如下：
(a) 前十二個月或採購機關前一會計年度內，同類財物或服務之循環性契約價值，但儘可能按其後十二個月內預期之財物或服務的數量與金額之變更予以調整；或
(b) 首次契約後之十二個月內或採購機關之會計年度內，同類財物或服務之循環性契約之估算金額。

8. 租賃、租購或分期付款購買財物或服務之採購，或未列明總價之採購，其價值估算基礎應為：
(a) 如為定期契約：
(i) 其契約期間為十二個月以下者，按契約期限內之最高預估金額計算；或
(ii) 其契約期間超過十二個月者，按最高預估金額加估計之剩餘價值計算；
(b) 如契約未定有期限，則以每月分期金額乘以四十八計算；及
(c) 如是否為定期契約有疑義時，應適用上述第(b)款。

第三條 安全及一般除外事項

1. 本協定之任何規定，不得解釋為禁止任何締約國，為保護其基本安全利益，而針對採購武器、彈藥或戰爭物資，或對國家安全或國防目的所不可或缺之採購，採取任何其認為必要之行動，或不公開任何資料。

2. 本協定內之任何規定，不得解釋為禁止任何締約國實施或執行下列措施。但各締約國在相同狀況下，就各項措施之實施，均不得構成專斷及無理歧視之手段，亦不得成為對國際貿易之變相限制：
(a) 維護公共道德、秩序或安全之必要措施；
(b) 維護人類與動植物生命或健康之必要措施；
(c) 保護智慧財產權之必要措施；或
(d) 與身心障礙者、慈善機構或受刑人之財物或服務有關之措施。

第四條 一般規定

不歧視待遇

1. 關於適用本協定之採購，各締約國與其採購機關對於其他締約國之財物與服務以及其他供應任一締約國之財物或服務之其他締約國廠商，應立即且無條件給予不低於下述之待遇：
(a) 對國內財物、服務及廠商之待遇；及
(b) 對其他締約國之財物、服務及廠商之待遇。

2. 對於任何涉及適用本協定採購之措施，締約國包括其採購機關，不得：
(a) 基於外國分支關係或外資所有權之程度，而對一本地設立之廠商，給予較低於另一本地設立之廠商之待遇；或

(b) 基於所提供之財物或服務屬於其他締約國，而對一本地設立之廠商予以歧視。

採用電子化方式

3. 以電子化方式進行適用本協定之採購時，採購機關應：
(a) 確保該採購所使用之資訊科技系統與軟體，包括有關資訊之驗證與加密之系統及軟體，能透過一般管道取得，且與其他一般管道可取得之資訊科技系統與軟體確能相容並交互運作；及
(b) 維持確保申請參與及投標之廉正性機制，包括確認收件時間與防範不正當使用。

採購行為

4. 採購機關應以下述透明中立之方式，進行適用本協定之採購：
(a) 符合本協定，使用例如公開招標、選擇性招標和限制性招標的方式；
(b) 避免利益衝突；及

(c) 防止貪污行為。

原產地規則

5. 為適用本協定採購之目的，締約國不得對自其他締約國進口或提供之財物或服務，採取有別於在交易當時自同一締約國進口之相同財物或服務所適用於一般貿易之原產地規則。

補償交易

6. 就適用本協定之採購，締約國及其採購機關，不得尋求、考慮、強制要求或執行任何補償交易。

非屬採購特有之措施

7. 第一項與第二項不適用於下列事項：針對進口或涉及進口所課徵之關稅或稅費；課徵上述關稅與稅費之方法；對於適用本協定採購之措施以外之其他進口規定或手續，及影響服務貿易之措施。

第五條 開發中國家

1. 締約國於為加入本協定而進行協商以及實施本協定時，應特別考慮開發中國家及低度開發國家(除非另有特定指明，以下統稱「開發中國家」)之發展、財政與貿易需求及情形，並認知各國之需求及情形各有不同。依本協定規定並於受要求時，締約國應給予下述國家特殊、差別之待遇：
   (a) 低度開發國家；及
   (b) 其他開發中國家，如該特殊與差別待遇符合其開發需要。
2. 開發中國家加入本協定時，各締約國應對該國之財物、服務與廠商，立即提供依其附錄一附件給予本協定其他締約國最有利之適用範圍，但不應違反該締約國與該開發中國家為維持在本協定下適當且平衡之機會，所進行之協商。
3. 根據其發展需求及於締約國同意時，開發中國家於過渡期內符合於附錄一附件所載期程，得採用或維持一個以上之下列過渡性措施，並以不歧視其他締約國之方式施行：
   (a) 價格優惠計畫，惟該計畫須：
      (i) 僅針對標案中使用來自採行財物或服務價格優惠之開發中國家之財物或服務，或其他開發中國家之財物或服務提供優惠，因該開發中國家需依據優惠協定對於來自其他開發中國家之財物或服務提供國民待遇。如該其他開發中國家為本協定締約國，此待遇應符合委員會所訂條件；及
      (ii) 符合透明原則，且於採購公告內清楚說明優惠與於該採購之適用情形；
   (b) 補償交易，惟採購公告內須清楚載明該補償交易之所有要求、考量、強制要求；
   (c) 特定機關或部門逐步適用；及
   (d) 高於永久門檻之門檻。
4. 為加入本協定而進行協商時，加入本協定之開發中國家對於施行本協定任一特定義務之日期，締約國得同意延緩適用該義務，但不包括第四條第一項第(b)款。施行日期應為：
   (a) 屬低度開發國家者，加入本協定後五年；及
   (b) 就其他開發中國家，履行特定義務必要之期間，且不得超過三年。
5. 任何開發中國家已就第四項所訂義務之施行日期進行協商者，應在其附錄一之附件七中列出協議之施行日期、該施行日期之特定義務，以及其同意在施行日期內遵守之其他暫時義務。
6. 本協定對開發中國家生效後，委員會得依該開發中國家之要求：
   (a) 展延依第三項採用或維持措施之過渡期間，或依第四項協議之施行日期；或
   (b) 就加入協定過程中無法預見的特殊情形，准許採用新的第三項過渡性措施。
7. 曾就第三項或第六項之過渡性措施、第四項之施行日期，或第六項之展延進行協商之開發中國家，應於過渡期間或施行日期前採取必要步驟，以確保該期間屆滿時，該締約國對於本協定之遵守。相關開發中國家，應即時通知委員會每一步驟。
8. 締約國應切實考量開發中國家就與該國加入或施行本協定有關之技術合作與能力建構之要求。
9. 委員會得制定本條文之執行程序，此程序得包括針對第六項之要求進行表決之規定。
10. 委員會應每五年檢討本條文之運作與有效性。

第六條 採購資訊

1. 各締約國應：
   (a) 即時於經正式指定、廣泛散布且大眾隨時可得之電子或平面媒體公告與適用本協定之採購有關之任何法律、規定、司法裁判、一般適用之行政規定、經法律或規章要求並納入公告或招標文件之標準契約條款及程序，以及任何對於上述文件之更改；及
   (b) 於被要求時，向任何締約國提供解釋。
2. 各締約國應列明：
   (a) 於附錄二列出公告第一項資訊之電子或平面媒體；
   (b) 於附錄三列出依第七條、第九條第七項與第十六條第二項進行公告之電子或平面媒體；及
   (c) 於附錄四列出締約國公告下列資訊之網址：
      (i) 第十六條第五項之採購統計數據；或
      (ii) 第十六條第六項之決標公告。

3. 列於附錄二、三或四之資訊如有任何更動，各締約國應立即通知委員會。

第七條 招標公告

採購公告

1. 就適用本協定之個別採購案，採購機關應於附錄三所載之適當平面或電子媒體上刊登採購公告，但第十三條所定情形不在此限；相關媒體須廣為散布，且此公告應維持至少在公告所指定截止期日前，能由民眾隨時取得。公告應：
   (a) 就附件一所載採購機關，須至少能在附錄三所載最短期間內免費透過電子方式於單一網站取得；及
   (b) 就附件二或三所載採購機關，如可經由電子化方式取得，至少應可透過免費之電子入口網站連結取得。

本協定鼓勵締約國與其附件二或三所載採購機關，以免費電子方式透過單一網站刊登公告。

2. 除本協定另有規定外，採購公告應包括：

(a) 採購機關之名稱與地址，其他聯絡採購機關、取得採購相關文件所必要之資訊，以及費用與付款方式（如有）；
(b) 採購案之說明，包括採購財物或服務之性質與數量，如不知其數量，則為其估計數量；
(c) 就循環性契約，其後續採購財物或服務之採購公告時間（如可能）；
(d) 任何選購項目之說明；
(e) 財物或服務交付之時程表或契約之期間；
(f) 擬使用之採購方法及其是否涉及協商或電子競價；
(g) 在可適用情況下，提交申請參與採購案文件之收件地址與最後收件日；
(h) 投標之收件地址與最後收件日；
(i) 投標或申請參與如得使用採購機關締約國官方語言以外之語言者，可採何種語言提交；
(j) 廠商所應具備之參加條件及其簡要說明，包括要求廠商提供特定文件或證明，但如採購公告同時，所有有興趣之廠商可取得之招標文件內已包含此要求者，不在此限；
(k) 如依第九條規定，採購機關欲邀請有限家數的合格廠商投標時，在可適用情況下，其選擇廠商的條件，與准予投標廠商之家數限制；及
(l) 載明該採購適用本協定。

摘要公告

3. 就每一採購，採購機關應於採購公告之同時，以一種世界貿易組織官方語言且隨時可取得之方式發布摘要公告；摘要公告至少應含下列資訊：
(a) 採購標的；
(b) 投標之期限，或在可適用情況下，提出申請參與採購或列入常年合格廠商名單之收件期限；及
(c) 索取採購案相關文件之地址。

採購預告

4. 本協定鼓勵採購機關儘早於每一會計年度，在附錄三所載適當平面或電子媒體預告未來之採購計畫（以下簡稱「採購預告」），採購預告應包括採購標的與預定發布採購公告之日。
5. 採購預告已盡可能包含採購機關依第二項所述之資訊，且載明有興趣之廠商應向採購機關表達對該採購案之興趣者，附件二或三之採購機關得以採購預告作為採購公告。

第八條　參與條件

1. 採購機關對於廠商參與採購所設之條件，應以確保廠商具備履行該採購之法律與財務條件及商業與技術能力所必要者為限。
2. 擬定參與條件時，採購機關：
(a) 不得以參與採購之廠商曾與特定締約國之採購機關簽訂一個以上之契約為條件；且
(b) 得要求為符合採購條件所必須之相關經驗。
3. 採購機關於審查廠商是否符合參與採購之條件時：
(a) 應根據廠商於採購機關國內外之商業活動，審查廠商之財務條件、商業與技術能力；及
(b) 應根據採購機關事前明定於公告或招標文件中之條件進行審查。
4. 當有證據時，締約國及其採購機關得排除有下列情形之一之廠商：
(a) 倒閉；
(b) 申報不實內容；
(c) 依過去契約之實質要求或義務，履約時有重大或持續的瑕疵；
(d) 法院最終判決嚴重犯罪或其他嚴重罪行；
(e) 違反專業行為，或負面影響廠商商業誠信之作為或不作為；或
(f) 逃漏稅。

第九條　廠商資格

登錄系統與資格審查程序

1. 締約國及其採購機關得設置廠商登錄系統，要求有興趣之廠商進行登錄並提供特定資訊。
2. 各締約國應確保：
(a) 各採購機關應盡力將資格審查程序之差異降至最低；且
(b) 採購機關設有登錄系統時，應盡力將各採購機關登錄系統之差異降到最低。
3. 締約國及其採購機關不得於目的或效果上，為形成其他締約國廠商參與採購之不必要阻礙，而採用或應用登錄系統或資格審查程序。

選擇性招標

4. 採購機關欲使用選擇性招標程序者應：
(a) 於採購公告中至少包括第七條第二項第(a)、(b)、(f)、(g)、(j)、(k)、(l)款之資訊，並邀請廠商提交申請參與文件；及
(b) 於投標期間開始前，依第十一條第三項第(b)款通知之合格廠商，至少提供其第七條第二項第(c)、(d)、(e)、(h)、(i)款之資訊。
5. 採購機關應准許所有合格廠商參與某一特定採購，惟該機關於採購公告中註明投標廠商之家數限制，以及遴選該家數廠商之條件者，不在此限。
6. 招標文件未於依第四項進行公告之日起供公開取得時，採購機關應確保所有依第五項遴選之合格廠商，於同一時間皆可取得招標文件。

常年合格廠商名單

7. 採購機關設置常年合格廠商名單者，應公告邀請有興趣之廠商申請加入該名單，該公告應刊登於附錄三所列適當媒體，且：
(a) 每年刊登公告；且

(b) 如採電子方式公告者，應能隨時取得。

8. 第七項所定公告應包括：
   (a) 可能使用該名單之財物或服務，或其類別之說明；
   (b) 廠商欲列入該名單應具備之條件，以及採購機關查證廠商是否符合條件之方法；
   (c) 採購機關之名稱與地址，以及聯絡該機關與取得所有與名單相關文件之其他必要資訊；
   (d) 該名單之有效期與展延或終止之方式，如未提供有效期時，載明通知終止使用該名單之方式；及
   (e) 載明該名單得使用於適用本協定之採購。

9. 縱有第七項規定，常年合格廠商名單之有效期為三年以下者，採購機關得僅於該名單有效期開始時，僅進行第七項所定公告一次，惟該公告應：
   (a) 載明有效期且不再進行進一步之公告；及
   (b) 以電子方式發布，且能於有效期內隨時取得。

10. 採購機關應允許廠商隨時申請列入常年合格廠商名單，且應於合理之時間內將所有合格廠商列入名單。

11. 如未列入常年合格廠商名單之廠商於第十一條第二項所定期間內申請參與依據常年合格廠商名單進行之採購並提出所有必要文件，採購機關應審查該申請。採購機關不得以無足夠時間審查申請為由，將廠商排除於採購案之考慮外，但基於採購案之複雜性，機關無法於准予投標期間內完成審查者，不在此限。

附件二及附件三所載機關

12. 如符合下列各款事項，附件二、三所載機關得以邀請廠商申請列入常年合格廠商名單之公告，做為採購之公告：
   (a) 公告係依第七項為之，且內容包括第八項要求之資訊及盡可能包括第七條第二項所要求且當時已可得之資訊，並載明該公告為採購之公告，或未來僅列於常年合格廠商名單之廠商會收到與適用常年合格廠商名單採購有關之通知；且
   (b) 廠商向機關表達對於特定採購案之興趣者，機關應即時提供廠商充足之資訊，包括第七條第二項所要求者（以可提供者為限），以使廠商評估其參與採購之意向。

13. 附件二或三所載採購機關有充足時間審查廠商是否具備參與條件時，得准許已依第十項申請列入常年性合格名單之廠商投標。

與採購機關所作決定有關之資料

14. 針對廠商參與採購之請求或列入常年合格廠商名單之申請，採購機關應即時通知廠商其對於該請求或申請之決定。

15. 採購機關如拒絕廠商參與採購之請求或列入常年合格廠商名單之申請、認定廠商不再具備資格，或將廠商自常年合格廠商名單上除名，應迅速通知該廠商，並依其要求，即時以書面解釋該決定之理由。

第十條　技術規格及招標文件

技術規格

1. 採購機關於目的或效果上，不得為製造國際貿易非必要障礙，擬定、採用、應用任何技術規格或訂定任何審查是否符合規定之程序。

2. 於訂定採購財物或服務之技術規格時，採購機關應於適宜情形下：
   (a) 指明性能或功能方面之技術規格，而非設計或敘述性之特性；且
   (b) 根據國際標準訂定技術規格；如無國際標準，根據國家技術規定、經認可之國家標準或建築規則。

3. 技術規格如採設計或敘述性之特性，採購機關應於適宜情形下，於招標文件內載明如「或同等品」字樣，以便將可證明符合採購要求之同等財物或服務納入考慮。

4. 採購機關不得訂定技術規格要求或提及特定商標或商號、專利、著作權、設計、型式、特定來源地、生產者或供應者，但無法以充分精確或明白之方式說明採購要求，且已在招標文件內註明例如「或同等品」字樣者，不在此限。

5. 採購機關不得以足以排除競爭之方式，尋求或接受在特定採購中有商業利益之人之建議，以擬定或採用任何採購案之技術規格。

6. 為茲明確，締約國及其採購機關，得依本條文規定，擬定、採用或應用技術規格以促進自然資源之保育或環境保護。

招標文件

7. 採購機關應使廠商得取得招標文件，該文件應包括所有廠商備標與投標所需之資訊。除非已載明於採購公告中，招標文件應包括下列資訊之完整說明：
   (a) 本採購案，包括欲採購之財物或服務之性質與數量。如不知其數量，為估計之數量與應符合之要求，包括技術規格、合格證明、計畫、圖說及說明資料；
   (b) 廠商參與之任何條件，包括所有廠商應提供與參與條件有關之資訊及文件；
   (c) 採購機關決標之所有審查條件，除價格為唯一條件者外，應一併提供各條件之相對重要性；
   (d) 採購機關如以電子化方式進行採購，任何驗證與加密之要求或其他與以電子方式提交資料有關之要求；
   (e) 採購機關如辦理電子競價，與進行電子競標有關之規則，包括載明與標案審查條件有關之項目；
   (f) 如舉行公開開標，開標日期、時間與地點，及於適宜情形下，經授權出席開標之人員；
   (g) 任何其他條款或條件，包括付款條件與投標方式之相關限制，例如以紙本或電子方式投標；及
   (h) 交付財物或提供服務之日期。

8. 決定採購財物交付或服務提供之日期時，採購機關應考慮例如採購案之複雜性，預期分包之程度，以及生產、出貨、自供應點運送與提供服務實際所需時間等因素。

9. 採購公告或招標文件所定審查條件得包括價格與其他成本因素、品質、技術水準、環境特性與交貨條款等。

10. 採購機關應即時：
(a) 提供招標文件，以確保有興趣之廠商有足夠時間投標；
(b) 依有興趣之廠商之要求，提供招標文件；及
(c) 回復有興趣或參加招標程序之廠商索取相關資訊之合理要求，但以該資訊不致使該廠商相較於其他廠商處於優勢地位為限。

修正

11. 決標前，如招標機關修正採購公告或提供給參與廠商之招標文件中所載條件或技術要求，或修改或重新發布公告或招標文件時，應以書面傳送所有修正、修改或重新發布之公告或招標文件：
(a) 如機關於進行修正、修改或重新公告時，知悉所參與之廠商，應傳送予所有該等廠商，如不知參與廠商，應以原本之發布方式進行；及
(b) 在適宜情形下，於適當時間內傳送，以使廠商修改與重行遞送修正後之投標文件。

第十一條 等標期

一般規定

1. 採購機關應在符合本身合理需要之情形下，考量下列因素，給予廠商充足時間準備與提出申請參與及投標：
(a) 採購案之性質與複雜程度；
(b) 預估分包之程度；及
(c) 如未採用電子方式，自國內外地點以非電子方式傳送投標文件所需之時間。

此期限，包括任何期限之展期，須同時適用所有有意或參加之廠商。

截止期限

2. 使用選擇性招標之採購機關應規定申請參與，原則上於採購公告發布之日起應不得少於二十五日。如因採購機關正式確認之緊急情況，導致相關期限不可行，得縮短該期限，但不得少於十日。
3. 除第四項、第五項、第七項、第八項規定外，採購機關應規定投標之截止日不得少於下列日期起四十日：
(a) 於公開招標程序，自採購公告發布之日起；或
(b) 於選擇性招標程序，不論是否使用常年合格廠商名單，自採購機關通知廠商受邀投標之日起。
4. 於下列情形，採購機關得將第三項所定等標期，縮短為不少於十日：
(a) 採購機關於刊登採購公告**至少**四十日前，但不早於十二個月前，根據第七條第四項發布採購預告，且採購預告包含：
(i) 採購案之說明；
(ii) 投標或提出申請參與之預估期限；
(iii) 載明有興趣之廠商應對機關表明其對此一購案有興趣；及
(iv) 向機關索取採購案相關文件之地址；及
(v) 盡可能提供第七條第二項所載採購公告之資料；
(b) 就循環性契約，採購機關在最初之採購公告中註明後續之公告將依照本項規定訂定等標期；或
(c) 採購機關正式確認之緊急情況導致第三項所定等標期不可行。
5. 於下列各情形，採購機關得將第三項所定等標期各縮短五日：
(a) 以電子方式發布採購公告；
(b) 所有招標文件自採購公告發布之日起，以電子方式提供；及
(c) 機關接受以電子方式投標。
6. 第五項與第四項合併適用時，於任何情形皆不得使依第三項所定之等標期短於自採購公告發布日起十日。
7. 不論本條其他規定，採購機關購買商業財物或服務或二者之混合時，得將第三項所定等標期縮短為不少於十三日，但以機關以電子方式同時發布採購公告與招標文件者為限。且如機關又以電子方式接受商業財物或服務之投標時，得將第三項所定期間縮短為不少於十日。
8. 附件二或三所載採購機關已選定所有或有限家數之合格廠商時，等標期得由該採購機關與選定之廠商共同議定之。如無協議，該期間不得少於十日。

第十二條 協商

1. 締約國得規定其採購機關於下列情形進行協商：
(a) 該機關於第七條第二項規定之採購公告中表明其有意進行協商；或
(b) 審查後發現依採購公告或招標文件中所載特定審查條件，並無明顯之最有利廠商。
2. 採購機關應：
(a) 確保依據採購公告或招標文件中所載審查條件淘汰參加協商之廠商；及
(b) 當協商結束時，給予所有未淘汰廠商相同期限以重新投標或修改投標內容。

第十三條 限制性招標

1. 採購機關於下列情形，得使用限制性招標，並得選擇不適用第七條至第九條、第十條（第七項至第十一項）、第十一條、第十二條、第十四條與第十五條，但以適用本條並非為避免廠商間之競爭，或對其他締約國之廠商構成歧視，或保護國內廠商為限：
(a) 於下述情形：
(i) 無人投標，或無廠商申請參加；
(ii) 遞交之投標文件無符合招標文件基本要求者；
(iii) 無廠商符合參加之條件；或
(iv) 有圍標情事，
但以招標文件之要求無重大變動為限；
(b) 如財物或服務僅得由特定廠商提供，且基於下述理由，無合理之其他選擇或替代財物或服務存在時：
(i) 要求之標的為藝術品；
(ii) 涉及專利、著作權或其他專屬權之保護；或
(iii) 基於技術原因而無競爭存在；

(c) 由原來提供財物或服務之廠商提供不含於原先採購之額外財物或服務，而更換提供該財物或服務之廠商將會：
(i) 因經濟或技術原因不可能達成，例如與原先採購之現有設備、軟體、服務或裝置之交相替換或相互操作性等要求；及
(ii) 造成採購機關之重大不便或大幅增加重複費用；
(d) 因機關無法預見之極緊急事故，致財物或服務無法經由公開或選擇性招標及時獲得，而有確實之必要者；
(e) 自商品市場採購之財物；
(f) 如採購機關因委託他人進行研究、實驗、探索或原創性之發展，購買根據該特定契約所開發出之原型或初次製造財物或服務。初次開發出之財物或服務可能包括為納入實地測試結果並證明該財物或服務之量產能符合可接受之品質標準而生產或提供之有限財物或服務，但不包括為確定商業可行性或為回收研發成本而進行之財物量產或提供服務；
(g) 於非經常性處分如清算、接管或破產的情形，在極短之時間內以極為有利之條件進行之採購，但不包括向一般廠商所為之例行性採購；或
(h) 由設計競賽中之優勝者得標且：
(i) 該競賽以符合本協定之原則之方式辦理，特別是與發布採購公告有關之部分；及
(ii) 參賽者由獨立之評審團審查，以使優勝者獲得設計契約。

2. 採購機關應就依第一項規定決標之各契約編製書面報告，該報告內容應包括採購機關名稱、採購財物或服務之金額與種類，並說明其符合依據第一項規定採用限制性招標之情形。

第十四條 電子競價

採購機關欲使用電子競價進行適用本協定之採購時，該機關應於電子競價開始前，提供下列資訊予各投標廠商：

(a) 自動審查方式，包括根據招標文件所定審查條件且將於競價時自動排序與重新排序之運算程式；
(b) 如依最有利標決標，其投標書要件初步審查之結果；及
(c) 其他與進行競價相關之資訊。

第十五條 投標文件之處理及決標

投標文件之處理

1. 採購機關應以公平、公正之採購程序收受、開啟及處理投標文件，並對投標內容保密。
2. 如單純因採購機關之不當處理，導致採購機關在等標期截止後始收到投標文件，採購機關不得處罰廠商。
3. 在開標至決標期間，如採購機關給予某一廠商改正其非故意造成之形式上錯誤之機會者，該採購機關亦應給予所有投標廠商相同之機會。

決標

4. 凡列入決標考慮者，其投標文件應以書面為之，且應於開標當時，符合公告與招標文件所定基本要求，而且是由符合參與條件之廠商所投標。
5. 除採購機關為公共利益不予決標外，應決標予其認為有能力履行契約約定，且符合公告及招標文件所載審查條件之下列投標廠商：
(a) 為最有利標；或
(b) 價格為唯一條件時，最低標。
6. 如採購機關認為某一投標文件之價格非尋常的低於其他投標文件，得向廠商查證其是否符合參加之條件且有能力履行契約之約定。
7. 採購機關不得為規避本協定之義務，而使用選擇權、取消採購或修改契約。

第十六條 採購資訊透明化

提供予廠商之資訊

1. 採購機關應即時通知投標廠商關於決標之決定，如廠商要求時，應以書面為之。依第十七條第二項及第三項，如廠商要求時，採購機關應向未得標廠商解釋其未選擇該廠商之原因，以及得標廠商之相對優點。

決標資訊之公告

2. 採購機關應於適用本協定之採購決標後七十二日內，在本協定附錄三所載適當平面或電子媒體上公告。機關如僅在電子媒體上公告，資訊應於合理時間內可供隨時取得。公告應至少包括下列資訊：
(a) 採購之財物或服務之說明；
(b) 採購機關之名稱與地址；
(c) 得標者之名稱與地址；
(d) 得標金額或決標時列入考慮之最高及最低標；
(e) 決標日期；及
(f) 所使用之採購方式，及如依第十三條使用限制性招標者，說明使用限制性招標之正當理由。

保存文件、報告與電子可追溯性

3. 採購機關應自決標日起保存下列資料至少三年：
(a) 與適用本協定之採購有關之招標程序和決標之文件與報告，包括第十三條所規定之報告；及
(b) 確保以電子方式辦理之適用本協定之採購，其數據可適當追溯。

統計資料之彙整與報告

4. 締約國應就其關於適用本協定之採購契約，彙整統計資料並向委員會報告。每一報告應包括一年之資料，且於報告期間末了之二年內提交，並包含下列資料：
(a) 就附件一所載採購機關：
(i) 所有該等機關適用本協定之契約之件數與總值；
(ii) 各機關適用本協定之契約之件數及總值，依國際公認之統一分類制度按財物與服務之類別分列；及
(iii) 各機關採限制性招標之方式，辦理適用本協定之契約之件數與總值。
(b) 就附件二及三所載採購機關，適用本協定之契約之件數與總值，依附件所載機關分列；及

(c) 如無法提供資料時，提供第(a)款及第(b)款所要求資料之估計，並說明作出估計之方法。

5. 締約國如於官方網站上依照第四項要求之方式公布統計資料，該締約國得以通知委員會該網址，以及進入及使用該統計數據之必要指示之方式，取代第四項所要求之報告。

6. 如締約國要求將決標有關公告，按照第二項之規定以電子方式公告，而大眾得透過單一資料庫取得該公告，且該資料庫之格式允許對於適用本協定之契約進行分析，該締約國得以通知委員會該網址，以及進入及使用該統計數據之必要指示之方式，取代第四項所要求之報告。

第十七條 資訊公開

提供資訊予締約國

1. 締約國應依請求，即時提供其他締約國用以判斷特定採購案係以公平公正之方式辦理，且符合本協定規定之必要資訊，包括得標者之特點與相對優點。如揭露此類資訊有妨害未來競標之虞，除非經諮詢提供資訊之締約國並取得其同意，否則取得資訊之締約國不得向任何廠商揭露。

不揭露資訊

2. 不論本協定其他規定，締約國及其採購機關，不得向任何特定廠商揭露可能妨害廠商間公平競爭之資訊。

3. 本協定並未要求締約國及其採購機關、主管機關及審議機關，揭露會造成下列情形之保密資訊：
   (a) 妨礙法律之執行；
   (b) 可能損害廠商間公平競爭；
   (c) 影響特定人之合法商業利益，包括智慧財產權之保護；或
   (d) 其他違反公共利益之情事。

第十八條 國內審查程序

1. 締約國應提供及時、有效、透明且無歧視之行政或司法審查程序使廠商得對涉及或曾涉及其利益且為適用本協定之採購，有下列事項者得提出申訴：
   (a) 違反本協定；或
   (b) 如廠商依締約國國內法，無權就違反協定之情形直接提出申訴者，任何未遵守締約國為執行本協定所訂定之措施之情形。

申訴之程序規定應以書面列明，且得供一般人取得。

2. 如廠商之投訴係針對涉及或曾涉及其利益且為適用本協定之採購，有第一項所述之違反本協定或未遵守措施情形者，採購機關之締約國應鼓勵該機關與廠商以諮商方式解決爭議。該採購機關應對投訴事項予以公正且及時之考量，以不損及廠商正在進行中的採購案或未來採購案，或其依行政或司法審查程序尋求改正措施之權利。

3. 各廠商應被允許有充足的時間準備與提出申訴，無論如何，不得少於廠商得知或合理的可得知申訴事實起十日。

4. 締約國應設立或指派至少一個獨立於採購機關之公正行政或司法機關受理與審查廠商就適用本協定之採購之申訴。

5. 如申訴係由第四項所定行政或司法機關以外之機構先行審議時，締約國應確保廠商對該適用本協定之採購之初步決定，得向獨立於採購機關之公正行政或司法機關提起上訴。

6. 締約國應確保非屬法院之審查機關之決定，應受司法審查或具備下列審查程序：
   (a) 採購機關應以書面回覆申訴，且將一切相關文件向審查機關揭露；
   (b) 程序之參與者（以下簡稱「參與者」）應有權於審查機關作成決定前陳述意見；
   (c) 參與者有權派遣代表或有人陪同；
   (d) 參與者應可參與全部程序；
   (e) 參與者有權要求程序公開進行，且得提出證人；及
   (f) 審查機關應即時以書面作成決定或建議，且應包含其各項決定或建議之理由。

7. 締約國應採用或維持含有下列事項之程序：
   (a) 快速臨時措施，俾保留廠商參加採購之機會。該臨時措施得使採購程序暫停進行，但申訴程序得規定於決定是否適用此等措施時，得就避免對包括公共利益在內之有關利益所生之不利後果列入考量，且應以書面說明不採取此等措施之正當理由；及
   (b) 如審查機關決定有第一項違反本協定或未遵守措施之情形存在，應有改正措施或賠償所受損害，所受損害之賠償得限於備標之成本或與申訴有關之成本，或兩者之總和。

第十九條 適用範圍之修正

預定修正之通知

1. 締約國對於附錄一之附件之預定改正、機關於不同附件之移列、機關之移除或其他修正，應通知委員會(所述各項，以下簡稱「修正」)。提出修正之締約國（以下簡稱「修正國」）應將以下事項包括於通知中：
   (a) 如欲以政府對該機關採購之控制或影響力已有效地排除為由，行使權力將該機關自附錄一之附件中移除者，為其排除之證據；或
   (b) 若為其他修正者，為本協定所載雙方協議適用範圍之改變所可能造成之效果之資訊。

通知之異議

2. 締約國於本協定下之權利可能因第一項所載預定修正通知而受影響者，得通知委員會對該預定修正提出異議。異議應於該通知向締約國分送日起四十五日內提出，且應說明異議之理由。

諮商

3. 修正國與提出異議之締約國（以下簡稱「異議國」）應盡力以諮商解決爭議。在諮商時，修正國與異議國應就下列事項考量預定之修正：
   (a) 就第一項第(a)款規定之通知，依第八項第(b)款所採標準，載明已有效去除政府對採購機關適用本協定之採購之控制與影響力；及
   (b) 就第一項第(b)款規定之通知，依第八項第(c)款所採與修正之補償性調整程度有關之基準，以維持權利與義務之平衡及本協定中共同同意適用範圍之對等程序。

修正之變更
4. 修正國與異議國以諮商解決異議，修正國並據以變更其預定修正時，修正國應依第一項通知委員會，且該修正之變更應於符合本條規定時方得生效。

修正之實施
5. 預定之修正應於下列情形方得生效：
(a) 第一項所定預定修正之通知向締約國分送日起四十五日內，無締約國以書面向委員會提出異議；
(b) 所有異議國通知委員會撤回其對預定修正之異議；或
(c) 第一項所定預定修正之通知向締約國分送日起已屆一百五十日，且修正國已以書面通知委員會其有意實施該修正。

實質同等適用範圍之撤回
6. 當修正係依第五項第(c)款生效時，異議國得撤回實質同等適用範圍。不論第四條第一項第(b)款之規定，依本項規定之撤回得僅對修正國施行。異議國至少應在撤回生效前 30 日，以書面通知委員會此撤回。依本項規定之撤回應符合委員會依第八項第(c)款所採關於補償性調整程度之基準。

協助解決異議之仲裁程序
7. 委員會依據第八項採用仲裁程序以協助解決異議時，修正國或異議國得在預定修正之通知向締約國分送日起一百二十日內啟動仲裁程序：
(a) 如無締約國在期限內啟動仲裁程序：

(i) 不論第五項第(c)款之規定，預定之修正應於第一項規定之預定修正通知向締約國分送日起一百三十日生效，且修正國已以書面通知委員會其有意實施該修正；及

(ii) 異議國不得依第六項撤回適用範圍。

(b) 如修正國或異議國已啟動仲裁程序：

(i) 不論第五項第(c)款之規定，預定之修正在仲裁程序結束前不生效力。

(ii) 任何欲執行補償權利，或依第六項規定撤回實質同等適用範圍之異議國，應參與仲裁程序；

(iii) 修正國依據第五項第(c)款之規定使該修正生效者，應遵循仲裁程序之結果；及

(iv) 如修正國依據第五項第(c)款之規定使該修正生效時，如未遵循仲裁程序之結果，異議國得依第六項規定撤回實質同等適用範圍，但以該撤回符合仲裁程序結果者為限。

委員會職責
8. 委員會應通過下列事項：
(a) 有助解決第二項所定異議之仲裁程序；
(b) 載明機關適用本協定之採購，政府對其控制與影響力已有效去除之認定基準；及
(c) 決定對依第一項第(b)款規定修正之補償性調整程度及第六項所定實質同等適用範圍之基準。

第二十條 諮商及爭端解決
1. 締約國對另一締約國就任何影響本協定運作事項所為之表示，應予以同理心考量且給予充分的諮商機會。
2. 如締約國認為因下列情事，其依本協定直接或間接可得利益遭取消或減損，或本協定目標之達成受到妨礙：
(a) 其他締約國未能履行其於本協定之義務；或
(b) 其他締約國採取任何措施，不論該措施是否牴觸本協定之規定，

締約國得訴諸「爭端解決規則及程序瞭解書」(以下簡稱「爭端解決瞭解書」) 之規定，以使該事件依共同滿意之方式解決。
3. 爭端解決瞭解書適用於本協定之任何諮商及爭端解決，但不論爭端解決瞭解書第二十二條第三項之規定，除本協定外，任何基於該瞭解書附錄一所列之協定而生之爭端，均不得導致依本協定所為之減讓或其他義務之暫停，而本協定之爭端亦不得導致該瞭解書附錄一所列其他協定所為之減讓或其他義務之暫停。

第二十一條 機構
政府採購委員會
1. 應設立由所有締約國之代表組成之政府採購委員會。委員會應自選其主席，並視需要召開會議，但每年至少應集會一次，俾使締約國就與本協定之運作或促進本協定目標有關之任何事項有諮商之機會，並執行締約國交付之其他任務。
2. 委員會得設工作小組或其他附屬機構以執行委員會交付之任務。
3. 委員會應每年：
(a) 檢討本協定之執行與運作情形；及
(b) 依馬爾喀什設立世界貿易組織協定（以下簡稱「世界貿易組織協定」）第四條第八項規定，將其活動及與本協定之執行及運作有關之發展，通知世界貿易組織總理事會。

觀察員
4. 非本協定締約國之世界貿易組織會員國有權以書面通知方式，以觀察員身分參加本委員會。任何世界貿易組織觀察員得以書面向委員會請求以觀察員身分參加本委員會，且委員會得賦予其觀察員之身分。

第二十二條　最後規定

接受與生效
1. 就適用範圍已載明於本協定附錄一之附件，且於一九九四年四月十五日簽署接受本協定，或於前述日期前以尚待批准之方式先行簽署本協定並嗣後於一九九六年一月一日前批准之政府而言，本協定自一九九六年一月一日起生效。

加入
2. 世界貿易組織會員國得依委員會決定所載、該會員國與締約國協議之條件，加入本協定。加入之手續，於該政府向世界貿易組織秘書長提交一份載明前述協議條件之文件時完成。本協定應於會員國提交加入文件後第 30 日對該會員國生效。

保留
3. 對本協定之任何規定，締約國不得有所保留。

國內立法
4. 各締約國應確保在不晚於本協定對其開始生效日前，其適用於其採購機關之法律、規章、行政程序、規則、程序與實務均符合本協定之規定。
5. 各締約國與本協定有關之法律與規章及其施行如有變更，應通知委員會。

未來之協商及未來之工作計畫
6. 各締約國應盡力避免新增或繼續使用歧視性措施，而扭曲公開採購。
7. 本協定各締約國至遲應於二〇一二年三月三十日通過之政府採購協定修正議定書生效後第三年年底前，以及其後定期進行協商，俾在兼顧開發中國家之需要下，改進本協定、逐步減少與去除歧視措施，並在互惠基礎上儘可能擴大其適用範圍。
8. (a) 為促進本協定之實施以及進行第七項所定之協商，委員會應透過採行下列工作計畫進行未來之工作：
   (i) 對於中小企業之處理；
   (ii) 統計資料之彙整與發布；
   (iii) 對於永續採購之處理；
   (iv) 締約國附件所載排除與限制條件；及
   (v) 國際採購之安全標準。
   (b) 委員會：
   (i) 得通過含有額外項目之工作計畫清單，該清單得定期檢討與更新；及
   (ii) 應決議第(a)款之特定工作計畫及依第(b)款第(i)目通過之各工作計畫中應進行之工作。
9. 按照世界貿易組織協定附件 1A 之原產地規則協定內有關調和貨物原產地規則工作計畫之結論，以及關於服務貿易之協商，締約國應於修訂第四條第五項時，在適宜情形下，將該工作計畫及協商結果列入考量。
10. 委員會至遲應於政府採購協定修正議定書生效後第五年年底前，檢討第二十條第二項第(b)款之適用性。

修正
11. 締約國得修正本協定。通過修正並將其送交締約國接受之決定應以共識決作成。修正將依下列情形生效：
   (a) 除第(b)款規定情形外，對接受之締約國而言，三分之二以上締約國接受時，及對其後接受之締約國而言，於其接受時；
   (b) 如委員會以共識決決議該修正不會改變締約國之權利和義務，對於所有締約國而言，應於三分之二締約國接受時生效。

退出
12. 任一締約國均得退出本協定。此一退出，自世界貿易組織秘書長收到該締約國退出之書面通知之日起，屆滿六十日始生效。任一締約國於此通知時，得請求立即召開委員會會議。
13. 如本協定任一締約國停止其為世界貿易組織之會員，亦應停止其為本協定之締約國，並自停止其為世界貿易組織之會員之日起生效。

特定締約國間排除適用本協定
14. 任何兩締約國之一，若於接受或加入本協定時，不同意本協定之相互適用，則本協定不適用於該兩締約國之間。

附錄
15. 本協定之附錄為構成本協定之一部分。

秘書處
16. 本協定應由世界貿易組織秘書處提供服務。

保存
17. 本協定應存放於世界貿易組織秘書長之處。秘書長應即時提供本協定各簽署國本協定、依第十九條所為之修正、依第十一項所為之修正，依第二項所為之加入通知，以及依第十二項或第十三項所為之退出之簽證副本。

登記
18. 本協定應依聯合國憲章第一〇二條規定辦理登記。

附錄四、Amending the Agreement on Government Procurement 2 April 2012

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:

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:
(ii) 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

1. Each Party shall:

(a) promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clause mandated by law or regulation and incorporated by reference in notices or tender documentation and procedure regarding covered procurement, and any modifications thereof, 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

1. 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 1 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 governments 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

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.

附錄五、Federal Acquisition Regulation (FAR)

Subpart 33.1—Protests

33.101 Definitions.

As used in this subpart—

"Day" means a calendar day, unless otherwise specified. In the computation of any period—

(1) The day of the act, event, or default from which the designated period of time begins to run is not included; and

(2) The last day after the act, event, or default is included unless—

(i) The last day is a Saturday, Sunday, or Federal holiday; or

(ii) In the case of a filing of a paper at any appropriate administrative forum, the last day is a day on which weather or other conditions cause the closing of the forum for all or part of the day, in which event the next day on which the appropriate administrative forum is open is included.

"Filed" means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

"Interested party for the purpose of filing a protest" means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

"Protest" means a written objection by an interested party to any of the following:

(1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.

(2) The cancellation of the solicitation or other request.

(3) An award or proposed award of the contract.

(4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

"Protest venue" means protests filed with the agency, the Government Accountability Office, or the U.S. Court of Federal Claims. U.S. District Courts do not have any bid protest jurisdiction.

33.102 General.

(a) Without regard to the protest venue, contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the agency, the Government Accountability Office (GAO), or the U.S. Court of Federal Claims. (See 19.302 for protests of small business status, 19.305 for protests of disadvantaged business status, 19.306 for protests of HUBZone small business status, and 19.307 for protests of service-disabled veteran-owned small business status, and 19.308 for protests of the status of an economically disadvantaged women-owned small business concern or of a women-owned small business concern eligible under the Women-Owned Small Business Program.)

(b) If, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency may—

(1) Take any action that could have been recommended by the Comptroller General had the protest been filed with the Government Accountability Office;

(2) Pay appropriate costs as stated in 33.104(h); and

(3) Require the awardee to reimburse the Government's costs, as provided in this paragraph, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(i) When a protest is sustained by GAO under circumstances that may allow the Government to seek reimbursement for protest costs, the contracting officer will determine whether the protest was sustained based on the awardee's negligent or intentional misrepresentation. If the protest was sustained on several issues, protest costs shall be apportioned according to the costs attributable to the awardee's actions.

(ii) The contracting officer shall review the amount of the debt, degree of the awardee's fault, and costs of collection, to determine whether a demand for reimbursement ought to be made. If it is in the best interests of the Government to seek reimbursement, the contracting officer shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary. Prior to issuing a final decision, the contracting officer shall afford the contractor an opportunity to inspect and copy agency records pertaining to the debt to the extent permitted by statute and regulation, and to request review of the matter by the head of the contracting activity.

(iii) When appropriate, the contracting officer shall also refer the matter to the agency debarment official for consideration under Subpart 9.4.

(c) In accordance with 31 U.S.C. 1558, with respect to any protest filed with the GAO, if the funds available to the agency for a contract at the time a protest is filed in connection with a solicitation for, proposed award of, or award of such a contract would otherwise expire, such funds shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such appeal or request, whichever is later.

(d) *Protest likely after award.* The contracting officer may stay performance of a contract within the time period contained in paragraph 33.104(c)(1) if the contracting officer makes a written determination that—

(1) A protest is likely to be filed; and

(2) Delay of performance is, under the circumstances, in the best interests of the United States.

(e) An interested party wishing to protest is encouraged to seek resolution within the agency (see 33.103) before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations (4 CFR Part 21).

(f) No person may file a protest at GAO for a procurement integrity violation unless that person reported to the contracting officer the information constituting evidence of the violation within 14 days after the person first discovered the possible violation (41 U.S.C. 423(g)).

33.103 Protests to the agency.

(a) *Reference.* Executive Order 12979, Agency Procurement Protests, establishes policy on agency procurement protests.

(b) Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.

(c) The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

(d) The following procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency:

(1) Protests shall be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements of paragraph (d)(2) of this section may be grounds for dismissal of the protest.

(2) Protests shall include the following information:

(i) Name, address, and fax and telephone numbers of the protester.

(ii) Solicitation or contract number.

(iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.

(vii) All information establishing that the protester is an interested party for the purpose of filing a protest.

(viii) All information establishing the timeliness of the protest.

(3) All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.

(4) In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest. Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement. If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 CFR 21.2(a)(3)).

(e) Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed.

(f) Action upon receipt of protest.

(1) Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(2) If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to paragraph (f)(1) of this section.

(3) Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(4) Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

(g) Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information.

(h) Agency protest decisions shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.

33.104 Protests to GAO.

Procedures for protests to GAO are found at 4 CFR Part 21 (GAO Bid Protest Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR Part 21, 4 CFR Part 21 governs.

(a) General procedure.

(1) A protester is required to furnish a copy of its complete protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer, so it is received no later than 1 day after the protest is filed with the GAO. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day.

(2) Immediately after receipt of the GAO's written notice that a protest has been filed, the agency shall give notice of the protest to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the protest is denied. The agency shall furnish copies of the protest submissions to such parties with instructions to (i) communicate directly with the GAO, and (ii) provide copies of any such communication to the agency and to other participating parties when they become known. However, if the protester has identified sensitive information and requests a protective order, then the contracting officer shall obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.

(3)(i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. The agency shall submit a complete report to the GAO within 30 days after the GAO notifies the agency by telephone that a protest has been filed, or within 20 days after receipt from the GAO of a determination to use the express option, unless the GAO—

(A) Advises the agency that the protest has been dismissed; or

(B) Authorizes a longer period in response to an agency's request for an extension. Any new date is documented in the agency's file.

(ii) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. However, if the GAO dismisses the protest before the documents are submitted to the GAO, then no protest file need be made available. Information exempt from disclosure under 5 U.S.C. 552 may be redacted from the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate—

(A) The protest;

(B) The offer submitted by the protester;

(C) The offer being considered for award or being protested;

(D) All relevant evaluation documents;

(E) The solicitation, including the specifications or portions relevant to the protest;

(F) The abstract of offers or relevant portions; and

(G) Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester.

(iii) At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and the GAO a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in its report, and those documents that the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents must be filed with the GAO and the other parties within 2 days after receipt of this list.

(iv) The agency report to the GAO shall include—

(A) A copy of the documents described in 33.104(a)(3)(ii);

(B) The contracting officer's signed statement of relevant facts, including a best estimate of the contract value, and a memorandum of law. The contracting officer's statement shall set forth findings, actions, and recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest; and

(C) A list of parties being provided the documents.

(4)(i) At the same time the agency submits its report to the GAO, the agency shall furnish copies of its report to the protester and any intervenors. A party shall receive all relevant documents, except—

(A) Those that the agency has decided to withhold from that party for any reason, including those covered by a protective order issued by the GAO. Documents covered by a protective order shall be released only in accordance with the terms of the order. Examples of documents the agency may decide to exclude from a copy of the report include documents previously furnished to or prepared by a party; classified information; and information that would give the party a competitive advantage; and

(B) Protester's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.

(ii)(A) If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or should have known, the agency shall provide the requested documents to the GAO within 2 days of receipt of the request.

(B) The additional documents shall also be provided to the protester and other interested parties within this 2-day period unless the agency has decided to withhold them for any reason (see subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order.

(C) The agency shall notify the GAO of any documents withheld from the protester and other interested parties and shall state the reasons for withholding them.

(5) The GAO may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency.

(i) *Requests for protective orders.* Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, with copies furnished simultaneously to all parties.

(ii) *Exclusions and rebuttals.* Within 2 days after receipt of a copy of the protective order request, any party may file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request shall be furnished simultaneously to all parties.

(iii) *Additional documents.* If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties.

(iv) *Sanctions and remedies.* The GAO may impose appropriate sanctions for any violation of the terms of the protective order. Improper disclosure of protected information will entitle the aggrieved party to all appropriate remedies under law or equity. The GAO may also take appropriate action against an agency which fails to provide documents designated in a protective order.

(6) The protester and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within 10 days, or 5 days if express option is used, after receipt of the report, with copies provided to the contracting officer and to other participating interested parties. If a hearing is held, these comments are due within 5 days after the hearing.

(7) Agencies shall furnish the GAO with the name, title, and telephone number of one or more officials (in both field and headquarters offices, if desired) whom the GAO may contact who are knowledgeable about the subject matter of the protest. Each agency shall be responsible for promptly advising the GAO of any change in the designated officials.

(b) Protests before award.

(1) When the agency has received notice from the GAO of a protest filed directly with the GAO, a contract may not be awarded unless authorized, in accordance with agency procedures, by the head of the contracting activity, on a nondelegable basis, upon a written finding that—

(i) Urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO; and

(ii) Award is likely to occur within 30 days of the written finding.

(2) A contract award shall not be authorized until the agency has notified the GAO of the finding in paragraph (b)(1) of this section.

(3) When a protest against the making of an award is received and award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose offers might become eligible for award of the protest. If appropriate, those offerors should be requested, before expiration of the time for acceptance of their offer, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extensions of offers, consideration should be given to proceeding under paragraph (b)(1) of this section.

(c) Protests after award.

(1) When the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded contract, except as provided in paragraphs (c)(2) and (3) of this section.

(2) In accordance with agency procedures, the head of the contracting activity may, on a nondelegable basis, authorize contract performance, notwithstanding the protest, upon a written finding that—

(i) Contract performance will be in the best interests of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision.

(3) Contract performance shall not be authorized until the agency has notified the GAO of the finding in paragraph (c)(2) of this section.

(4) When it is decided to suspend performance or terminate the awarded contract, the contracting officer should attempt to negotiate a mutual agreement on a no-cost basis.

(5) When the agency receives notice of a protest filed with the GAO after the dates contained in paragraph (c)(1), the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

(d) *Findings and notice.* If the decision is to proceed with contract award, or continue contract performance under paragraphs (b) or (c) of this section, the contracting officer shall include the written findings or other required documentation in the file. The contracting officer also shall give written notice of the decision to the protester and other interested parties.

(e) *Hearings.* The GAO may hold a hearing at the request of the agency, a protester, or other interested party who has responded to the notice in paragraph (a)(2) of this section. A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO. All parties may file comments on the hearing and the agency report within 5 days of the hearing.

(f) *GAO decision time.* GAO issues its recommendation on a protest within 100 days from the date of filing of the protest with the GAO, or within 65 days under the express option. The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option.

(g) *Notice to GAO.* If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the 60-day period. The report shall explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.

(h) Award of costs.

(1) If the GAO determines that a solicitation for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency pay to an appropriate protester the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs. The agency shall use funds available for the procurement to pay the costs awarded.

(2) The protester shall file its claim for costs with the contracting agency within 60 days after receipt of the GAO's recommendation that the agency pay the protester its costs. Failure

to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

(3) The agency shall attempt to reach an agreement on the amount of costs to be paid. If the agency and the protester are unable to agree on the amount to be paid, the GAO may, upon request of the protester, recommend to the agency the amount of costs that the agency should pay.

(4) Within 60 days after the GAO recommends the amount of costs the agency should pay the protester, the agency shall notify the GAO of the action taken by the agency in response to the recommendation.

(5) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 2.101, "Small business concern"), costs under paragraph (h)(2) of this section—

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and 5 CFR 304.105; or

(ii) For attorneys' fees that exceed $150 per hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorneys' fees for small businesses.

(6) Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs that have not yet been paid.

(7) Any costs the contractor receives under this section shall not be the subject of subsequent proposals, billings, or claims against the Government, and those exclusions should be reflected in the cost agreement.

(8) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

33.105 Protest at the U.S. Court of Federal Claims.

Procedures for protests at the U.S. Court of Federal Claims are set forth in the rules of the U.S. Court of Federal Claims. The rules may be found at http://www.uscfc.uscourts.gov/rules-and-forms.

33.106 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.233-2, Service of Protest, in solicitations for contracts expected to exceed the simplified acquisition threshold.

(b) The contracting officer shall insert the clause at 52.233-3, Protest After Award, in all solicitations and contracts. If a cost reimbursement contract is contemplated, the contracting officer shall use the clause with its Alternate I.

附錄六、DIRECTIVE 2007/66/EC

THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee (1),Having regard to the opinion of the Committee of the Regions (2),Acting in accordance with the procedure laid down in Article 251 of the Treaty (3),Whereas:

(1) Council Directives 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (4) and 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (5) concern the review procedures with regard to contracts awarded by contracting authorities as referred to in Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts,public supply contracts and public service contracts (6) and contracting entities as referred to in Article 2 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (7).Directives 89/665/EEC and 92/13/EEC are intended to ensure the effective application of Directives2004/18/EC and 2004/17/EC.

(2) Directives 89/665/EEC and 92/13/EEC therefore apply only to contracts falling within the scope of Directives2004/18/EC and 2004/17/EC as interpreted by the Court of Justice of the European Communities, whatever competitive procedure or means of calling for competition is used, including design contests, qualification systems and dynamic purchasing systems. According to the case law of the Court of Justice, the Member States should ensure that effective and rapid remedies are available against decisions taken by contracting authorities and contracting entities as to whether a particular contract falls within the personal and material scope of irectives 2004/18/EC and 2004/17/EC.

(3) Consultations of the interested parties and the case law f the Court of Justice have revealed a certain number of eaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms 20.12.2007 EN Official Journal of the European Union L 335/31

(1) OJ C 93, 27.4.2007, p. 16.

(2) OJ C 146, 30.6.2007, p. 69.

(3) Opinion of the European Parliament of 21 June 2007 (not yet published in the Official Journal) and Council Decision of 15 November 2007.

(4) OJ L 395, 30.12.1989, p. 33. Directive as amended by Directive 92/50/EEC (OJ L 209, 24.7.1992, p. 1).

(5) OJ L 76, 23.3.1992, p. 14. Directive as last amended by Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).

(6) OJ L 134, 30.4.2004, p. 114. Directive as last amended by Directive 2006/97/EC.

(7) OJ L 134, 30.4.2004, p. 1. Directive as last amended by Directive 2006/97/EC. established by Directives 89/665/EEC and 92/13/EEC do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. Consequently, the guarantees of transparency and non-discrimination sought by those Directives should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by Directives 2004/18/EC and 2004/17/EC. Directives 89/665/EEC and 92/13/EEC should therefore be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.

(4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not.

(5) The duration of the minimum standstill period should take into account different means of communication. If rapid means of communication are used, a shorter period can be provided for than if other means of communication are used. This Directive only provides for minimum standstill periods. Member States are free to introduce or to maintain periods which exceed those minimum periods. Member States are also free to decide which period should apply, if different means of communication are used cumulatively.

(6) The standstill period should give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure. When the award decision is notified to them, the tenderers concerned should be given the relevant information which is essential for them to seek effective review. The same applies accordingly to candidates to the extent that the contracting authority or contracting entity has not made available in due time information about the rejection of their application.
(7) Such relevant information includes, in particular, a summary of the relevant reasons as set out in Article
41 of Directive 2004/18/EC and Article 49 of Directive 2004/17/EC. As the duration of the standstill period
varies from one Member State to another, it is also important that the tenderers and candidates concerned
should be informed of the effective period available to them to bring review proceedings.
(8) This type of minimum standstill period is not intended to apply if Directive 2004/18/EC or Directive 2004/17/EC does not require prior publication of a contract notice in the *Official Journal of the European Union*, in particular in cases of extreme urgency as provided for in Article 31(1)(c) of Directive 2004/18/EC or Article 40(3)(d) of Directive 2004/17/EC. In those cases it is sufficient to provide for effective review procedures after the conclusion of the contract. Similarly, a standstill period is not necessary if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned. In this case there is no other person remaining in the tendering procedure with an interest in receiving the notification and in benefiting from a standstill period to allow for effective review.
(9) Finally, in cases of contracts based on a framework agreement or a dynamic purchasing system, a mandatory standstill period could have an impact on the efficiency gains intended by those tendering procedures. Member States should be able therefore, instead of introducing a mandatory standstill period, to provide for ineffectiveness as an effective sanction in accordance with Article 2d of both Directives89/665/EEC and 92/13/EEC for infringements of the second indent of the second subparagraph of Article 32(4) and of Article 33(5) and (6) of Directive 2004/18/EC, and of Article 15(5) and (6) of Directive 2004/17/EC.
(10) In the cases referred to in Article 40(3)(i) of Directive 2004/17/EC, contracts based on a framework agreement do not require prior publication of a contract notice in the *Official Journal of the European Union.* In those cases a standstill period should not be mandatory.
(11) When a Member State requires a person intending to use a review procedure to inform the contracting authority or contracting entity of that intention, it is necessary to make it clear that this should not affect the standstill period or any other period to apply for review. Furthermore, when a Member State requires that the person concerned has first sought a review with the contracting authority or contracting entity, it is necessary that this person should have a reasonable minimum period within which to refer to the competent review body before the conclusion of the contract, in the event that that person should wish to challenge the reply or lack of reply from the contracting authority or contracting entity.L 335/32 EN Official Journal of the European Union 20.12.2007
(12) Seeking review shortly before the end of the minimum standstill period should not have the effect of depriving the body responsible for review procedures of the minimum time needed to act, in particular to extend the standstill period for the conclusion of the contract.It is thus necessary to provide for an independent minimum standstill period that should not end before the review body has taken a decision on the application.This should not prevent the review body from making a prior assessment of whether the review as such is admissible. Member States may provide that this period shall end either when the review body has taken a decision on the application for interim measures, including on a further suspension of the conclusion of
the contract, or when the review body has taken a decision on the merits of the case, in particular on the application for the setting aside of an unlawful decision.
(13) In order to combat the illegal direct award of contracts,which the Court of Justice has called the most serious breach of Community law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independentreview body.
(14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete.Direct awards within the meaning of this Directive should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union* within the meaning of Directive 2004/18/EC. This corresponds to a procedure without prior call for competition within the meaning of Directive 2004/17/EC.
(15) Possible justifications for a direct award within the meaning of this Directive may include the exemptions in Articles 10 to 18 of Directive 2004/18/EC, the application of Article 31, Article 61 or Article 68 of Directive 2004/18/EC, the award of a service contract in accordance with Article 21 of Directive 2004/18/EC or a lawful 'in-house' contract award following the interpretation of the Court of Justice.
(16) The same applies to contracts which meet the conditions for an exclusion or special arrangements in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article

62 of Directive 2004/17/EC, to cases involving the application of Article 40(3) of Directive 2004/17/EC or to the award of a service contract in accordance with Article 32 of Directive 2004/17/EC.
(17) A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.
(18) In order to prevent serious infringements of the standstill obligation and automatic suspension, which are prerequisites for effective review, effective sanctions should apply. Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle if they are combined with infringements of Directive 2004/18/EC or Directive 2004/17/EC to the extent that
those infringements have affected the chances of the tenderer applying for review to obtain the contract.
(19) In the case of other infringements of formal requirements, Member States might consider the principle of ineffectiveness to be inappropriate. In those cases Member States should have the flexibility to provide for alternative penalties. Alternative penalties should be limited to the imposition of fines to be paid to a body independent of the contracting authority or entity or to a shortening of the duration of the contract. It is for Member States to determine the details of alternative penalties and the rules of their application.
(20) This Directive should not exclude the application of stricter sanctions in accordance with national law.
(21) The objective to be achieved where Member States lay down the rules which ensure that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed. The consequences resulting from a contract being considered ineffective should be determined by national law. National law may therefore, for example, provide for the retroactive cancellation of all contractual obligations (*ex tunc*) or conversely limit the scope of the cancellation to those obligations which would still have to be performed (*ex nunc*). This should not lead to the absence of forceful penalties if the obligations deriving from a contract have already been fulfilled either entirely or almost entirely. In such cases Member States should provide for alternative penalties as well, taking into account the extent to which a contract remains in force in accordance with national law. Similarly, the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law. 20.12.2007 EN Official Journal of the European Union L 335/33
(22) However, in order to ensure the proportionality of the sanctions applied, Member States may grant the body responsible for review procedures the possibility of not jeopardising the contract or of recognising some or all of its temporal effects, when the exceptional circumstances of the case concerned require certain overriding reasons relating to a general interest to be respected. In those cases alternative penalties should be applied instead. The review body independent of the contracting authority or contracting entity should examine all relevant aspects in order to establish whether overriding reasons relating to a general interest require that the effects of the contract should be maintained.
(23) In exceptional cases the use of the negotiated procedure without publication of a contract notice within the meaning of Article 31 of Directive 2004/18/EC or Article 40(3) of Directive 2004/17/EC is permitted immediately after the cancellation of the contract. If in those cases, for technical or other compelling reasons, the remaining contractual obligations can, at that stage, only be performed by the economic operator which has been awarded the contract, the application of overriding reasons might be justified.
(24) Economic interests in the effectiveness of a contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned should not constitute overriding reasons.
(25) Furthermore, the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective.
(26) In order to avoid legal uncertainty which may result from ineffectiveness, Member States should provide for an exemption from any finding of ineffectiveness in cases where the contracting authority or contracting entity considers that the direct award of any contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordancewith Directives 2004/18/EC and 2004/17/EC and has applied a minimum standstill period allowing for effective remedies. The voluntary publication which triggers this standstill period does not imply any extension of obligations deriving from Directive 2004/18/EC or Directive 2004/17/EC.
(27) As this Directive strengthens national review procedures, especially in cases of an illegal direct award, economic operators should be encouraged to make use of these new mechanisms. For reasons of legal certainty the enforceability of the ineffectiveness of a contract is limited to a certain period. The effectiveness of these time limits should be respected.
(28) Strengthening the effectiveness of national review procedures should encourage those concerned to make greater use of the possibilities for review by way of interlocutory procedure

before the conclusion of a contract. In those circumstances, the corrective mechanism should be refocused on serious infringements of Community lawon public procurement.
(29) The voluntary attestation system provided for by Directive 92/13/EEC, whereby contracting entities have the possibility of having the conformity of their award procedures established through periodic examinations, has been virtually unused. It cannot thus achieve its objective of preventing a significant number of infringements of Community law on public procurement.On the other hand, the requirement imposed on Member States by Directive 92/13/EEC to ensure the permanent availability of bodies accredited for this purpose can represent an administrative maintenance cost which is no longer justified in the light of the lack of real demand by contracting entities. For these reasons, the attestation system should be abolished.
(30) Similarly, the conciliation mechanism provided for by Directive 92/13/EEC has not elicited any real interest from economic operators. This is due both to the fact that it does not of itself make it possible to obtain binding interim measures likely to prevent in time the illegal conclusion of a contract, and also to its nature,which is not readily compatible with observance of the particularly short deadlines applicable to reviews seeking interim measures and the setting aside of decisions taken unlawfully. In addition, the potential effectiveness of the conciliation mechanism has been weakened further by the difficulties encountered in establishing a complete and sufficiently wide list of independent conciliators in each Member State, available at any time and capable of dealing with conciliation requests at very short notice.
For these reasons, the conciliation mechanism should be abolished.
(31) The Commission should be entitled to request Member States to provide it with information on the operation of national review procedures proportionate to the objective pursued by involving the Advisory Committee for Public Contracts in determining the extent and nature of such information. Indeed, only by making such information available will it be possible to assess correctly the effects of the changes introduced by this Directive at the end of a significant period of implementation.L 335/34 EN Official Journal of the European Union 20.12.2007
(32) The Commission should review progress made in the Member States and report to the European Parliament and to the Council on the effectiveness of this Directive no later than three years after its deadline for implementation.
(33) The measures necessary for the implementation of Directives 89/665/EEC and 92/13/EEC should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1).
(34) Since, for the reasons stated above, the objective of this Directive, namely improving the effectiveness of review procedures concerning the award of contracts falling within the scope of Directives 2004/18/EC and 2004/17/EC, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article,this Directive does not go beyond what is necessary in order to achieve that objective, while respecting the principle of the procedural autonomy of the Member States.
(35) In accordance with point 34 of the Interinstitutional Agreement on better law-making (2), Member States should draw up, for themselves and in the interests of the Community, their own tables illustrating the correlation between this Directive and the transposition measures, and make them public.
(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular,this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.
(37) Directives 89/665/EEC and 92/13/EEC should therefore be amended accordingly,HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 89/665/EEC

Directive 89/665/EEC is hereby amended as follows:
1. Articles 1 and 2 shall be replaced by the following:

'*Article 1*

Scope and availability of review procedures

1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (*), unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.
2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national

rules.
3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.20.12.2007 EN Official Journal of the European Union L 335/35
(1) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).(2) OJ C 321, 31.12.2003, p. 1.
4. Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.
5. Member States may require that the person concerned first seek review with the contracting authority. In that case,Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.
Article 2
Requirements for review procedures
1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:
(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation ofany decision taken by the contracting authority;
(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in
the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
(c) award damages to persons harmed by an infringement.
2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.
3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision,Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no
earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).
4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.
5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.
6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.
7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law. Furthermore , except where a decision must be set aside prior to the award of damages, a Member State may provide that,after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.L 335/36 EN Official Journal of the European Union 20.12.2007
8. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.
9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision
must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review

body. The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

(*) OJ L 134, 30.4.2004, p. 114. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).';

2. the following articles shall be inserted:

'*Article 2a*

Standstill period

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/18/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision. Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure. Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned. The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

— a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive, and, — a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

Article 2b

Derogations from the standstill period

Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

(a) if Directive 2004/18/EC does not require prior publication of a contract notice in the *Official Journal of the European Union*;

(b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;

(c) in the case of a contract based on a framework agreement as provided for in Article 32 of Directive 2004/18/EC and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 33 of that Directive.

20.12.2007 EN Official Journal of the European Union L 335/37 If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

— there is an infringement of the second indent of the second subparagraph of Article 32(4) or of Article 33(5) or (6) of Directive 2004/18/EC, and, — the contract value is estimated to be equal to or to exceed the thresholds set out in Article 7 of Directive 2004/18/EC.

Article 2c

Time limits for applying for review

Where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/18/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

Article 2d

Ineffectiveness

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/18/EC;

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/18/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

(c) in the cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and adynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed.In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

3. Member States may provide that the review body independent of the contracting authority may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead. Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.L 335/38 EN Official Journal of the European Union 20.12.2007

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

— the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/18/EC,

— the contracting authority has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:

— the contracting authority considers that the award of a contract is in accordance with the second indent of the second subparagraph of Article 32(4) or with Article 33(5) and (6) of Directive 2004/18/EC,

— the contracting authority has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Article 2e

Infringements of this Directive and alternative penalties

1. In the case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) which is not covered by Article2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

— the imposition of fines on the contracting authority; or,

— the shortening of the duration of the contract.
Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force. The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.
Article 2f
Time limits
1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:
(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:
— the contracting authority published a contract award notice in accordance with Articles 35(4), 36 and 37 of Directive 2004/18/EC, provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*, or
— the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive. This option also applies to the cases referred to in Article 2b(c) of this Directive;
(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract. 20.12.2007 EN Official Journal of the European Union L 335/39
2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.';
3. Article 3 shall be replaced by the following:
'Article 3
Corrective mechanism
1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2004/18/EC.
2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.
3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:
(a) its confirmation that the infringement has been corrected;
(b) a reasoned submission as to why no correction has been made; or
(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a).
4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.
5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.';4. the following articles shall be inserted: *'Article 3a*
Content of a notice for voluntary ex ante transparency
The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:
(a) the name and contact details of the contracting authority;
(b) a description of the object of the contract;
(c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*;
(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and
(e) where appropriate, any other information deemed useful by the contracting authority.
Article 3b
Committee procedure
1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 (*) (hereinafter referred to as the

Committee).
2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (**) shall apply, having regard to the provisions of Article 8 thereof.

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(*) OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).
(**) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).' ;L 335/40 EN Official Journal of the European Union 20.12.2007
5. Article 4 shall be replaced by the following:
'Article 4
Implementation
1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.
2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3).' ;6. the following article shall be inserted: *'Article 4a*
Review
No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.' .*Article 2***Amendments to Directive 92/13/EEC**Directive 92/13/EEC is hereby amended as follows:
1. Article 1 shall be replaced by the following:
'Article 1
Scope and availability of review procedures
1. This Directive applies to contracts referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*), unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive. Contracts within the meaning of this Directive include supply, works and service contracts, framework agreements and dynamic purchasing systems. Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/17/EC, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.
2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim in respect of harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.
3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.
4. Member States may require that the person wishing to use a review procedure has notified the contracting entity of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.
5. Member States may require that the person concerned first seek review with the contracting entity. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract. Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph. The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting entity has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contracting entity has sent a reply or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

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(*) OJ L 134, 30.4.2004, p. 1. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).' ;20.12.2007 EN Official Journal of the European Union L 335/41 2. Article 2 shall be amended as follows:
(a) the title 'Requirements for review procedures' shall be inserted;
(b) paragraphs 2 to 4 shall be replaced by the following: '2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.
3. When a body of first instance, which is independent of the contracting entity, reviews a contract award decision, Member States shall ensure that the contracting entity cannot conclude the contract before the review body has made a decision on the application

either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4)
and (5).3a. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.4. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.' ;(c) paragraph 6 shall be replaced by the following:6. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.' ;(d) in the first subparagraph of paragraph 9, the words 'court or tribunal within the meaning of Article 177 of the Treaty' shall be replaced by the words 'court or tribunal within the meaning of Article 234 of the Treaty' ;3. the following articles shall be inserted: *'Article 2a*

Standstill period

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting entities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/17/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.
Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.Candidates shall be deemed to be concerned if the contracting entity has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned. L 335/42 EN Official Journal of the European Union 20.12.2007 The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:
— a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC, and,
— a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

Article 2b

Derogations from the standstill period

Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:
(a) if Directive 2004/17/EC does not require prior publication of a notice in the *Official Journal of the European Union*;
(b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;
(c) in the case of specific contracts based on a dynamic purchasing system as provided for in Article 15 of Directive 2004/17/EC.
If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:
— there is an infringement of Article 15(5) or (6) of Directive 2004/17/EC, and,
— the contract value is estimated to be equal to or to exceed the thresholds set out in Article 16 of Directive 2004/17/EC.

Article 2c

Time limits for applying for review

Where a Member State provides that any application for review of a contracting entity's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/17/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of receipt of the contracting entity's decision. The communication of the contracting entity's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for a review concerning decisions referred to in Article

2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

Article 2d

Ineffectiveness

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/17/EC;

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/17/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

(c) in cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a dynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed.In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).20.12.2007 EN Official Journal of the European Union L 335/43

3. Member States may provide that the review body independent of the contracting entity may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects,that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

— the contracting entity considers that the award of a contract without prior publication of a notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/17/EC,

— the contracting entity has published in the *Official Journalof the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude thecontract, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:

— the contracting entity considers that the award of a contract is in accordance with Article 15(5) and (6) of Directive 2004/17/EC,

— the contracting entity has sent a contract award decision,together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Article 2e

Infringements of this Directive and alternative penalties

1. In case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting entity shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

— the imposition of fines on the contracting entity; or,

— the shortening of the duration of the contract.
Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting entity and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force. The award of damages does not constitute an appropriate penalty for the purposes of this paragraph. L 335/44 EN Official Journal of the European Union 20.12.2007
Article 2f
Time limits
1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:
(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:
— the contracting entity published a contract award notice in accordance with Articles 43 and 44 of Directive 2004/17/EC, provided that this notice includes the justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*, or
— the contracting entity informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC. This option also applies to the cases referred to in Article 2b(c) of this Directive;
(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.
2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.' ;4. Articles 3 to 7 shall be replaced by the following:
'Article 3a
Content of a notice for voluntary ex ante transparency
The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:
(a) the name and contact details of the contracting entity;
(b) a description of the object of the contract;
(c) a justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*;
(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and
(e) where appropriate, any other information deemed useful by the contracting entity.
Article 3b
Committee procedure
1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 (*) (hereinafter referred to as the Committee).
2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing
powers conferred on the Commission (**) shall apply, having regard to the provisions of Article 8 thereof.

(*) OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).
(**) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).' ;5. Article 8 shall be replaced by the following:
'Article 8
Corrective mechanism
1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of procurement has been committed during a contract award procedure falling within the scope of Directive 2004/17/EC, or in relation to Article 27(a) of that Directive in the case of contracting entities to which that provision applies.
2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.
3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:
(a) its confirmation that the infringement has been corrected;20.12.2007 EN Official Journal of the European Union L 335/45
(b) a reasoned submission as to why no correction has been made; or
(c) a notice to the effect that the contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of the powers specified in Article 2(1)(a).
4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters

on the fact that the alleged infringement is already the subject of judicial review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.
5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State concerned shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.';6. Articles 9 to 12 shall be replaced by the following:
'*Article 12*
Implementation
1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.
2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3).
Article 12a
Review
No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.';7. the Annex shall be deleted.
Article 3
Transposition
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 20 December 2009. They shall forthwith communicate to the Commission the text of those provisions. When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The Member States shall determine how such reference is to be made.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.
Article 4
Entry into force
This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.
Article 5
Addressees
This Directive is addressed to the Member States.
Done at Strasbourg, 11 December 2007.
For the *European Parliament*
The President
H.-G. PÖTTERING
For the Council
The President
M. LOBO ANTUNES
L 335/46 EN Official Journal of the European Union 20.12.200

附錄七、中華人民共和國政府採購法

第一章　總　則

第一條

為了規範政府採購行為，提高政府採購資金的使用效益，維護國家利益和社會公共利益，保護政府採購當事人的合法權益，促進廉政建設，制定本法。

第二條

在中華人民共和國境內進行的政府採購適用本法。

本法所稱政府採購，是指各級國家機關、事業單位和團體組織，使用財政性資金採購依法制定的集中採購目錄以內的或者採購限額標準以上的貨物、工程和服務的行為。

政府集中採購目錄和採購限額標準依照本法規定的許可權制定。

本法所稱採購，是指以合同方式有償取得貨物、工程和服務的行為，包括購買、租賃、委託、雇用等。

本法所稱貨物，是指各種形態和種類的物品，包括原材料、燃料、設備、產品等。

本法所稱工程，是指建設工程，包括建築物和構築物的新建、改建、擴建、裝修、拆除、修繕等。

本法所稱服務，是指除貨物和工程以外的其他政府採購對象。

第三條

政府採購應當遵循公開透明原則、公平競爭原則、公正原則和誠實信用原則。

第四條

政府採購工程進行招標投標的，適用招標投標法。

第五條

任何單位和個人不得採用任何方式，阻撓和限制供應商自由進入本地區和本行業的政府採購市場。

第六條

政府採購應當嚴格按照批准的預算執行。

第七條

政府採購實行集中採購和分散採購相結合。集中採購的範圍由省級以上人民政府公佈的集中採購目錄確定。

屬於中央預算的政府採購項目，其集中採購目錄由國務院確定並公佈；屬於地方預算的政府採購項目，其集中採購目錄由省、自治區、直轄市人民政府或者其授權的機構確定並公佈。

納入集中採購目錄的政府採購項目，應當實行集中採購。

第八條

政府採購限額標準，屬於中央預算的政府採購項目，由國務院確定並公佈；屬於地方預算的政府採購項目，由省、自治區、直轄市人民政府或者其授權的機構確定並公佈。

第九條

政府採購應當有助於實現國家的經濟和社會發展政策目標，包括保護環境，扶持不發達地區和少數民族地區，促進中小企業發展等。

第十條

政府採購應當採購本國貨物、工程和服務。但有下列情形之一的除外：

（一）需要採購的貨物、工程或者服務在中國境內無法獲取或者無法以合理的商業條件獲取的；

（二）為在中國境外使用而進行採購的；

（三）其他法律、行政法規另有規定的。

前款所稱本國貨物、工程和服務的界定，依照國務院有關規定執行。

第十一條

政府採購的資訊應當在政府採購監督管理部門指定的媒體上及時向社會公開發佈，但涉及商業秘密的除外。

第十二條

在政府採購活動中，採購人員及相關人員與供應商有利害關係的，必須迴避。供應商認為採購人員及相關人員與其他供應商有利害關係的，可以申請其迴避。

前款所稱相關人員，包括招標採購中評標委員會的組成人員，競爭性談判採購中談判小組的組成人員，詢價採購中詢價小組的組成人員等。

第十三條

各級人民政府財政部門是負責政府採購監督管理的部門，依法履行對政府採購活動的監督管理職責。

各級人民政府其他有關部門依法履行與政府採購活動有關的監督管理職責。

第二章　政府採購當事人

第十四條

政府採購當事人是指在政府採購活動中享有權利和承擔義務的各類主體，包括採購人、供應商和採購代理機構等。

第十五條

採購人是指依法進行政府採購的國家機關、事業單位、團體組織。

第十六條

集中採購機構為採購代理機構。設區的市、自治州以上人民政府根據本級政府採購項目組織集中採購的需要設立集中採購機構。

集中採購機構是非營利事業法人，根據採購人的委託辦理採購事宜。

第十七條

集中採購機構進行政府採購活動，應當符合採購價格低於市場平均價格、採購效率更高、採購品質優良和服務良好的要求。

第十八條

採購人採購納入集中採購目錄的政府採購項目，必須委託集中採購機構代理採購；採購未納入集中採購目錄的政府採購項目，可以自行採購，也可以委託集中採購機構在委託的範圍內代理採購。

納入集中採購目錄屬於通用的政府採購項目的，應當委託集中採購機構代理採購；屬於本部門、本系統有特殊要求的項目，應當實行部門集中採購；屬於本單位有特殊要求的項目，經省級以上人民政府批准，可以自行採購。

第十九條

採購人可以委託經國務院有關部門或者省級人民政府有關部門認定資格的採購代理機構，在委託的範圍內辦理政府採購事宜。

採購人有權自行選擇採購代理機構，任何單位和個人不得以任何方式為採購人指定採購代理機構。

第二十條

採購人依法委託採購代理機構辦理採購事宜的，應當由採購人與採購代理機構簽訂委託代理協議，依法確定委託代理的事項，約定雙方的權利義務。

第二十一條

供應商是指向採購人提供貨物、工程或者服務的法人、其他組織或者自然人。

第二十二條

供應商參加政府採購活動應當具備下列條件：

（一）具有獨立承擔民事責任的能力；

（二）具有良好的商業信譽和健全的財務會計制度；

（三）具有履行合同所必需的設備和專業技術能力；

（四）有依法繳納稅收和社會保障資金的良好記錄；

（五）參加政府採購活動前三年內，在經營活動中沒有重大違法記錄；

（六）法律、行政法規規定的其他條件。

採購人可以根據採購項目的特殊要求，規定供應商的特定條件，但不得以不合理的條件對供應商實行差別待遇或者歧視待遇。

第二十三條

採購人可以要求參加政府採購的供應商提供有關資質證明文件和業績情況，並根據本法規定的供應商條件和採購項目對供應商的特定要求，對供應商的資格進行審查。

第二十四條

兩個以上的自然人、法人或者其他組織可以組成一個聯合體，以一個供應商的身份共同參加政府採購。

以聯合體形式進行政府採購的，參加聯合體的供應商均應當具備本法第二十二條規定的條件，並應當向採購人提交聯合協議，載明聯合體各方承擔的工作和義務。聯合體各方應當共同與採購人簽訂採購合同，就採購合同約定的事項對採購人承擔連帶責任。

第二十五條

政府採購當事人不得相互串通損害國家利益、社會公共利益和其他當事人的合法權益；不得以任何手段排斥其他供應商參與競爭。

供應商不得以向採購人、採購代理機構、評標委員會的組成人員、競爭性談判小組的組成人員、詢價小組的組成人員行賄或者採取其他不正當手段謀取中標或者成交。

採購代理機構不得以向採購人行賄或者採取其他不正當手段謀取非法利益。

第三章　政府採購方式

第二十六條

政府採購採用以下方式：

（一）公開招標；

（二）邀請招標；

（三）競爭性談判；

（四）單一來源採購；

（五）詢價；

（六）國務院政府採購監督管理部門認定的其他採購方式。

公開招標應作為政府採購的主要採購方式。

第二十七條

採購人採購貨物或者服務應當採用公開招標方式的，其具體數額標準，屬於中央預算的政府採購項目，由國務院規定；屬於地方預算的政府採購項目，由省、自治區、直轄市人民政府規定；因特殊情況需要採用公開招標以外的採購方式的，應當在採購活動開始前獲得設區的市、自治州以上人民政府採購監督管理部門的批准。

第二十八條

採購人不得將應當以公開招標方式採購的貨物或者服務化整為零或者以其他任何方式規避公開招標採購。

第二十九條

符合下列情形之一的貨物或者服務，可以依照本法採用邀請招標方式採購：

（一）具有特殊性，只能從有限範圍的供應商處採購的；

（二）採用公開招標方式的費用占政府採購項目總價值的比例過大的。

第三十條

符合下列情形之一的貨物或者服務，可以依照本法採用競爭性談判方式採購：

（一）招標後沒有供應商投標或者沒有合格標的或者重新招標未能成立的；

（二）技術複雜或者性質特殊，不能確定詳細規格或者具體要求的；

（三）採用招標所需時間不能滿足用戶緊急需要的；

（四）不能事先計算出價格總額的。

第三十一條

符合下列情形之一的貨物或者服務，可以依照本法採用單一來源方式採購：

（一）只能從唯一供應商處採購的；

（二）發生了不可預見的緊急情況不能從其他供應商處採購的；

（三）必須保證原有採購項目一致性或者服務配套的要求，需要繼續從原供應商處添購，且添購資金總額不超過原合同採購金額百分之十的。

第三十二條

採購的貨物規格、標準統一、現貨貨源充足且價格變化幅度小的政府採購項目，可以依照本法採用詢價方式採購。

第四章　政府採購程序

第三十三條

負有編制部門預算職責的部門在編制下一財政年度部門預算時，應當將該財政年度政府採購的項目及資金預算列出，報本級財政部門匯總。部門預算的審批，按預算管理許可權和程序進行。

第三十四條

貨物或者服務項目採取邀請招標方式採購的，採購人應當從符合相應資格條件的供應商中，通過隨機方式選擇三家以上的供應商，並向其發出投標邀請書。

第三十五條

貨物和服務項目實行招標方式採購的，自招標文件開始發出之日起至投標人提交投標文件截止之日止，不得少於二十日。

第三十六條

在招標採購中，出現下列情形之一的，應予廢標：

（一）符合專業條件的供應商或者對招標文件作實質回應的供應商不足三家的；

（二）出現影響採購公正的違法、違規行為的；

（三）投標人的報價均超過了採購預算，採購人不能支付的；

（四）因重大變故，採購任務取消的。

廢標後，採購人應當將廢標理由通知所有投標人。

第三十七條

廢標後，除採購任務取消情形外，應當重新組織招標；需要採取其他方式採購的，應當在採購活動開始前獲得設區的市、自治州以上人民政府採購監督管理部門或者政府有關部門批

准。

第三十八條

採用競爭性談判方式採購的，應當遵循下列程序：

（一）成立談判小組。談判小組由採購人的代表和有關專家共三人以上的單數組成，其中專家的人數不得少於成員總數的三分之二。

（二）制定談判文件。談判文件應當明確談判程序、談判內容、合同草案的條款以及評定成交的標準等事項。

（三）確定邀請參加談判的供應商名單。談判小組從符合相應資格條件的供應商名單中確定不少於三家的供應商參加談判，並向其提供談判文件。

（四）談判。談判小組所有成員集中與單一供應商分別進行談判。在談判中，談判的任何一方不得透露與談判有關的其他供應商的技術資料、價格和其他資訊。談判文件有實質性變動的，談判小組應當以書面形式通知所有參加談判的供應商。

（五）確定成交供應商。談判結束後，談判小組應當要求所有參加談判的供應商在規定時間內進行最後報價，採購人從談判小組提出的成交候選人中根據符合採購需求、品質和服務相等且報價最低的原則確定成交供應商，並將結果通知所有參加談判的未成交的供應商。

第三十九條

採取單一來源方式採購的，採購人與供應商應當遵循本法規定的原則，在保證採購項目品質和雙方商定合理價格的基礎上進行採購。

第四十條

採取詢價方式採購的，應當遵循下列程序：

（一）成立詢價小組。詢價小組由採購人的代表和有關專家共三人以上的單數組成，其中專家的人數不得少於成員總數的三分之二。詢價小組應當對採購項目的價格構成和評定成交的標準等事項作出規定。

（二）確定被詢價的供應商名單。詢價小組根據採購需求，從符合相應資格條件的供應商名單中確定不少於三家的供應商，並向其發出詢價通知書讓其報價。

（三）詢價。詢價小組要求被詢價的供應商一次報出不得更改的價格。

（四）確定成交供應商。採購人根據符合採購需求、品質和服務相等且報價最低的原則確定成交供應商，並將結果通知所有被詢價的未成交的供應商。

第四十一條

採購人或者其委託的採購代理機構應當組織對供應商履約的驗收。大型或者複雜的政府採購項目，應當邀請國家認可的品質檢測機構參加驗收工作。驗收方成員應當在驗收書上簽字，並承擔相應的法律責任。

第四十二條

採購人、採購代理機構對政府採購項目每項採購活動的採購文件應當妥善保存，不得偽造、變造、隱匿或者銷毀。採購文件的保存期限為從採購結束之日起至少保存十五年。

採購文件包括採購活動記錄、採購預算、招標文件、投標文件、評標標準、評估報告、定標文件、合同文本、驗收證明、質疑答復、投訴處理決定及其他有關文件、資料。

採購活動記錄至少應當包括下列內容：

（一）採購項目類別、名稱；

（二）採購項目預算、資金構成和合同價格；

（三）採購方式，採用公開招標以外的採購方式的，應當載明原因；

（四）邀請和選擇供應商的條件及原因；

（五）評標標準及確定中標人的原因；

（六）廢標的原因；

（七）採用招標以外採購方式的相應記載。

第五章　政府採購合同

第四十三條

政府採購合同適用合同法。採購人和供應商之間的權利和義務，應當按照平等、自願的原則以合同方式約定。

採購人可以委託採購代理機構代表其與供應商簽訂政府採購合同。由採購代理機構以採購人名義簽訂合同的，應當提交採購人的授權委託書，作為合同附件。

第四十四條

政府採購合同應當採用書面形式。

第四十五條

國務院政府採購監督管理部門應當會同國務院有關部門，規定政府採購合同必須具備的條款。

第四十六條

採購人與中標、成交供應商應當在中標、成交通知書發出之日起三十日內，按照採購文件確定的事項簽訂政府採購合同。

中標、成交通知書對採購人和中標、成交供應商均具有法律效力。中標、成交通知書發出後，採購人改變中標、成交結果的，或者中標、成交供應商放棄中標、成交項目的，應當依法承擔法律責任。

第四十七條

政府採購項目的採購合同自簽訂之日起七個工作日內，採購人應當將合同副本報同級政府採購監督管理部門和有關部門備案。

第四十八條

經採購人同意，中標、成交供應商可以依法採取分包方式履行合同。

政府採購合同分包履行的，中標、成交供應商就採購項目和分包項目向採購人負責，分包供應商就分包項目承擔責任。

第四十九條

政府採購合同履行中，採購人需追加與合同標的相同的貨物、工程或者服務的，在不改變合同其他條款的前提下，可以與供應商協商簽訂補充合同，但所有補充合同的採購金額不得超過原合同採購金額的百分之十。

第五十條

政府採購合同的雙方當事人不得擅自變更、中止或者終止合同。

政府採購合同繼續履行將損害國家利益和社會公共利益的，雙方當事人應當變更、中止或者終止合同。有過錯的一方應當承擔賠償責任，雙方都有過錯的，各自承擔相應的責任。

第六章　質疑與投訴

第五十一條

供應商對政府採購活動事項有疑問的，可以向採購人提出詢問，採購人應當及時作出答復，但答復的內容不得涉及商業秘密。

第五十二條

供應商認為採購文件、採購過程和中標、成交結果使自己的權益受到損害的，可以在知道或者應知其權益受到損害之日起七個工作日內，以書面形式向採購人提出質疑。

第五十三條

採購人應當在收到供應商的書面質疑後七個工作日內作出答復，並以書面形式通知質疑供應商和其他有關供應商，但答復的內容不得涉及商業秘密。

第五十四條

採購人委託採購代理機構採購的，供應商可以向採購代理機構提出詢問或者質疑，採購代理機構應當依照本法第五十一條、第五十三條的規定就採購人委託授權範圍內的事項作出答復。

第五十五條

質疑供應商對採購人、採購代理機構的答復不滿意或者採購人、採購代理機構未在規定的時間內作出答復的，可以在答復期滿後十五個工作日內向同級政府採購監督管理部門投訴。

第五十六條

政府採購監督管理部門應當在收到投訴後三十個工作日內，對投訴事項作出處理決定，並以書面形式通知投訴人和與投訴事項有關的當事人。

第五十七條

政府採購監督管理部門在處理投訴事項期間，可以視具體情況書面通知採購人暫停採購活動，但暫停時間最長不得超過三十日。

第五十八條

投訴人對政府採購監督管理部門的投訴處理決定不服或者政府採購監督管理部門逾期未作處理的，可以依法申請行政復議或者向人民法院提起行政訴訟。

第七章　監　督　檢　查

第五十九條

政府採購監督管理部門應當加強對政府採購活動及集中採購機構的監督檢查。

監督檢查的主要內容是：

（一）有關政府採購的法律、行政法規和規章的執行情況；

（二）採購範圍、採購方式和採購程序的執行情況；

（三）政府採購人員的職業素質和專業技能。

第六十條

政府採購監督管理部門不得設置集中採購機構，不得參與政府採購項目的採購活動。

採購代理機構與行政機關不得存在隸屬關係或者其他利益關係。

第六十一條

集中採購機構應當建立健全內部監督管理制度。採購活動的決策和執行程序應當明確，並相互監督、相互制約。經辦採購的人員與負責採購合同審核、驗收人員的職責許可權應當明確，並相互分離。

第六十二條

集中採購機構的採購人員應當具有相關職業素質和專業技能，符合政府採購監督管理部門規定的專業崗位任職要求。

集中採購機構對其工作人員應當加強教育和培訓；對採購人員的專業水準、工作實績和職業道德狀況定期進行考核。採購人員經考核不合格的，不得繼續任職。

第六十三條

政府採購項目的採購標準應當公開。

採用本法規定的採購方式的，採購人在採購活動完成後，應當將採購結果予以公佈。

第六十四條

採購人必須按照本法規定的採購方式和採購程序進行採購。

任何單位和個人不得違反本法規定，要求採購人或者採購工作人員向其指定的供應商進行採購。

第六十五條

政府採購監督管理部門應當對政府採購項目的採購活動進行檢查，政府採購當事人應當如實反映情況，提供有關材料。

第六十六條

政府採購監督管理部門應當對集中採購機構的採購價格、節約資金效果、服務品質、信譽狀況、有無違法行為等事項進行考核，並定期如實公佈考核結果。

第六十七條

依照法律、行政法規的規定對政府採購負有行政監督職責的政府有關部門，應當按照其職責分工，加強對政府採購活動的監督。

第六十八條

審計機關應當對政府採購進行審計監督。政府採購監督管理部門、政府採購各當事人有關政府採購活動，應當接受審計機關的審計監督。

第六十九條

監察機關應當加強對參與政府採購活動的國家機關、國家公務員和國家行政機關任命的其他人員實施監察。

第七十條

任何單位和個人對政府採購活動中的違法行為，有權控告和檢舉，有關部門、機關應當依照各自職責及時處理。

第八章　法　律　責　任

第七十一條　【法律責任】§79

採購人、採購代理機構有下列情形之一的，責令限期改正，給予警告，可以並處罰款，對直接負責的主管人員和其他直接責任人員，由其行政主管部門或者有關機關給予處分，並予通報：

（一）應當採用公開招標方式而擅自採用其他方式採購的；

（二）擅自提高採購標準的；

（三）委託不具備政府採購業務代理資格的機構辦理採購事務的；

（四）以不合理的條件對供應商實行差別待遇或者歧視待遇的；

（五）在招標採購過程中與投標人進行協商談判的；

（六）中標、成交通知書發出後不與中標、成交供應商簽訂採購合同的；

（七）拒絕有關部門依法實施監督檢查的。

第七十二條　【法律責任】§79

採購人、採購代理機構及其工作人員有下列情形之一，構成犯罪的，依法追究刑事責任；尚不構成犯罪的，處以罰款，有違法所得的，並處沒收違法所得，屬於國家機關工作人員的，依法給予行政處分：

（一）與供應商或者採購代理機構惡意串通的；

（二）在採購過程中接受賄賂或者獲取其他不正當利益的；

（三）在有關部門依法實施的監督檢查中提供虛假情況的；

（四）開標前洩露標底的。

第七十三條

有前兩條違法行為之一影響中標、成交結果或者可能影響中標、成交結果的，按下列情況分別處理：

（一）未確定中標、成交供應商的，終止採購活動；

（二）中標、成交供應商已經確定但採購合同尚未履行的，撤銷合同，從合格的中標、成交候選人中另行確定中標、成交供應商；

（三）採購合同已經履行的，給採購人、供應商造成損失的，由責任人承擔賠償責任。

第七十四條

採購人對應當實行集中採購的政府採購項目，不委託集中採購機構實行集中採購的，由政

府採購監督管理部門責令改正；拒不改正的，停止按預算向其支付資金，由其上級行政主管部門或者有關機關依法給予其直接負責的主管人員和其他直接責任人員處分。

第七十五條

採購人未依法公佈政府採購項目的採購標準和採購結果的，責令改正，對直接負責的主管人員依法給予處分。

第七十六條

採購人、採購代理機構違反本法規定隱匿、銷毀應當保存的採購文件或者偽造、變造採購文件的，由政府採購監督管理部門處以二萬元以上十萬元以下的罰款，對其直接負責的主管人員和其他直接責任人員依法給予處分；構成犯罪的，依法追究刑事責任。

第七十七條 【法律責任】§79

供應商有下列情形之一的，處以採購金額千分之五以上千分之十以下的罰款，列入不良行為記錄名單，在一至三年內禁止參加政府採購活動，有違法所得的，並處沒收違法所得，情節嚴重的，由工商行政管理機關吊銷營業執照；構成犯罪的，依法追究刑事責任：

（一）提供虛假材料謀取中標、成交的；

（二）採取不正當手段詆毀、排擠其他供應商的；

（三）與採購人、其他供應商或者採購代理機構惡意串通的；

（四）向採購人、採購代理機構行賄或者提供其他不正當利益的；

（五）在招標採購過程中與採購人進行協商談判的；

（六）拒絕有關部門監督檢查或者提供虛假情況的。

供應商有前款第（一）至（五）項情形之一的，中標、成交無效。

第七十八條

採購代理機構在代理政府採購業務中有違法行為的，按照有關法律規定處以罰款，可以依法取消其進行相關業務的資格，構成犯罪的，依法追究刑事責任。

第七十九條

政府採購當事人有本法第七十一條、第七十二條、第七十七條違法行為之一，給他人造成損失的，並應依照有關民事法律規定承擔民事責任。

第八十條

政府採購監督管理部門的工作人員在實施監督檢查中違反本法規定濫用職權，怠忽職守，徇私舞弊的，依法給予行政處分；構成犯罪的，依法追究刑事責任。

第八十一條

政府採購監督管理部門對供應商的投訴逾期未作處理的，給予直接負責的主管人員和其他直接責任人員行政處分。

第八十二條

政府採購監督管理部門對集中採購機構業績的考核，有虛假陳述，隱瞞真實情況的，或者不作定期考核和公佈考核結果的，應當及時糾正，由其上級機關或者監察機關對其負責人進行通報，並對直接負責的人員依法給予行政處分。

集中採購機構在政府採購監督管理部門考核中，虛報業績，隱瞞真實情況的，處以二萬元以上二十萬元以下的罰款，並予以通報；情節嚴重的，取消其代理採購的資格。

第八十三條

任何單位或者個人阻撓和限制供應商進入本地區或者本行業政府採購市場的，責令限期改正；拒不改正的，由該單位、個人的上級行政主管部門或者有關機關給予單位責任人或者個人處分。

第九章 附 則

第八十四條

使用國際組織和外國政府貸款進行的政府採購，貸款方、資金提供方與中方達成的協議對採購的具體條件另有規定的，可以適用其規定，但不得損害國家利益和社會公共利益。

第八十五條

對因嚴重自然災害和其他不可抗力事件所實施的緊急採購和涉及國家安全和秘密的採購，不適用本法。

第八十六條

軍事採購法規由中央軍事委員會另行制定。

第八十七條

本法實施的具體步驟和辦法由國務院規定。

第八十八條

本法自 2003 年 1 月 1 日起施行。

附錄八、政府採購供應商投訴處理辦法

第一章　總　　則

第一條　為了防止和糾正違法的或者不當的政府採購行為，保護參加政府採購活動供應商的合法權益，維護國家利益和社會公共利益，建立規范高效的政府採購投訴處理機制，根據《中華人民共和國政府採購法》（以下簡稱政府採購法），制定本辦法。

第二條　供應商依法向財政部門提起投訴，財政部門受理投訴、作出處理決定，適用本辦法。

第三條　縣級以上各級人民政府財政部門負責依法受理和處理供應商投訴。

財政部負責中央預算項目政府採購活動中的供應商投訴事宜。

縣級以上地方各級人民政府財政部門負責本級預算項目政府採購活動中的供應商投訴事宜。

第四條　各級財政部門應當在省級以上財政部門指定的政府採購信息發布媒體上公告受理投訴的電話、傳真等方便供應商投訴的事項。

第五條　財政部門處理投訴，應當堅持公平、公正和簡便、高效的原則，維護國家利益和社會公共利益。

第六條　供應商投訴實行實名制，其投訴應當有具體的投訴事項及事實根據，不得進行虛假、惡意投訴。

第二章　投訴提起與受理

第七條　供應商認為採購文件、採購過程、中標和成交結果使自己的合法權益受到損害的，應當首先依法向採購人、採購代理機構提出質疑。對採購人、採購代理機構的質疑答復不滿意，或者採購人、採購代理機構未在規定期限內作出答復的，供應商可以在答復期滿後 15 個工作日內向同級財政部門提起投訴。

第八條　投訴人投訴時，應當提交投訴書，並按照被投訴採購人、採購代理機構（以下簡稱被投訴人）和與投訴事項有關的供應商數量提供投訴書的副本。

投訴書應當包括下列主要內容：

（一）投訴人和被投訴人的名稱、地址、電話等；

（二）具體的投訴事項及事實依據；

（三）質疑和質疑答復情況及相關證明材料；

（四）提起投訴的日期。

投訴書應當署名。投訴人為自然人的，應當由本人簽字；投訴人為法人或者其他組織的，應當由法定代表人或者主要負責人簽字蓋章並加蓋公章。

第九條　投訴人可以委托代理人辦理投訴事務。代理人辦理投訴事務時，除提交投訴書外，還應當向同級財政部門提交投訴人的授權委托書，授權委托書應當載明委托代理的具體權限和事項。

第十條　投訴人提起投訴應當符合下列條件：

（一）投訴人是參與所投訴政府採購活動的供應商；

（二）提起投訴前已依法進行質疑；

（三）投訴書內容符合本辦法的規定；

（四）在投訴有效期限內提起投訴；

（五）屬于本財政部門管轄；

（六）同一投訴事項未經財政部門投訴處理；

（七）國務院財政部門規定的其他條件。

第十一條　財政部門收到投訴書後，應當在 5 個工作日內進行審查，對不符合投訴條件的，分別按下列規定予以處理：

（一）投訴書內容不符合規定的，告知投訴人修改後重新投訴；

（二）投訴不屬于本部門管轄的，轉送有管轄權的部門，並通知投訴人；

（三）投訴不符合其他條件的，書面告知投訴人不予受理，並應當說明理由。

對符合投訴條件的投訴，自財政部門收到投訴書之日起即為受理。

第十二條　財政部門應當在受理投訴後 3 個工作日內向被投訴人和與投訴事項有關的供應商發送投訴書副本。

第十三條　被投訴人和與投訴事項有關的供應商應當在收到投訴書副本之日起 5 個工作日內，以書面形式向財政部門作出說明，並提交相關證據、依據和其他有關材料。

第三章　投訴處理與決定

第十四條　財政部門處理投訴事項原則上採取書面審查的辦法。財政部門認為有必要時，可以進行調查取證，也可以組織投訴人和被投訴人當面進行質證。

第十五條　對財政部門依法進行調查的，投訴人、被投訴人以及與投訴事項有關的單位及人員等應當如實反映情況，並提供財政部門所需要的相關材料。

第十六條　投訴人拒絕配合財政部門依法進行調查的，按自動撤回投訴處理；被投訴人不提交相關證據、依據和其他有關材料的，視同放棄說明權利，認可投訴事項。

第十七條　財政部門經審查，對投訴事項分別作出下列處理決定：

（一）投訴人撤回投訴的，終止投訴處理；

（二）投訴缺乏事實依據的，駁回投訴；

（三）投訴事項經查證屬實的，分別按照本辦法有關規定處理。

第十八條　財政部門經審查，認定採購文件具有明顯傾向性或者歧視性等問題，給投訴人或者其他

供應商合法權益造成或者可能造成損害的，按下列情況分別處理：

（一）採購活動尚未完成的，責令修改採購文件，並按修改後的採購文件開展採購活動；

（二）採購活動已經完成，但尚未簽訂政府採購合同的，決定採購活動違法，責令重新開展採購活動；

（三）採購活動已經完成，並且已經簽訂政府採購合同的，決定採購活動違法，由被投訴人按照有關法律規定承擔相應的賠償責任。

第十九條 財政部門經審查，認定採購文件、採購過程影響或者可能影響中標、成交結果的，或者中標、成交結果的產生過程存在違法行為的，按下列情況分別處理：

（一）政府採購合同尚未簽訂的，分別根據不同情況決定全部或者部分採購行為違法，責令重新開展採購活動；

（二）政府採購合同已經簽訂但尚未履行的，決定撤銷合同，責令重新開展採購活動；

（三）政府採購合同已經履行的，決定採購活動違法，給採購人、投訴人造成損失的，由相關責任人承擔賠償責任。

第二十條 財政部門應當自受理投訴之日起 30 個工作日內，對投訴事項作出處理決定，並以書面形式通知投訴人、被投訴人及其他與投訴處理結果有利害關係的政府採購當事人。

第二十一條 財政部門作出處理決定，應當制作投訴處理決定書，並加蓋印章。投訴處理決定書應當包括下列主要內容：

（一）投訴人和被投訴人的姓名或者名稱、住所等；

（二）委托代理人辦理的，代理人的姓名、職業、住址、聯係方式等；

（三）處理決定的具體內容及事實根據和法律依據；

（四）告知投訴人行政復議申請權和訴訟權利；

（五）作出處理決定的日期。

投訴處理決定書的送達，依照民事訴訟法關于送達的規定執行。

第二十二條 財政部門在處理投訴事項期間，可以視具體情況書面通知被投訴人暫停採購活動，但暫停時間最長不得超過 30 日。

被投訴人收到通知後應當立即暫停採購活動，在法定的暫停期限結束前或者財政部門發出恢復採購活動通知前，不得進行該項採購活動。

第二十三條 財政部門應當將投訴處理結果在省級以上財政部門指定的政府採購信息發布媒體上公告。

第二十四條 投訴人對財政部門的投訴處理決定不服或者財政部門逾期未作處理的，可以依法申請行政復議或者向人民法院提起行政訴訟。

第四章 法律責任

第二十五條 財政部門在處理投訴過程中，發現被投訴人及其工作人員、評標委員會成員、供應商有違法行為，本機關有權處理、處罰的，應當依法予以處理、處罰；本機關無權處理的，應當轉送有權處理的機關依法處理。

第二十六條 投訴人有下列情形之一的，屬于虛假、惡意投訴，財政部門應當駁回投訴，將其列入不良行為記錄名單，並依法予以處罰：

（一）1 年內 3 次以上投訴均查無實據的；

（二）捏造事實或者提供虛假投訴材料的。

第二十七條 被投訴人的違法行為給他人造成損失的，應當依照有關民事法律規定承擔民事責任。

第二十八條 財政部門工作人員在投訴處理過程中濫用職權、玩忽職守、徇私舞弊的，依法給予行政處分；構成犯罪的，依法追究刑事責任。

第五章 附 則

第二十九條 財政部門處理投訴不得向投訴人和被投訴人收取任何費用。但因處理投訴發生的鑒定費用，應當按照“誰過錯誰負擔”的原則由過錯方負擔；雙方都有過錯的，由雙方合理分擔。

第三十條 財政部門應當建立投訴處理檔案管理制度，並自覺接受有關部門依法進行的監督檢查。

第三十一條 對在投訴處理過程中知悉的商業秘密及個人隱私，財政部門及知情人應當負保密責任。

第三十二條 本辦法自 2004 年 9 月 11 日起施行。