DECISIONS

COUNCIL DECISION (EU) 2016/763

of 13 May 2016

establishing the position to be taken on behalf of the European Union within the Committee on Government Procurement as regards the draft decision on arbitration procedures pursuant to Article XIX:8 of the Revised Agreement on Government Procurement

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 207(4), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Revised Agreement on Government Procurement ('the Revised GPA'), which entered into force on 6 April 2014, lays down a revamped legal framework applicable by the Revised GPA Parties to covered procurement. The Revised GPA provides for the possibility of the Revised GPA Parties using arbitration procedures in cases where objections regarding proposed rectification, transfer of an entity from one annex to another, withdrawal of an entity or other modification of a Party's annexes to Appendix I were raised but could not be solved through consultations.

(2) Pursuant to Article XIX:8 of the Revised GPA, the Committee on Government Procurement is required to adopt arbitration procedures in order to facilitate the resolution of those objections.

(3) The Revised GPA Parties have extensively discussed the possible content of such arbitration procedures as regards various options to be applied in case of objections to a proposed modification of a Party's procurement coverage. The Revised GPA Parties have been able to find a consensus on that matter.

(4) The agreed arbitration procedures are set out in a draft decision on arbitration procedures pursuant to Article XIX:8 of the Revised GPA.

(5) That draft decision on arbitration procedures provides for the conditions that need to be met in order to resort to the arbitration procedures and sets out rules governing the appointment of arbitrators, the participation of third Parties in arbitration procedures, the conduct of the proceedings and the arbitrators' determination.

(6) The adoption of the draft decision on arbitration procedures is expected to make a positive contribution to the existing legal framework of the Revised GPA as it has the purpose of facilitating the resolution of objections raised regarding a proposed rectification, transfer of an entity from one annex to another, withdrawal of an entity or other modification of a Party's annexes to Appendix I to the Revised GPA.

(7) Accordingly, it is appropriate to establish the position to be taken on behalf of the Union within the Committee on Government Procurement with regard to the draft decision on arbitration procedures,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the Union within the Committee on Government Procurement shall be to approve the adoption of the draft decision on arbitration procedures pursuant to Article XIX:8 of the Revised Agreement on Government Procurement.

The text of the draft decision on arbitration procedures is attached to this Decision.

Article 2

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 13 May 2016.

For the Council
The President
E.M.J. PLOUMEN

DRAFT DECISION ON ARBITRATION PROCEDURES PURSUANT TO ARTICLE XIX:8 OF THE REVISED GPA

The Committee on Government Procurement ('the Committee'),

Noting that Article XIX:8 of the Revised Agreement on Government Procurement ('the Agreement') requires the Committee to develop arbitration procedures to facilitate resolution of objections under Article XIX:2 of the Agreement; and

Confirming the importance of Article XIX:8(b) and (c) of the Agreement to these arbitration procedures and reiterating the Parties' commitment to adopt decisions pursuant to Article XIX:8(b) and (c) of the Agreement.

Hereby adopts the following arbitration procedures to facilitate the resolution of objections under Article XIX:2 of the Agreement:

Invocation of Arbitration Procedures

1. Pursuant to Article XIX:7 of the Agreement, where the modifying Party and an objecting Party are unable to resolve an objection to a proposed modification under Article XIX:1 of the Agreement, the modifying Party or any objecting Party may refer the proposed modification to arbitration, stating the reasons for its request, by notifying the Committee no earlier than 45 days after the date of circulation of the notification of the proposed modification under Article XIX:1 of the Agreement.

2. Where two or more Parties refer the same proposed modification to arbitration prior to the appointment of all the arbitrators, the modifying Party and all objecting Parties shall agree to a single arbitration addressing all objections to the same proposed modification. If additional referrals on the same proposed modification are made after the appointment of all the arbitrators, the modifying Party and all objecting Parties shall agree to a single arbitration whenever feasible.

Appointment of the Arbitrators

3. Arbitration shall be carried out by arbitrators. Unless the Parties to the arbitration otherwise agree, there shall be three arbitrators. Arbitrators shall meet the requirements set out for panelists under Articles 8(1), 8(2), and 8(9) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

4. The Secretariat of the Committee shall on request from a Party to the arbitration, propose nominations for the arbitrators. The Parties to the arbitration shall not oppose nominations except for compelling reasons. Citizens of the Parties to the arbitration and government officials of the third Parties shall not be appointed as arbitrators, unless otherwise agreed by the Parties to the arbitration.

5. Where the Parties to the arbitration cannot agree on who should be appointed as arbitrators within 20 days after referring the proposed modification to arbitration, at the request of a Party to the arbitration, the Director-General shall appoint the arbitrators within 10 days, after consulting Parties to the arbitration and the Chair of the Committee.

Third Party Participation

6. Any Party to the Agreement having a substantial interest in a proposed modification brought to arbitration and having notified its interest to the Committee (referred to herein as 'third Party') within 10 days after the proposed modification being referred to arbitration shall be invited to make a written submission, attend substantive meetings of the arbitrators with the Parties to the arbitration, make oral statements, and be entitled to respond to questions from the arbitrators.

Procedures

7. In its proceedings, the arbitrators shall apply the relevant provisions of the Agreement and be guided by the decision adopted by the Committee in accordance with Article XIX:8(b) of the Agreement, once it is adopted. In addition, the following working procedures shall apply:

   a. The Secretariat of the Committee shall promptly transmit to the arbitrators the applicable notification and objection under paragraph 1 or 2 of Article XIX of the Agreement. Within 10 days of the appointment of the arbitrators, and after consultations with the Parties to the arbitration, the arbitrators shall adopt a timetable for the conduct of the arbitration proceedings. The timetable should be based on the timetable included in the Annex to this Decision.

b. Unless the Parties to the arbitration agree that it is unnecessary, the arbitrators shall hold a substantive meeting with the Parties to the arbitration. Before the substantive meeting, the Parties to the arbitration shall transmit to the arbitrators written submissions in which they present the facts of the case and their arguments.

c. Where a Party to the arbitration submits information that it has designated as confidential to the arbitrators, the arbitrators, the other Parties to the arbitration and third Parties shall treat that information as confidential. Upon request of a Party to the arbitration, the arbitrators shall establish additional procedures necessary to preserve the confidentiality of such information.

d. Where a Party to the arbitration designates information in its written submissions as confidential, the Party shall, on request of another Party to the arbitration or a third Party, provide a non-confidential summary of the information contained in its submission that could be disclosed to the public.

e. At the substantive meeting, the arbitrators shall ask the Party that has requested arbitration to present its case by making an oral submission. The Party against which the arbitration has been brought shall then be asked to present its point of view by making an oral submission.

f. The substantive meetings of the arbitrators shall be open to the public, except where a Party to the arbitration requests that the meeting be closed to protect information designated as confidential.

g. The arbitrators may, at any time, put questions to the Parties to the arbitration and third Parties and ask them for explanations either in the course of the meeting or in writing.

h. The written submissions of the Parties to the arbitration, including any responses to questions put by the arbitrators, shall be made available to the other Party or Parties to the arbitration as well as to the third Parties. The Parties to the arbitration shall submit a written version of their oral statements made at the meeting with the arbitrators to the arbitrators, the other Party or Parties to the arbitration and to the third Parties.

i. The written submissions, responses to questions, and written versions of oral statements of the third Parties shall be made available to the arbitrators, the Parties to the arbitration and other third Parties, and shall be reflected in the arbitrators' report.

j. The deliberations of the arbitrators shall be kept confidential.

k. The arbitrators may seek information from any relevant source and may consult experts. The arbitrators shall provide to the Parties to the arbitration and third Parties any information provided to or received from experts. The Parties to the arbitration shall have an opportunity to comment on any input received from experts.

l. Any additional procedures specific to the arbitration shall be determined by the arbitrators in consultation with the Parties to the arbitration.

m. Subject to paragraph 7.c., nothing in these procedures shall preclude a Party to the arbitration or a third Party from disclosing statements of its own positions to the public.

8. The Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes shall apply to each person serving as an arbitrator under these procedures and, as specified in the Rules of Conduct and the relevant provisions of the Staff Regulations, to those members of the Secretariat called upon to assist the arbitrators.

9. Where Parties to the arbitration reach a mutually agreed solution to objections to the proposed modification, they shall promptly notify the arbitrators. Upon receipt of the notification, the arbitrators shall terminate the proceedings for those Parties. The details of any mutually agreed solution shall be notified to the Committee, where any Party to the Agreement may comment.

Arbitrators' Determination

10. The terms of reference for the arbitrators shall require the arbitrators to determine:

a. in the case of a proposed withdrawal under Article XIX:1(a) of the Agreement, whether government control or influence over the covered procurement of the entity proposed to be withdrawn has been effectively eliminated; or

b. in the case of any other proposed modification under Article XIX:1(b), whether the proposed modification maintains a balance of rights and obligations and a comparable level of mutually agreed coverage provided in the Agreement and, where appropriate, the level of compensatory adjustment.

11. The arbitrators shall issue a report containing its reasoned determination to the Parties to the arbitration within 90 days or, in the event that the timetable is modified by the arbitrators, no later than 120 days of:

a. the appointment of the arbitrators where an arbitration is conducted pursuant to paragraph 1.; or

b. the request where an arbitration is conducted pursuant to paragraph 12.

The time period set out in this paragraph may be extended by mutual agreement of the Parties to the arbitration. The Secretariat of the Committee shall promptly circulate the report to the Parties to the Agreement following translation.

12. Where the arbitrators make a negative determination under paragraph 10.a., and where the arbitrators made no determination of compensatory adjustment under paragraph 10.b., any Party to the arbitration may request after 30 days and no later than 60 days following the circulation of the arbitrators' report that the same arbitrators, where available, shall determine the level of compensatory adjustment that would result in a comparable level of coverage and maintain the balance of rights and obligations under the Agreement. In doing so, the arbitrators shall be guided by the decision adopted by the Committee in accordance with Article XIX:8(c) of the Agreement, once it is adopted. Where any of the original arbitrators are not available, a replacement shall be appointed in accordance with paragraphs 3. to 5.

Implementation

13. The Parties to the arbitration shall accept the arbitrators' determination as final.

14. For the purposes of Article XIX:7(b)(i) of the Agreement, the arbitration procedures are completed:

a. when a report under paragraph 11. that does not give rise to the right to further proceedings under paragraph 12. is circulated to the Parties to the Agreement; or

b. where Parties to the arbitration do not exercise a right available to them under paragraph 12., upon the expiration of the time period set out in that paragraph.

ANNEX

PROPOSED TIMETABLE FOR ARBITRATION

The arbitrators shall base the timetable adopted under paragraph 7.a. on the following:

a.	Receipt of written submissions of the Parties to the arbitration:	
	(1) Requesting Party:	---------- 2 weeks
	(2) Responding Party:	---------- 2 weeks
b.	Receipt of third party submissions:	---------- 1 week
c.	Substantive meeting with the arbitrators:	---------- 1-2 weeks
d.	Responses to questions to Parties and third Parties to the arbitration:	---------- 1-2 weeks
e.	Issuance and circulation of the arbitrators' report on its determination:	---------- 4 weeks

Consistent with the provisions of paragraph 11., the arbitrators may change the above timetable and may schedule additional meetings with the Parties to the arbitration after consulting them.