

## **Chapter Nine**

### **Government Procurement**

#### *Objectives*

The objectives of this Chapter are to recognize the importance of conducting government procurement in accordance with the fundamental principles of openness, transparency, and due process; and to strive to provide comprehensive coverage of procurement markets by eliminating market access barriers to the supply of goods and services, including construction services.

#### **Article 9.1: Scope and Coverage**

1. This Chapter applies to any measure adopted or maintained by a Party relating to procurement by an entity listed in Annex 9.1:
  - (a) by any contractual means, including purchase and rental or lease, with or without an option to buy, build-operate-transfer contracts, and public works concession contracts; and
  - (b) subject to the conditions specified in Annex 9.1.
2. This Chapter does not apply to:
  - (a) non-contractual agreements or any form of assistance provided by a Party or a state enterprise, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements, government provision of goods and services to persons or to a regional or local level of government, and purchases for the direct purpose of providing foreign assistance;
  - (b) purchases funded by international grants, loans, or other assistance, where the provision of such assistance is subject to conditions inconsistent with the provisions of this Chapter;
  - (c) hiring of government employees and related employment measures; and
  - (d) acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt.
3. Each Party shall ensure that its procuring entities listed in Annex 9.1 comply with this Chapter in conducting procurement covered by this Chapter.

4. Where an entity awards a contract that is not covered by this Chapter, nothing in this Chapter shall be construed to cover any good or service component of that contract.
5. No entity may prepare, design, or otherwise structure or divide, in any stage of the procurement, any procurement in order to avoid the obligations of this Chapter.
6. Nothing in this Chapter shall prevent either Party from developing new procurement policies, procedures, or contractual means, provided they are not inconsistent with this Chapter.

## **Article 9.2: General Principles**

### *National Treatment and Non-Discrimination*

1. With respect to any measure governing procurement covered by this Chapter, each Party shall accord to the goods and services of the other Party, and to the suppliers of the other Party of such goods and services, treatment no less favorable than the most favorable treatment the Party accords to its own goods, services, and suppliers.
2. With respect to any measure governing procurement covered by this Chapter, neither Party may:
  - (a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or
  - (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

### *Determination of Origin*

3. For purposes of paragraphs 1 and 2, determination of the origin of goods shall be made on a non-preferential basis.

### *Offsets*

4. An entity shall not consider, seek, or impose offsets at any stage of a procurement.

### *Measures Not Specific to Procurement*

5. Paragraphs 1 and 2 do not apply to measures respecting customs duties or other charges of any kind imposed on or in connection with importation, the method of levying such duties and charges or other import regulations, including restrictions and formalities, or

measures affecting trade in services other than measures specifically governing procurement covered by this Chapter.

**Article 9.3: Publication of Procurement Measures**

Each Party shall promptly publish:

- (a) its measures of general application specifically governing procurement covered by this Chapter; and
- (b) any changes in such measures in the same manner as the original publication.

**Article 9.4: Publication of Notice of Intended Procurement**

1. For each procurement covered by this Chapter, an entity shall publish in advance a notice inviting interested suppliers to submit tenders for that procurement (“notice of intended procurement”), except as provided in Article 9.9(2). Each such notice shall be accessible during the entire period established for tendering for the relevant procurement.

2. Each notice of intended procurement shall include a description of the intended procurement, any conditions that suppliers must fulfill to participate in the procurement, the name of the entity issuing the notice, the address where suppliers may obtain all documents relating to the procurement, the time limits for submission of tenders, and the dates for delivery of the goods or services to be procured.

**Article 9.5: Time Limits for the Tendering Process**

1. An entity shall prescribe time limits for the tendering process that allow sufficient time for suppliers to prepare and submit responsive tenders, taking into account the nature and complexity of the procurement. An entity shall provide no less than 30 days between the date on which it publishes the notice of intended procurement and the deadline for submitting tenders.

2. Notwithstanding paragraph 1, where there are no qualification requirements for suppliers, entities may establish a time limit of less than 30 days, but in no case less than 10 days, in the following circumstances:

- (a) where the entity has published a notice containing the information specified in Article 9.4(2) at least 30 days and not more than 12 months in advance;
- (b) in the case of the second or subsequent publications of notices for procurement of a recurring nature;

- (c) where an entity procures commercial goods or services that are sold or offered for sale to, and customarily purchased and used by, non-governmental buyers for non-governmental purposes; or
- (d) where an unforeseen state of urgency duly substantiated by the entity renders impracticable the time limits specified in paragraph 1.

**Article 9.6: Information on Intended Procurements**

1. An entity shall provide interested suppliers tender documentation that includes all the information necessary to permit suppliers to prepare and submit responsive tenders. The documentation shall include all criteria that the entity will consider in awarding the contract, including all cost factors, and the weights or, where appropriate, the relative values, that the entity will assign to these criteria in evaluating tenders.

2. Where an entity does not publish all the tender documentation by electronic means, the entity shall, on request of any supplier, promptly make the documentation available in written form to the supplier.

3. Where an entity, during the course of a procurement, modifies the criteria referred to in paragraph 1, it shall transmit all such modifications in writing:

- (a) to all suppliers that are participating in the procurement at the time the criteria are modified, if the identities of such suppliers are known, and in all other cases, in the same manner as the original information was transmitted; and
- (b) in adequate time to allow such suppliers to modify and re-submit their tenders, as appropriate.

**Article 9.7: Technical Specifications**

1. An entity shall not prepare, adopt, or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade between the Parties.

2. Any technical specification prescribed by an entity shall be, where appropriate:

- (a) specified in terms of performance requirements rather than design or descriptive characteristics; and
- (b) based on international standards, where applicable, otherwise on national technical regulations, recognized national standards, or building codes.

3. An entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the

procurement requirements and provided that, in such cases, words such as “or equivalent” are included in the tender documentation.

4. An 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 that procurement.

5. For greater certainty, this Article is not intended to preclude a Party from preparing, adopting, or applying technical specifications to promote the conservation of natural resources.

### **Article 9.8: Conditions for Participation**

1. Where an entity requires suppliers to satisfy registration, qualification, or any other requirements or conditions for participation (“conditions for participation”) in order to participate in a procurement, the entity shall publish a notice inviting suppliers to apply for participation. The entity shall publish the notice sufficiently in advance to provide interested suppliers sufficient time to prepare and submit applications and for the entity to evaluate and make its determinations based on such applications.

2. Each entity shall:

- (a) limit any conditions for participation in a procurement to those that are essential to ensure that the potential supplier has the legal, technical, and financial capacity to fulfill the requirements and technical specifications of the procurement;
- (b) base qualification decisions solely on the conditions for participation that it has specified in advance in notices or tender documentation; and
- (c) recognize as qualified all suppliers of the other Party that meet the requisite conditions for participation in a procurement covered by this Chapter.

3. Entities may establish publicly available lists of suppliers qualified to participate in procurements. Where an entity requires suppliers to qualify for such a list in order to participate in a procurement, and a supplier that has not yet qualified applies to be included on the list, the entity shall promptly start the qualification procedures for the supplier and shall allow the supplier to participate in the procurement, provided there is sufficient time to complete the procedures within the time period established for tendering.

4. No entity may 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 an entity of that Party or that the supplier has prior work experience in the territory of that Party. An entity shall judge a supplier’s financial and technical capacities on the basis of its global

business activities including both its activity in the territory of the Party of the supplier, and its activity, if any, in the territory of the Party of the entity.

5. An entity shall promptly communicate to any supplier that has applied for qualification its decision on whether that supplier is qualified. Where an entity rejects an application for qualification or ceases to recognize a supplier as qualified, that entity shall, on request of the supplier, promptly provide it a written explanation of the reasons for its decision.

6. Nothing in this Article shall preclude an entity from excluding a supplier from a procurement on grounds such as bankruptcy or false declarations.

### **Article 9.9: Tendering Procedures**

1. Entities shall award contracts by means of open tendering procedures, in the course of which any interested supplier may submit a tender.

2. Provided that the tendering procedure is not used to avoid competition or to protect domestic suppliers, entities may award contracts by means other than open tendering procedures in the following circumstances, where applicable:

- (a) in the absence of tenders that conform to the essential requirements in the tender documentation provided in a prior invitation to tender, including any conditions for participation, on condition that the requirements of the initial procurement are not substantially modified in the contract as awarded;
- (b) where, for works of art, or for reasons connected with the protection of exclusive rights, such as patents or copyrights, or proprietary information, or where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
- (c) for additional deliveries by the original supplier that are intended either as replacement parts, extensions, or continuing services for existing equipment, software, services or installations, where a change of supplier would compel the entity to procure goods or services not meeting requirements of interchangeability with existing equipment, software, services, or installations;
- (d) for goods purchased on a commodity market;
- (e) where an entity procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study, or original development. When such contracts

have been fulfilled, subsequent procurements of such goods or services shall be subject to Articles 9.2 through 9.8 and Article 9.17;

- (f) where additional construction services that were not included in the initial contract but that were within the objectives of the original tender documentation have, due to unforeseeable circumstances, become necessary to complete the construction services described therein. However, the total value of contracts awarded for additional construction services may not exceed 50 percent of the amount of the initial contract; or
- (g) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the entity, the goods or services could not be obtained in time by means of an open tendering procedure and the use of an open tendering procedure would result in serious injury to the entity, or the entity's program responsibilities, or the Party. For purposes of this subparagraph, lack of advance planning by an entity or its concerns relating to the amount of funds available to it within a particular period do not constitute unforeseeable events.

3. An entity shall maintain a record or prepare a written report providing specific justification for any contract awarded by means other than open tendering procedures, as provided in paragraph 2.

#### **Article 9.10: Awarding of Contracts**

1. An entity shall require that in order to be considered for award, a tender must be submitted in writing and must, at the time it is submitted:

- (a) conform to the essential requirements of the tender documentation; and
- (b) be submitted by a supplier that has satisfied the conditions for participation that the entity has provided to all participating suppliers.

2. Unless an entity determines that it is not in the public interest to award a contract, it shall award the contract to the supplier that the entity has determined to be fully capable of undertaking the contract and whose tender is determined to be the most advantageous in terms of the requirements and evaluation criteria set out in the tender documentation.

3. No entity may cancel a procurement, or terminate or modify awarded contracts, in order to avoid the obligations of this Chapter.

## **Article 9.11: Information on Awards**

### *Information Provided to Suppliers*

1. Subject to Article 9.15, an entity shall promptly inform suppliers participating in a tendering procedure of its contract award decision. On request, an entity shall provide a supplier whose tender was not selected for award the reasons for not selecting its tender and the relative advantages of the tender the entity selected.

### *Publication of Award Information*

2. After awarding a contract covered by this Chapter, an entity shall promptly publish a notice that includes at least the following information about the award:

- (a) the name of the entity;
- (b) a description of the goods or services procured;
- (c) the name of the winning supplier;
- (d) the value of the contract award; and
- (e) where the entity has not used open tendering procedures, an indication of the circumstances justifying the procedures used.

### *Maintenance of Records*

3. An entity shall maintain records and reports relating to tendering procedures and contract awards covered by this Chapter, including the records and reports provided for in Article 9.9(3), for a period of at least three years.

## **Article 9.12: Ensuring Integrity in Procurement Practices**

Each Party shall adopt the necessary legislative or other measures to establish that it is a criminal offense under its law for:

- (a) a procurement official of that Party to solicit or accept, directly or indirectly, any article of monetary value or other benefit, for that procurement official or for another person, in exchange for any act or omission in the performance of that procurement official's procurement functions;
- (b) any person to offer or grant, directly or indirectly, to a procurement official of that Party, any article of monetary value or other benefit, for that procurement official or for another person, in exchange for any act or omission in the performance of that procurement official's procurement functions; and



- (c) any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign procurement official, for that foreign procurement official or for a third party, in order that the foreign procurement official act or refrain from acting in relation to the performance of procurement duties, in order to obtain or retain business or other improper advantage.

### **Article 9.13: Domestic Review of Supplier Challenges**

#### *Independent Review Authorities*

1. Each Party shall establish or designate at least one impartial administrative or judicial authority that is independent from its entities to receive and review challenges that suppliers submit relating to the Party's measures implementing this Chapter in connection with a procurement covered by this Chapter and make appropriate findings and recommendations. Where a challenge by a supplier is initially reviewed by a body other than such an impartial authority, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the entity that is the subject of the challenge.
2. Each Party shall provide that an authority it establishes or designates under paragraph 1 has authority to take prompt interim measures pending the resolution of a challenge to preserve the supplier's opportunity to participate in the procurement and to ensure that the Party complies with its measures implementing this Chapter, including by suspending the contract award or the performance of a contract that has already been awarded.
3. Each Party shall ensure that its review procedures are published and are timely, transparent, effective, and consistent with due process principles.
4. Each Party shall ensure that all documents related to a challenge to a procurement covered by this Chapter are made available to any authority it establishes or designates under paragraph 1.
5. Notwithstanding other review procedures provided for or developed by each of the Parties, each Party shall ensure that any authority it establishes or designates under paragraph 1 provides at least the following:
  - (a) an opportunity for the supplier to review relevant documents and to be heard by the authority in a timely manner;
  - (b) sufficient time for the supplier to prepare and submit written challenges, which in no case shall be less than 10 days from the time when the basis of

the complaint became known or reasonably should have become known to the supplier;

- (c) a requirement that the entity respond in writing to the supplier's challenge;
- (d) an opportunity for the supplier to reply to the entity's response to the challenge; and
- (e) prompt delivery in writing of the decisions relating to the challenge, with an explanation of the grounds for each decision.

6. Each Party shall ensure that a supplier's submission of a challenge will not prejudice the supplier's participation in ongoing or future procurements.

#### **Article 9.14: Modifications and Rectifications**

1. Either Party may modify its coverage under this Chapter provided that it:
  - (a) notifies the other Party in writing and the other Party does not object in writing within 30 days of the notification; and
  - (b) offers within 30 days acceptable compensatory adjustments to the other Party to maintain a level of coverage comparable to that existing prior to the modification, except as provided in paragraphs 2 and 3.
2. Either Party may make rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to its Schedules to Annex 9.1, Sections (A) through (C), provided that it notifies the other Party in writing and the other Party does not object in writing within 30 days of the notification. A Party that makes such a rectification or minor amendment shall not be required to provide compensatory adjustments.
3. A Party need not provide compensatory adjustments in those circumstances where the Parties agree that the proposed modification covers an entity over which a Party has effectively eliminated its control or influence. Where the Parties do not agree that such government control or influence has been effectively eliminated, the objecting Party may request further information or consultations with a view to clarifying the nature of any government control or influence and reaching agreement on the entity's continued coverage under this Chapter.
4. Where the Parties are in agreement on the proposed modification, rectification, or minor amendment, including where a Party has not objected within 30 days under paragraph 1 or 2, the Commission shall give effect to the agreement by modifying forthwith the relevant Section of Annex 9.1.

### **Article 9.15: Non-Disclosure of Information**

1. The Parties, their entities, and their review authorities shall not disclose confidential information the disclosure of which would prejudice legitimate commercial interests of a particular person or might prejudice fair competition between suppliers, without the formal authorization of the person that provided the information to the Party.
2. Nothing in this Chapter shall be construed as requiring a Party or its entities to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest.

### **Article 9.16: Exceptions**

Provided 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 trade between the Parties, nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining 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 handicapped persons, of philanthropic institutions, or of prison labor.

The Parties understand that subparagraph (b) includes environmental measures necessary to protect human, animal, or plant life or health.

### **Article 9.17: Public Information**

1. In order to facilitate access to information on commercial opportunities under this Chapter, each Party shall ensure that electronic databases that provide current information on all procurements covered by this Chapter that are conducted by entities listed in Annex 9.1(A), including information that can be disaggregated by detailed categories of goods and services, are made available to interested suppliers of the other Party, through the Internet or a comparable computer-based telecommunications network. Each Party shall, on request of the other Party, provide information on:

- (a) the classification system used to disaggregate information on procurement of different goods and services in such databases; and
- (b) the procedures for obtaining access to such databases.

2. Entities listed in Annex 9.1(A) shall publish notices of intended procurement in a government-wide, single point of entry electronic publication that is accessible through the Internet or a comparable computer-based telecommunications network. For entities listed in Annex 9.1(B), each Party shall facilitate a reasonable means for suppliers of the other Party to easily identify procurement opportunities, which should include a single point of entry.

3. Each Party shall encourage its entities to publish, as early as possible in the fiscal year, information regarding the entity's procurement plans.

#### **Article 9.18: Committee on Procurement**

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

- (a) bilateral cooperation relating to the development and use of electronic communications in government procurement systems, including developments that may lead to reducing the time limits for tendering set out in Article 9.5;
- (b) exchange of statistics and other information to assist the Parties in monitoring the implementation and operation of this Chapter;
- (c) consideration of further negotiations aimed at broadening the coverage of this Chapter, including with respect to sub-federal or sub-central entities and state-owned enterprises; and
- (d) efforts to increase understanding of their respective government procurement systems, with a view to maximizing access to government procurement opportunities for small business suppliers. To that end, either Party may request the other to provide trade-related technical assistance, including training of government personnel or interested suppliers on specific elements of each Party's government procurement system.

#### **Article 9.19: Further Negotiations**

On request of either Party, the Parties shall enter into negotiations with a view to extending coverage under this Chapter on a reciprocal basis, if a Party provides, through an international agreement entered into after entry into force of this Agreement, access to its procurement market for suppliers of a non-Party beyond what it provides under this Agreement to suppliers of the other Party.

## **Article 9.20: Definitions**

For purposes of this Chapter:

**build-operate-transfer contract** and **public works concession contract** mean any contractual arrangement, the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plant, buildings, facilities, or other government-owned works and under which, as consideration for a supplier's execution of a contractual arrangement, the entity grants to the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of, such works for the duration of the contract;

**entity** means an entity listed in Annex 9.1;

**in writing** or **written** means any expression of information in words, numbers, or other symbols, including electronic expressions, that can be read, reproduced, and stored;

**international standard** means a standard that has been developed in conformity with the document referenced in Article 7.3 (International Standards);

**offsets** means conditions imposed or considered by an entity prior to, or in the course of, its procurement process that encourage local development or improve a Party's balance of payments accounts by means of requirements of local content, licensing of technology, investment, counter-trade, or similar requirements;

**procurement official** means a person who performs procurement functions;

**publish** means to disseminate information in an electronic or paper medium that is distributed widely and is readily accessible to the general public;

**supplier** means a person that provides or could provide goods or services to an entity; and

**technical specification** means a specification that lays down the characteristics of goods to be procured or their related processes and production methods, or the characteristics of services to be procured or their related operating methods, including the applicable administrative provisions, and a requirement relating to conformity assessment procedures that an entity prescribes. A technical specification may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements, as they apply to a good, process, service or production or operating method.