

CHAPTER NINE **GOVERNMENT PROCUREMENT**

ARTICLE 9.1: SCOPE AND COVERAGE

Application of Chapter

1. This Chapter applies to any measure, including any act or guideline of a Party, regarding covered procurement.

2. For purposes of this Chapter, **covered procurement** means a procurement of goods, services, or both:

- (a) by any contractual means, including purchase, rental, or lease, with or without an option to buy; build-operate-transfer contracts; and public works concession contracts;
- (b) where the value is estimated, in accordance with paragraph 4, to equal or exceed the relevant threshold specified in the Annexes;
- (c) that is conducted by a procuring entity; and
- (d) that is not excluded from coverage by this Agreement.

3. This Chapter does not apply to:

- (a) non-contractual agreements or any form of assistance that a Party or a state enterprise provides, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements, and government provision of goods and services to persons or to state, regional, or local governments;
- (b) purchases funded entirely or partially by international grants, loans, or other international assistance, where the provision of such assistance is subject to conditions inconsistent with this Chapter; and
- (c) acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt.

Compliance

4. Each Party shall ensure that its procuring entities comply with this Chapter in conducting covered procurements.

Valuation

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

- (a) may not prepare, design, or otherwise structure or divide a procurement, in any stage of the procurement, in order to avoid the application of this Chapter; and
- (b) shall take into account all forms of remuneration, including any premiums, fees, commissions, interest, other revenue streams that may be provided for under the contract, and, where the procurement provides for the possibility of option clauses, the total maximum value of the procurement, inclusive of optional purchases.

ARTICLE 9.2: GENERAL PRINCIPLES

National Treatment and Non-Discrimination

1. With respect to any measure covered by this Chapter, each Party, including its procuring entities, 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 covered by this Chapter, a Party may not:

- (a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; nor
- (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.

Rules of Origin

3. For purposes of procurement covered by this Chapter, neither Party may apply rules of origin to goods imported from the other Party that are different from the rules of origin the Party applies in the normal course of trade to imports of the same goods from the other Party.

Offsets

4. A procuring entity may not seek, take account of, or impose offsets in any stage of a covered 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 or charges, other import regulations, including restrictions and formalities, or measures affecting trade in services other than measures governing covered procurement.

ARTICLE 9.3: PUBLICATION OF PROCUREMENT MEASURES

Each Party shall promptly publish laws, regulations, judicial decisions, administrative rulings, procedures, and other measures of general application specifically governing procurement, and any changes to such measures, in officially designated electronic or paper media that are widely disseminated and readily accessible to the public.

ARTICLE 9.4: PUBLICATION OF NOTICE OF INTENDED PROCUREMENT AND NOTICE OF PLANNED PROCUREMENT

Notice of Intended Procurement

1. For each covered procurement, a procuring entity shall publish in advance a notice inviting interested suppliers to submit tenders (“notice of intended procurement”) in an electronic or paper medium that is widely available and remains readily accessible to the public for the entire period established for tendering for that procurement.

2. Each notice of intended procurement shall include a description of the intended procurement, any conditions for participation, the name of the procuring entity, the address

where all documents relating to the procurement may be obtained, the deadline for submission of tenders, and the time for delivery of the goods or services being procured.

Notice of Planned Procurement

3. Each Party shall encourage its procuring entities to publish as early as possible in each fiscal year a notice regarding each entity's planned procurements. The notice should include the subject matter of any planned procurement and the estimated date of the publication of the notice of intended procurement.

ARTICLE 9.5: TIME LIMITS FOR TENDERING PROCESS

1. A procuring entity shall prescribe time limits for tendering that allow suppliers sufficient time to prepare and submit responsive tenders, taking into account the nature and complexity of the procurement. Except as provided in paragraph 3, a procuring entity shall provide no less than 40 days from the date of publication of a notice of intended procurement to the deadline for submission of tenders.

2. Notwithstanding paragraph 1, a procuring entity may establish a period of less than 40 days, provided that the period is sufficiently long to enable suppliers to prepare and submit responsive tenders and is in no case less than ten days:

- (a) where the entity has published a separate notice, including a notice of planned procurement under Article 9.4.3, at least 40 days and not more than 12 months in advance, and such notice contains a description of the procurement, the time limits for the submission of tenders or, where appropriate, applications for participation in a procurement, and the address from which documents relating to the procurement may be obtained;
- (b) where the entity procures commercial goods or services, except that the procuring entity may not rely on this provision if it requires suppliers to satisfy conditions for participation; or
- (c) in duly substantiated cases of extreme urgency brought about by events unforeseeable by the procuring entity, such that a 40-day deadline would result in serious adverse consequences to the entity or the relevant Party.

ARTICLE 9.6: INFORMATION ON INTENDED PROCUREMENT

Tender Documentation

1. A procuring entity shall provide to an interested supplier 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, scope, and, where quantifiable, the quantity of the goods or services to be procured and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings, or instructional materials;
- (b) any conditions for participation, information, or documents that suppliers are required to submit;
- (c) all criteria, including all cost factors, to be considered in awarding the contract, and the relative importance of each criterion;
- (d) the date, time, and place for the opening of tenders; and
- (e) any other terms or conditions, including terms of payment, relating to the procurement.

2. A procuring entity shall promptly:

- (a) provide, on request, the tender documentation to any supplier participating in the procurement; and
- (b) reply to any reasonable request for relevant information by a supplier participating in the procurement, provided that such information does not give that supplier an advantage over its competitors in the procurement.

Modifications

3. If, during the course of a procurement, a procuring entity modifies the criteria or technical 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, the procuring entity shall transmit in writing any such modification or amended or reissued notice or tender documentation:

- (a) to all suppliers that are participating at the time the information is amended, if known, and, in all other cases, in the same manner as the original information;
- (b) in sufficient time to allow such suppliers to modify and submit amended tenders, as appropriate; and
- (c) in cases where a notice is reissued, in accordance with the time limits set out in Article 9.5.

ARTICLE 9.7: TECHNICAL SPECIFICATIONS

- 1. A procuring entity may 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 trade between the Parties.
- 2. In prescribing any technical specification for the good or service being procured, a procuring entity shall:
 - (a) specify the technical specification, wherever appropriate, in terms of performance or functional requirements, rather than design or descriptive characteristics; and
 - (b) base the technical specification on international standards, where such exist and are applicable to the procuring entity, except where the use of an international standard would fail to meet the procuring entity's program requirements or would impose more burdens than the use of a government-unique standard.
- 3. A procuring entity may not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design or 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, words such as "or equivalent" are included in the tender documentation.

4. A procuring entity may not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in preparing or adopting 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 procuring entity from preparing, adopting, or applying technical specifications to promote the conservation of natural resources or to protect the environment.

ARTICLE 9.8: CONDITIONS FOR PARTICIPATION

1. Where a procuring entity requires suppliers to satisfy conditions for participation, the entity shall, subject to the other provisions of this Chapter:

- (a) limit any conditions for participation in a covered procurement to those that are essential to ensure that the supplier has the legal, technical, and financial abilities to fulfill the requirements and technical specifications of the procurement;
- (b) evaluate a supplier's financial and technical abilities on the basis of its global business activities, including both its activities in the territory of the Party of the supplier, as well as its activities, if any, in the territory of the Party of the procuring entity, and may 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 that Party or that the supplier has prior work experience in the territory of that Party;
- (c) base its determination of whether a supplier has satisfied the conditions for participation solely on the conditions that it has specified in advance in notices or tender documentation; and
- (d) allow all suppliers that satisfy the conditions for participation to participate in the procurement.

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

3. Where a procuring entity requires suppliers to satisfy conditions for participation, 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 adequate time to prepare and submit responsive applications and for the entity to evaluate and make its determination based on such applications.

4. A procuring entity may establish a publicly available multi-use list of suppliers that satisfy its conditions for participation. Where a procuring entity requires suppliers to qualify for such a list in order to participate in a covered procurement, the entity shall promptly process any application for inclusion on the list. The entity shall allow a supplier whose application for inclusion on such a list is pending to participate in a procurement, provided that the entity determines that the supplier satisfies the conditions for participation and that there is sufficient time for the procuring entity to complete its evaluation of the supplier within the time period established for tendering.

5. A procuring entity shall promptly communicate to any supplier that has applied for participation its decision on whether that supplier has satisfied the conditions for participation. Where a procuring entity rejects an application for participation or ceases to recognize a supplier as having satisfied the conditions for participation, the entity shall promptly inform the supplier and, on request of the supplier, promptly provide a written explanation of the reasons for its decision.

ARTICLE 9.9: LIMITED TENDERING

1. Subject to paragraph 2, a procuring entity 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, to protect domestic suppliers, or in a manner that discriminates against suppliers of the other Party, a procuring entity may contact a supplier of its choice and may choose not to apply Articles 9.4 through 9.8 and Article 9.10 in relation to a covered procurement in any of the following circumstances:

- (a) where, in response to a prior notice of intended procurement or invitation to tender,
 - (i) no tenders were submitted;

- (ii) no tenders were submitted that conform to the essential requirements in the tender documentation; or
 - (iii) no suppliers satisfied the conditions for participation;
- and the entity does not substantially modify the essential requirements of the procurement or the conditions for participation;
- (b) where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist because:
 - (i) the requirement is for works of art;
 - (ii) the procuring entity is obligated to protect patents, copyrights, or other exclusive rights, or proprietary information; or
 - (iii) there is an absence of competition for technical reasons;
- (c) for additional deliveries of goods or services 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 procuring entity to procure goods or services that do not meet requirements of interchangeability with existing equipment, software, services, or installations;
 - (d) for goods purchased on a commodity market;
 - (e) 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. When such contracts have been fulfilled, subsequent procurements of goods or services shall be subject to Articles 9.4 through 9.8 and 9.10; or

- (f) 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 by means of an open tendering procedure and the use of an open tendering procedure would result in serious injury to the entity, the entity's program responsibilities, or the Party.

3. For each contract awarded under paragraph 2, a procuring entity shall prepare a written report that includes 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 2 that justify the use of a procedure other than open tendering procedures. The procuring entity shall provide the report to the other Party on request.

ARTICLE 9.10: AWARDING OF CONTRACTS

1. A procuring 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 evaluation criteria specified in the notices and tender documentation; and
- (b) be submitted by a supplier that has satisfied any conditions for participation.

2. Unless a procuring entity determines that it is not in the public interest to award a contract, the entity shall award the contract to a 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 notices and tender documentation.

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

Information Provided to Suppliers

4. Subject to Article 9.14, a procuring entity shall promptly inform suppliers that have submitted tenders of its contract award decision. A procuring entity, on request of a supplier whose tender was not selected for award, shall provide the supplier the reasons for not selecting its tender and the relative advantages of the tender selected.

Publication of Award Information

5. Promptly after awarding a contract in a covered procurement, a procuring entity shall 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 supplier awarded the contract;
- (d) the value of the contract award; and
- (e) where the entity did not use an open tendering procedure, an indication of the circumstances justifying the procedure used.

Maintenance of Records

6. A procuring entity shall maintain records and reports relating to tendering procedures and contract awards in covered procurements, including the reports required by Article 9.9.3, according to the practices of each Party, for at least three years after the date a contract is awarded.

ARTICLE 9.11: ENSURING INTEGRITY IN PROCUREMENT PRACTICES

Further to Article 18.5 (Anti-Corruption), each Party shall adopt or maintain procedures to declare ineligible for participation in the Party's procurements, either indefinitely or for a specified time, suppliers that the Party has determined to have engaged in fraudulent or illegal action in relation to procurement. On request of the other Party, a Party shall identify the suppliers determined to be ineligible under these procedures, and, where appropriate, exchange information regarding those suppliers or the fraudulent or illegal action.

ARTICLE 9.12: DOMESTIC REVIEW OF SUPPLIER CHALLENGES

1. Each Party shall permit a supplier to challenge a Party's compliance with its measures implementing this Chapter without prejudice to that supplier's participation in ongoing or future procurement activities. Each Party shall ensure that its review

procedures are made publicly available in writing, and are timely, transparent, effective, and consistent with the principle of due process.

2. Each Party shall establish or designate at least one impartial administrative or judicial authority that is independent of the procuring entity that is the subject of the challenge to receive and review challenges that suppliers submit in connection with any covered procurement. Where a body other than such an authority 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 that is the subject of the challenge.

3. Each Party shall authorize the authority that it establishes or designates under paragraph 2 to take prompt interim measures, pending the resolution of a challenge, to ensure that the Party complies with its measures implementing this Chapter and to preserve the supplier's opportunity to participate in the procurement, including by suspending the contract award or the performance of a contract that has already been awarded. However, in deciding whether to apply an interim measure, each Party may take into account any overriding adverse consequences to the public interest if an interim measure were taken. If a Party decides not to apply an interim measure, it shall provide a written explanation of the grounds for its decision.

4. Each Party shall ensure that the authority that it establishes or designates under paragraph 2 conducts its review in accordance with the following:

- (a) a supplier shall be allowed sufficient time to prepare and submit a written challenge, which in no case shall be less than ten days from the time when the basis of the challenge became known or reasonably should have become known to the supplier;
- (b) the procuring entity shall be required to respond in writing to the supplier's challenge and provide all relevant documents to the authority;
- (c) the supplier that initiates the challenge shall be provided an opportunity to reply to the procuring entity's response before the authority makes a decision on the challenge; and
- (d) the authority shall promptly provide decisions relating to a supplier's challenge in writing, with an explanation of the grounds for each decision.

ARTICLE 9.13: MODIFICATIONS AND RECTIFICATIONS TO COVERAGE

1. Either Party may modify its coverage under this Chapter provided that it:
 - (a) notifies the other Party in writing and that Party does not object in writing within 30 days after the notification; and
 - (b) within 30 days after notifying the other Party, offers acceptable compensatory adjustments to the other Party to maintain a level of coverage comparable to that existing before the modification, except as provided in paragraph 3.
2. Either Party may make rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to its Schedule to Annex 9-A-1, 9-A-2, or 9-A-3, provided that it notifies the other Party in writing and the other Party does not object in writing within 30 days after the notification. A Party that makes such a rectification or minor amendment need not offer compensatory adjustments to the other Party.
3. A Party need not offer compensatory adjustments where the Parties agree that the proposed modification covers a procuring entity over which the Party has effectively eliminated its control or influence. Where the Parties do not agree that government control or influence has been effectively eliminated, the objecting Party may request further information or consultations with a view to clarifying the nature of any government control or influence and reaching agreement on the procuring entity's continued coverage under this Chapter.
4. The Joint Committee shall modify the relevant Annex to reflect any agreed modification, technical rectification, or minor amendment.

ARTICLE 9.14: NON-DISCLOSURE OF INFORMATION

1. A Party, including its procuring entities and review authority referred to in Article 9.12, shall not disclose confidential information that a person provides in the course of a procurement or challenge without the authorization of the person that provided the information. A procuring entity shall treat tenders in confidence.

2. Nothing in this Chapter shall be construed to require a Party, including its procuring entities, to provide confidential information the disclosure of which would:

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

ARTICLE 9.15: EXCEPTIONS

1. Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the 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.

2. The Parties understand that paragraph 1(b) includes environmental measures necessary to protect human, animal, or plant life or health.

ARTICLE 9.16: 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, a procuring entity grants to the supplier, for a specified period, temporary ownership or a right to control and operate, and demand payment for the use of, such works for the duration of the contract;

commercial goods and services means goods and services of a type that are sold or offered for sale to, and customarily purchased by, non-governmental buyers for non-governmental purposes; it includes goods and services with modifications customary in the commercial marketplace, as well as minor modifications not customarily available in the commercial marketplace;

conditions for participation means any financial or other guaranty that a supplier must provide, and any registration, qualification, or other requirements or conditions that a supplier must fulfill, to participate in a procurement;

in writing or **written** means any worded or numbered expression that can be read, reproduced, and later communicated, and includes electronically transmitted and stored information;

offsets means any conditions or undertakings that require use of domestic content, domestic suppliers, the licensing of technology, technology transfer, investment, counter-trade, or similar actions to encourage local development or to improve a Party's balance-of-payments accounts;

procuring entity means an entity listed in Annex 9-A-1, 9-A-2, or 9-A-3;

services includes construction services, unless otherwise specified;

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

technical specification means a tendering requirement that:

- (a) sets out the characteristics of:
 - (i) goods to be procured, including quality, performance, safety, and dimensions, or the processes and methods for their production; or
 - (ii) services to be procured, or the processes or methods for their provision, including any applicable administrative provisions; or

- (b) addresses terminology, symbols, packaging, marking, or labelling requirements, as they apply to a good or service.