

CHAPTER 9

GOVERNMENT PROCUREMENT

Article 9.1

Definitions

For the purposes of this Chapter:

entity means an entity listed in Annex 9.1;

government procurement or procurement means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not 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;

government procurement measure means any law, regulation, administrative guidance, practice, or procedure of general application relating to government procurement;

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;

limited tendering means a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice in accordance with Article 9.13.2;

open tendering means a procurement method whereby all interested suppliers may submit a tender;

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

qualified supplier means a supplier that a procuring entity recognises as having satisfied the conditions for participation;

selective tendering means a procurement method whereby only qualified suppliers are invited by the procuring entity to submit a tender;

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

technical specification means a tendering requirement that:

- (a) sets out the characteristics of:
 - (i) goods to be procured, such as quality, performance, safety and dimensions, or the processes and methods for their production; or
 - (ii) services to be procured, or the processes and methods for their provision;
- (b) addresses terminology, symbols, packaging, marking or labeling requirements, as they apply to a good or service; or
- (c) sets out conformity assessment procedures prescribed by an entity.

Article 9.2

Scope

1. This Chapter shall apply to any government procurement measure adopted or maintained by a Party relating to procurement by an entity:

- (a) by any contractual means, including purchase, rental or lease, with or without an option to buy;
- (b) for which the value, as estimated in accordance with Article 9.3, equals or exceeds the relevant threshold specified in Annex 9.2, at the time of the publication of a notice in accordance with Article 9.8; and
- (c) subject to the provisions specified in Annex 9.1.⁶

2. This Chapter shall not apply to:

⁶ For greater certainty, nothing in this Chapter shall have the effect of obligating either Party to permit the supply of services in relation to government procurement covered by this Chapter unless otherwise specified in the Party's Schedules to Annex 11.6 and to Annex 12.5.

- (a) the purchase or acquisition of goods and services by an entity of a Party from another entity of that Party, except where tenders are called, in which case this Chapter shall apply;
- (b) non-contractual agreements or any form of assistance provided by a Party, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements and purchases for the direct purpose of providing foreign assistance;
- (c) purchases funded by international grants, loans, or other assistance, where the provision of such assistance is subject to conditions inconsistent with this Chapter;
- (d) 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;
- (e) hiring of government employees and related employment measures; and
- (f) procurement conducted under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation of a project where that international agreement applies to a Party.

3. Entities of each Party shall not prepare, design or otherwise structure or divide, at any stage of the procurement, any procurement in order to avoid the obligations of this Chapter.

Article 9.3

Valuation

In calculating the value of a contract for the purpose of ascertaining whether the procurement is covered by this Chapter, a procuring entity shall include the estimated maximum total value of the procurement over its entire duration, taking into account all forms of remuneration provided for in such contracts, including options, premiums, fees, commissions and interest.

Article 9.4

Exceptions

1. Subject to the requirement 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 either 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 persons with disabilities, of philanthropic institutions or of prison labour.

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

3. Nothing in this Chapter shall be construed to prevent either 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 defense purposes.

Article 9.5

National Treatment and Non-Discrimination

1. With respect to any government procurement measure regarding procurement covered by this Chapter, each Party shall grant to goods, services and suppliers of the other Party treatment no less favourable than that accorded by it to domestic goods, services and suppliers.

2. With respect to any government procurement measure regarding procurement covered by this Chapter, neither Party shall allow its entities to:

- (a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation to, or ownership by a person of, the other Party; or

- (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier are goods or services of the other Party.

3. A Party, including its entities, shall not consider, seek, or impose, at any stage of a procurement, conditions or measures used to encourage its development or improve the balance-of-payments accounts, such as the licensing of technology, investment requirements, counter-trade or other similar requirements.

4. Paragraphs 1 and 2 shall not apply to measures concerning 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, including restrictions and formalities, or measures affecting trade in services other than government procurement measures.

5. For the purposes of paragraphs 1 and 2, each Party shall apply to procurement covered by this Chapter the rules of origin that it applies in the normal course of trade.

Article 9.6

Non-Disclosure of Information

1. The Parties, their entities and review authorities shall not, except to the extent required by law, disclose confidential information that would prejudice legitimate commercial interests of a particular supplier or that might prejudice fair competition between suppliers without the written authorisation of the supplier that provided the information.

2. Nothing in this Chapter shall be construed as requiring either Party, its entities or review authorities to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest.

Article 9.7

Publication of Information on Procurement

Each Party shall promptly publish its procurement laws, regulations, procedures and administrative guidance of general application relating to procurements covered by this Chapter, and any changes or additions to this information.

Article 9.8

Notice of Intended Procurement

1. For each procurement covered by this Chapter, an entity shall publish in advance a notice of intended procurement inviting interested suppliers to submit tenders for that procurement, except as provided in Article 9.13.2. 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 fulfil 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.
3. Each notice of intended procurement shall be published sufficiently in advance to provide interested suppliers with a reasonable period of time, in light of the nature, circumstances and complexity of the procurement, to obtain the full tender documentation and to prepare and submit responsive tenders by the closing date, or to apply for participation in the procurement where applicable.
4. The Parties agree that entities shall in no case provide less than 10 days between the date on which the notice of intended procurement is published and the final date for the submission of tenders or applications to participate.

Article 9.9

Conditions for Participation

1. Where an entity requires suppliers to register, qualify, or satisfy any other conditions before being permitted to participate in a procurement, each Party shall ensure that a notice is published inviting suppliers to apply for registration or qualification or to demonstrate satisfaction of other conditions for participation.
2. The notice shall be published sufficiently in advance for interested suppliers to prepare and submit responsive applications and for the entity to evaluate and make its determinations based on such applications.
3. Any conditions for participation in the procurement, including the legal, commercial, technical and financial capacity of suppliers, as well as the

verification of qualifications, shall be limited to those which are essential to ensure the supplier's capability to fulfil the contract in question.

4. The commercial, technical and financial capacity of a supplier shall be judged on the basis of both that supplier's global business activity and its activity in the Area of the procuring entity, taking due account of the legal relationship between the supply organisations.

5. Entities shall consider for a particular procurement those suppliers of the other Party that request to participate in the procurement and that are not yet registered or qualified, provided there is sufficient time to complete the registration or qualification procedures within the time period allowed for the submission of tenders.

6. Nothing in this Article shall preclude an entity from excluding a supplier from a procurement on grounds such as bankruptcy, liquidation or insolvency, false declarations relating to a procurement, or significant deficiency in the performance of any obligation under a prior contract.

Article 9.10

Lists of Registered or Qualified Suppliers

1. Entities may establish for continuing use a list of suppliers registered or qualified to participate in procurements.

2. Entities shall publish annually or otherwise make available continuously in electronic form a notice inviting interested suppliers to apply for inclusion on the list.

3. Entities shall ensure that suppliers may apply for participation in the list at any time, and that all qualifying suppliers are included within a reasonable period, taking into account the conditions for participation and the need for verification.

4. Where entities require suppliers to qualify for such a list before being permitted to participate in a procurement, and a supplier that has not previously satisfied such requirements or conditions submits an application, the entity shall promptly start the registration or qualification process. The entity shall allow such supplier to participate in the procurement, provided there is sufficient time to complete the registration or procurement procedures within the time period allowed for the submission of tenders.

Article 9.11

Technical Specifications

1. Each Party shall ensure that its entities do 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 specifications prescribed by an entity shall, where appropriate:
 - (a) be specified in terms of performance and functional requirements, rather than design or descriptive characteristics; and
 - (b) be based on international standards, where applicable, or otherwise on national technical regulations, recognised national standards, or building codes.
3. Each Party shall ensure that its entities do 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. Each Party shall ensure that its entities do not seek or accept, in a manner that would have the effect of prejudicing fair competition, advice to 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.

Article 9.12

Tender Documentation

1. Tender documentation provided to suppliers shall contain all information necessary to enable them to prepare and submit responsive tenders, including the essential requirements and evaluation criteria for the award of the procurement contract.
2. Where entities do not offer direct access to the tender documentation by electronic means, entities shall promptly make available the tender documentation at the request of any interested or, as applicable, qualified supplier.

3. Where an entity modifies the tender documentation, and that modification could impact on the preparation of tenders, it shall publish or transmit all such modifications in writing:

- (a) to all suppliers who have requested tender documentation at the time the criteria are modified, and in the same manner as the original information was transmitted by the entity; and
- (b) in adequate time to allow such suppliers to modify and resubmit their tenders, as appropriate.

Article 9.13

Tendering Procedures

1. Except as provided for in paragraph 2, entities shall award contracts by means of open or selective tendering procedures, in the course of which all interested suppliers or, in the case of selective tendering, suppliers invited to do so by an entity may submit a tender.

2. 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 the other Party or protects domestic suppliers, a procuring entity may use limited tendering procedures only under any of the following circumstances:

- (a) where, in response to a prior notice, invitation to participate, or invitation to tender under open or selective tendering procedures:
 - (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; andprovided that the essential requirements of the procurement as set out in the tender documentation have not been substantially modified;
- (b) where, for works of art, or for reasons connected with the protection of exclusive rights, such as patents or copyrights, 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) when 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 this Chapter;
- (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, due to unforeseeable circumstances, become necessary to complete the construction services described therein, provided that the total value of contracts awarded for additional construction services does not exceed 50 percent of the amount of the main contract;
- (g) in so far as it is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the entity and beyond its control, the goods or services could not be obtained in time by means of an open or selective tendering procedure;
- (h) for purchases made under exceptionally advantageous conditions that only arise in the very short term, including public auction or unusual disposals, such as those resulting from liquidation, bankruptcy or receivership. This subparagraph is not intended to cover routine purchases from regular suppliers; and
- (i) in the case of a contract awarded to the winner of a design contest provided that the contest has been organised in a manner which is consistent with the principles of this Chapter and that the contest is judged by an independent jury with a view to a design contract being awarded to the winner.

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

Article 9.14

Treatment of Tenders and Awarding of Contracts

1. An entity shall receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process.

2. To be considered for award of a contract, a tender must, at the time of opening by the entity, conform to the essential requirements of the notice of intended procurement or tender documentation and be submitted by a supplier who complies with the conditions for participation.

3. 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, or where price is the sole criterion, the lowest price.

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

Article 9.15

Post-Award Information

1. Entities shall promptly inform suppliers that have submitted a tender of the contract award decision.

2. Entities shall, at the request of an unsuccessful supplier, promptly explain the reasons for the rejection of its tender or the relative advantages of the tender the entity selected.

3. Entities shall, promptly after the award of a contract for a procurement covered by this Chapter, publish a notice containing at least the following information:

- (a) the name and address of the successful supplier;

- (b) a description of the goods or services supplied; and
- (c) the value of the contract award.

Article 9.16

Ensuring Integrity in Procurement Practices

Each Party shall ensure that criminal or administrative penalties exist to address corruption in its government procurement, and that its entities have in place policies and procedures to address any potential conflict of interest on the part of those engaged in or having influence over a procurement.

Article 9.17

Domestic Review of Supplier Complaints

1. Each Party shall ensure that its entities accord impartial and timely consideration to any complaints from suppliers regarding an alleged breach of government procurement measures implementing this Chapter arising in the context of a procurement in which they have, or have had, an interest. Where appropriate, a Party may encourage suppliers to seek clarification from its entities with a view to facilitating the resolution of any such complaints.
2. Each Party shall provide suppliers of the other Party with non-discriminatory, timely, transparent and effective access to an administrative or judicial body competent to hear or review complaints of alleged breaches of the procuring Party's government procurement measures implementing this Chapter arising in the context of procurements in which those suppliers have, or have had, an interest.
3. Each Party shall make information on complaint mechanisms generally available.
4. Where an administrative or judicial body may award compensation for any breach of government procurement measures implementing this Chapter, such compensation may be limited to the costs for tender preparation reasonably incurred by the supplier for the purpose of the procurement, or the costs relating to the complaint, or both.

Article 9.18

Encouraging Use of Electronic Communications in Procurement

1. The Parties shall encourage their entities to provide opportunities for government procurement to be undertaken through electronic means.
2. In order to facilitate commercial opportunities for their suppliers under this Chapter, each Party shall maintain a single electronic portal for accessing information on government procurement supply opportunities in its Area and on procurement laws, regulations, procedures and administrative guidance of general application published in accordance with Article 9.7.
3. The Parties shall encourage, to the extent possible, the use of electronic means for the provision of tender documents and receipt of tenders.

Article 9.19

Modifications and Rectifications of Annex 9.1

1. Either Party may modify its Section under Annex 9.1 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 of the notification 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 to its Section under Annex 9.1 in respect of:
 - (a) a change in the name of an entity listed in Annex 9.1;
 - (b) merger of two or more entities listed within Annex 9.1; and
 - (c) the separation of an entity listed in Annex 9.1 into two or more entities that are all added to Annex 9.1,

provided that it notifies the other Party in writing every 2 years, commencing with the entry into force of this Agreement, and the other Party does not object in

writing within 30 days of the notification. A Party that makes such a rectification 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 to Annex 9.1 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 under Annex 9.1.

Article 9.20

Committee on Procurement

1. The Parties hereby establish a Committee on Procurement, comprising representatives of each Party.

2. The Committee on Procurement may explore opportunities for further cooperation, collaboration and information exchange on matters relating to this Chapter. Such cooperation, collaboration or information exchange may be carried out in person or via teleconference, videoconference or any other means determined by the Committee. The Committee may also address issues through correspondence, including via electronic communication.

Article 9.21

Review

At the request of either Party, the Parties shall review the coverage under this Chapter with the aim of improving their suppliers' access to each other's government procurement market on a reciprocal basis.