

CHAPTER 9 : GOVERNMENT PROCUREMENT

ARTICLE 9.1 : DEFINITIONS

For the purposes of this Chapter:

1. **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 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;
2. **conditions for participation** means any registration, qualification or other pre-requisites for participation in a procurement;
3. **government procurement** means the process by which a procuring entity purchases goods and services;
4. **in writing** or **written** means any worded or numbered expression that can be read, reproduced, and later communicated, including electronically transmitted and stored information;
5. **offsets** means measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements
6. **open tendering** means a procurement method where all interested suppliers may submit a tender;
7. **procuring entity** means an entity listed in Annex 9A (Government Procurement Schedules);
8. **services** includes construction services, unless otherwise specified;
9. **standard** means a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for goods or services or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method;

10. **supplier** means a person that provides or could provide goods or services to a procuring entity;

11. **technical specification** means a tendering requirement that:

- (a) lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or
- (b) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service.

ARTICLE 9.2 : OBJECTIVES

1. The Parties agree to open their respective government procurement markets in order to maximize competitive opportunities for their suppliers and reduce costs of doing business for both government and industry.

2. The Parties shall achieve these objectives through:

- (a) ensuring that the opportunity exists for their suppliers to compete on an equal and transparent basis for government procurements;
- (b) ensuring the non-application against their suppliers of preferential schemes and other forms of discrimination based on the place of origin of goods and services; and
- (c) promoting the use of electronic procurement.

ARTICLE 9.3 : SCOPE AND COVERAGE

1. This Chapter applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Chapter as specified in Annex 9A (Government Procurement Schedules).

2. This Chapter applies to procurement of goods or services, or any combination of goods and services by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, build–operate–transfer contracts and public works concessions.

3. Where entities, in the context of procurement covered under this Chapter, require entities not included in Annex 9A (Government Procurement Schedules) to award contracts in accordance with particular

requirements, Article 9.4 shall apply, *mutatis mutandis*, to such requirements.

4. This Chapter applies to any procurement contract of a value of not less than the relevant threshold specified in Annex 9A (Government Procurement Schedules).

5. Except as otherwise specified in Annex 9A (Government Procurement Schedules), this Chapter does not cover:

- (a) non-contractual agreements or any form of governmental assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives and governmental provision of goods and services to persons or governmental authorities;
- (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) acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and services related to the sale, redemption and distribution of government debt⁹⁻¹; and
- (d) hiring of government employees and its related employment measures.

6. No procuring entity may, at any stage of the procurement, prepare, design or otherwise structure or divide any procurement in order to avoid any obligation under this Chapter.

7. Nothing in this Chapter shall prevent a Party from developing new procurement policies, procedures, or contractual means, provided that they are not inconsistent with this Chapter.

8. The provisions of this Chapter do not affect the rights and obligations provided for in Chapter 2 (Trade in Goods), Chapter 10 (Investment), and Chapter 11 (Cross-Border Trade in Services).

ARTICLE 9.4 : NATIONAL TREATMENT AND NON-DISCRIMINATION

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Chapter, each Party

⁹⁻¹ For greater certainty, this Chapter does not apply to procurement of banking, financial or specialized services related to the following activities:

- (a) the incurring of public indebtedness; or
- (b) public debt management.

shall provide immediately and unconditionally to the goods, services and suppliers of the other Party offering such goods and services, treatment no less favourable than that accorded to domestic goods, services and suppliers.

2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Chapter, each Party shall ensure that its entities shall not:

- (a) treat a locally established supplier less favourably 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 it is a supplier of a good or service of the other Party.

3. The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Chapter.

ARTICLE 9.5 : VALUATION OF PROCUREMENTS

The following provisions shall apply in determining the value of a procurement for purposes of implementing this Chapter:

- (a) valuation shall take into account all forms of remuneration, including any premiums, fees, commissions and interest receivable;
- (b) the selection of a valuation method by a government body shall not be made, nor shall any procurement requirement be divided, with the intention of avoiding the application of this Chapter; and
- (c) in cases where an intended procurement specifies the need for option clauses, the basis for valuation shall be the total value of the maximum permissible procurement, inclusive of optional purchases.

ARTICLE 9.6 : RULES OF ORIGIN

For the purposes of covered procurement, no Party may apply rules of origin to goods imported or supplied from the other Party that are different from the rules of origin the Party applies at the same time in the

normal course of trade to imports or supplies of the same goods from the same Party.

ARTICLE 9.7 : OFFSETS

A procuring entity shall not impose, seek or consider offsets in the qualification and selection of suppliers, goods or services, or in the evaluation of tenders and award of contracts.

ARTICLE 9.8 : PUBLICATION OF INFORMATION ON PROCUREMENT MEASURES

Each Party shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, procedure (including standard contract clauses), and any modifications or additions to this information regarding government procurement covered by this Chapter, in an officially designated electronic medium listed in Annex 9B (Officially Designated Electronic Media for the Publication of Information on Government Procurement), and in such a manner as to enable the other Party and suppliers to become acquainted with them. Each Party shall be prepared, upon request, to explain such information to the other Party.

ARTICLE 9.9 : PUBLICATION OF NOTICE OF INTENDED PROCUREMENT

1. For each procurement covered by this Chapter, a procuring entity shall publish in advance a notice inviting all interested suppliers to submit tenders for that procurement (“notice of intended procurement”), except as otherwise provided in Article 9.13. This notice shall be published in an officially designated electronic medium listed in Annex 9B (Officially Designated Electronic Media for the Publication of Information on Government Procurement). 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 procuring entity issuing the notice, the address and contact 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 Party shall encourage its procuring entities to publish, as early as possible in the fiscal year, information regarding the procuring entity’s indicative procurement plans published in an officially designated electronic medium listed in Annex 9B (Officially Designated Electronic Media for the Publication of Information on Government Procurement). Where such information is published, a procuring entity may apply

Article 9.10 (Time Limits for the Tendering Process) for the purpose of establishing shorter time limits for tendering.

ARTICLE 9.10 : TIME LIMITS FOR THE TENDERING PROCESS

1. A procuring entity shall prescribe time limits for the tendering process that allows sufficient time for suppliers to prepare and submit responsive tenders, taking into account the nature and complexity of the procurement. A procuring entity shall provide no less than twenty-one (21) 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, a procuring entity may establish a time limit of less than twenty-one (21) days, but in no case less than ten (10) days, in the following circumstances:

- (a) where the procuring entity has published a separate notice containing the information specified in paragraph 3 of Article 9.9 (Publication of Notice of Intended Procurement) in an officially designated electronic medium listed in Annex 9B (Officially Designated Electronic Media for the Publication of Information on Government Procurement) at least twenty-one (21) days and not more than twelve (12) months in advance;
- (b) in the case of the second or subsequent publication of notices for procurement of a recurring nature;
- (c) where a state of urgency duly substantiated by the procuring entity renders the time limit specified in paragraph 1 impracticable; or
- (d) where the procuring entity has published a notice of intended procurement by electronic means in an officially designated electronic medium listed in Annex 9B (Officially Designated Media for the Publication of Information on Government Procurement).

ARTICLE 9.11 : TENDER DOCUMENTATION AND TECHNICAL SPECIFICATIONS

Tender Documentation

1. A procuring entity shall provide interested suppliers with tender documentation that includes all the information necessary to permit suppliers to prepare and submit responsive tenders. The documentation shall include all the criteria that the procuring entity will consider in

awarding the contract, including all cost factors, and the weights or, where appropriate, the relative values that the procuring entity will assign to these criteria in evaluating tenders.

2. To the extent possible, a procuring entity should make available relevant tender documentation on the internet or a comparable publicly available computer-based telecommunications network openly accessible to all suppliers. Where a procuring 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.

Technical Specifications

3. Technical specifications laying down the characteristics of the goods or services to be procured shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to trade between the Parties.

4. Technical specifications prescribed by a procuring entity shall, where appropriate, be:

- (a) expressed 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.

5. There shall be no requirement or reference 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.

6. A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in that procurement.

7. Where, during the course of a procurement, a procuring entity modifies any part of the tender documentation referred to in paragraph 1, including the criteria or technical requirements thereof, it shall transmit all such modifications in writing:

- (a) to all suppliers that are participating in the procurement at the time the criteria was modified, if the identities of such

suppliers are known, and in all other cases, in the same manner the original information was transmitted; and

- (b) in adequate time to allow such suppliers to modify and re-submit their tenders, as appropriate.

ARTICLE 9.12 : QUALIFICATION OF SUPPLIERS

1. In the process of qualifying suppliers, a procuring entity shall not discriminate between domestic suppliers and suppliers of the other Party.

2. Any conditions for participation in open tendering procedures shall be no less favourable to suppliers of the other Party than to domestic suppliers.

3. The process of, and the time required for, registering and/or qualifying suppliers shall not be used in order to exclude suppliers of the other Party, or from being considered for a particular intended procurement.

4. Qualification procedures shall be consistent with the following:

- (a) Any condition for participation in the procurement, including financial guarantees, technical qualifications and information necessary for establishing the legal, financial, commercial and technical capacity of suppliers, as well as the verifications of qualifications, shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. The legal, financial, commercial and technical capacity of a supplier shall be judged both on the basis of that supplier's global business activity and its activity in the territory of the procuring entity taking due account of the legal relationship between the supply organizations.

- (b) A procuring entity shall promptly communicate to any supplier that has applied for qualification its decision on whether that supplier is qualified. Where a procuring entity rejects an application for qualification or ceases to recognize a supplier as qualified, that procuring entity shall, on request of the supplier, promptly provide it with a written explanation.

5. Nothing in this Article shall preclude a procuring entity from excluding a supplier from a procurement on grounds such as bankruptcy or false declaration, provided that such an action is consistent with the national treatment provisions of this Chapter.

ARTICLE 9.13 : LIMITED TENDERING PROCEDURES

1. 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 or to protect domestic suppliers, a procuring entity may award contracts by means other than open tendering procedures in the following circumstances, where applicable:

- (a) when no tenders were submitted in response to a prior notice or invitation to participate, or 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) when, 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 procuring 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 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 such goods or services shall be subject to the principles and procedures laid down in this Chapter;
- (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 per cent (50%) of the amount of the initial contract;

- (g) for new construction services consisting of the repetition of similar services which conform to a basic project for which an initial contract was awarded following an open procurement method, and for which the procuring entity has indicated in the notice of intended procurement concerning the initial service, that a limited procurement method might be used in awarding contracts for such new services;
- (h) in so far 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 procuring entity, or the procuring entity's program responsibilities or the Party;
- (i) for purchases made under exceptionally advantageous conditions which only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership or bankruptcy and not for routine purchases from regular suppliers; or
- (j) in the case of a contract awarded to a winner of a design contest, provided that:
 - (i) the contest has been organized in a manner that is consistent with the principles of this Chapter, notably as regards the publication of a notice of intended procurement; and
 - (ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner.

3. A procuring entity shall maintain a record or prepare a written report on the contract awarded under these provisions, containing the name of the procuring entity, the value and kind of goods or services procured, and the specific justifications for use of tender procedures other than open tendering procedures, as provided in paragraph 2.

ARTICLE 9.14 : EVALUATION OF TENDERS

The tender evaluation process shall be fair and non-discriminatory, and shall have a mechanism to eliminate any potential conflict of interest

between persons administering the process and suppliers participating in the process.

ARTICLE 9.15 : INFORMATION ON AWARDS

1. Subject to Article 9.21 (Non-Disclosure of Information), a procuring entity shall promptly inform suppliers participating in a tendering procedure of its contract award decision. The award notice should include at least the following information:

- (a) the name of the procuring entity;
- (b) a description of the goods or services procured;
- (c) the name of the winning supplier;
- (d) the date of award;
- (e) the value of the contract award; and
- (f) where the procuring entity has not used an open tendering procedure, an indication of the circumstances according to Article 9.13 (Limited Tendering Procedures) justifying the procedures used.

2. A procuring entity shall, on request from an unsuccessful supplier of the other Party which participated in the relevant tender, promptly provide pertinent information concerning reasons for the rejection of its tender, unless the release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers.

ARTICLE 9.16 : MODIFICATIONS AND RECTIFICATIONS TO COVERAGE

1. Each Party may make rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to its Schedules in Annex 9A (Government Procurement Schedules), provided that it notifies the other Party in writing and that Party does not object in writing within thirty (30) days of the notification. A Party that makes such a rectification or minor amendment need not provide compensatory adjustments to the other Party.

2. Where a Party proposes to make a modification to its Schedules in Annex 9A (Government Procurement Schedules) when the business or commercial operations or functions of any of its procuring entities or part thereof is constituted or established as an enterprise with a legal entity separate and distinct from the Government of a Party, regardless of

whether or not the Government holds any shares or interest in such a legal entity, it shall notify the other Party. The proposed removal of such an entity or modification shall become effective thirty (30) days from the date of notification. The other Party shall not be entitled to compensatory adjustments.

ARTICLE 9.17 : TRANSPARENCY

The Parties shall apply all procurement laws, regulations, procedures and practices consistently, fairly and equitably so that their corporate governance structures provide transparency to potential suppliers.

ARTICLE 9.18 : ELECTRONIC PROCUREMENT

1. The Parties shall, within the context of their commitment to promote electronic commerce, seek to provide opportunities for government procurement to be undertaken through electronic means, hereinafter referred to as “e-procurement”.

2. Each Party shall work toward a single entry point for the purpose of enabling suppliers to access information on procurement opportunities in its territory.

3. Each Party shall, to the extent possible, make procurement opportunities that are available to the public accessible to suppliers via the internet or a comparable publicly available computer-based telecommunications network openly accessible to all suppliers. To the extent possible, each Party shall make available relevant documentation by the same means.

4. For the purposes of this Chapter, the Parties shall endeavour to use English as the language for publishing the notice for each case of intended procurement. The notice shall contain at least the following information:

- (a) the subject matter of the contract;
- (b) the time-limits set for the submission of tenders; and
- (c) the addresses and contact from which documents relating to the contracts may be requested.

ARTICLE 9.19 : CHALLENGE PROCEDURES

1. In the event of a complaint by a supplier of a Party that there has been a breach of this Chapter in the context of procurement by the other

Party, that Party may encourage the supplier to first seek resolution of its complaint in consultation with the procuring entity of the other Party.

2. Each Party shall provide suppliers of the other Party with non-discriminatory, timely, transparent and effective procedures to challenge alleged breaches of this Chapter arising in the context of procurements in which they have, or have had, an interest.

3. Each Party shall provide its challenge procedures in writing and make them generally available.

4. Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment.

5. A Party's total liability for any breach of this Chapter or compensation for loss or damages suffered shall be limited to the costs for tender preparation reasonably incurred by the supplier for the purpose of the procurement.

ARTICLE 9.20 : EXCEPTIONS

1. Nothing in this Chapter shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent any Party from imposing or enforcing measures:

- (a) necessary to protect public morals, order or safety;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to protect intellectual property; or
- (d) relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.

ARTICLE 9.21 : NON-DISCLOSURE OF INFORMATION

1. The Parties, their procuring entities, and their review authorities shall not disclose confidential information if such disclosure 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, including its procuring entities, to disclose confidential information if such disclosure would impede law enforcement or otherwise be contrary to the public interest.